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THE TRANSFER OF PROPERTY ACT, 1882

.

B. B. MITRA

The Transfer of Property Act, 1882

Act IV of 1882

TWELFTH EDITION

By

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P R E F A C E

TO THE TWELFTH EDITION

The present edition was long overdue. The interval between the present and the immediately preceding edition is more than 15 years. Many important cases on the Transfer of Property Act have in the meantime been decided by the Supreme Court as well as by the High Courts of the different States. I have spared no pains to incorporate all the Important cases decided since the publication of the previous edition in 1955.

In order that the length of the book may not increase, some of the old cases that have lost their importance with the passage of time have been omitted. With the same object in view lengthy extracts from the report of the Select Committee relating to the amendments made by the Act of 1929 have been deleted and extensive quotations from judgments have been abridged. Unnecessary details in expounding the principles laid down in the cases mentioned in the book have been omitted wherever possible. In short, all-out efforts have been made to curtail the volume without sacrificing the substance.

In incorporating new cases attempt has been made to state the principles with reference to the facts of those cases. Salient facts have been stated in the briefest possible manner so that one may know in what context a particular principle has been laid down. A bare statement of the principle without reference to the facts is very often misleading. If the salient facts are stated before stating the principle, a practising lawyer can at once know to what extent the principle is applicable to the case he is arguing before the Court.

All the recent decisions of the Supreme Court on the various provisions of the Transfer of Property Act have been carefully noted. As to the recent cases decided by the High Courts of the different States of India only those cases have been incorporated as have laid down important principles not covered by the decisions of the Supreme Court.

I have resisted the temptation of indicating what the law should be, because I think that the primary duty of a court of law as well as of a practising lawyer is to apply the law as it is without speculating what the law should be.

Late B. B. Mitra, the author of the book, is a well-known figure in the field of legal literature. It is with a great deal of hesitation that I undertook the difficult task of revising the book in order to make it up to date. I have tried my best to keep intact the original text of the learned author as far as possible ; but in incorporating new matter in order to make the book up to date I have used my own discretion.

I am greatly indebted to Mr. A. N. Saha M.A.L.L.B., for preparing the index which will serve as an invaluable guide to the points of law discussed in the book.

I hope that the present edition of the book will prove as useful to the legal profession as its earlier editions.

Calcutta

A. C. S.

1 January 1971

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The Transfer of Property Act

Act No. IV of 1882

*An Act to amend the Law relating to the Transfer of Property
by Act of Parties.*

WHEREAS it is expedient to define and amend certain parts
of the law relating to the transfer of property by act of parties ; It is hereby enacted as follows :—

Preamble

1. **History of the Act :—**The kernel of the Bill which became the Transfer of Property Act was a draft prepared in England by the Indian Law Commission, which was sent out to India in 1870, with instructions to take the necessary steps for passing it into law. It was heterogeneous, ill-defined and ill-drawn. The sections on powers, for instance, were unnecessary. No mortgagee was to take possession of the mortgaged land, no mortgagee was to foreclose. Not only the English but all the Indian forms of mortgages were ignored. The then Law-Member of the Governor-General's Council felt that the amount of simplicity gained would not justify the amount of disturbance created.

However, in obedience to the orders of the Secretary of State, the Bill with some slight amendments made by the Law-Member was introduced into the Council in 1877, referred to a Select Committee and circulated to the Local Governments for publication and translation. A mass of criticisms and suggestions came in and the Bill was revised and republished in 1878 and for a second time sent to the Local Governments. Another mass of criticisms came in. The Bill was therefore recast, circulated for a third time to the Local Governments and referred to a Commission. The Commission made several amendments, both in the wording and substance of the Bill.

o The recommendations of this Commission were duly communicated to the Select Committee. Most of the changes proposed were adopted and the Bill became law in 1882.

(See Whitley Stokes' *Anglo-Indian Codes*, Vol. I, pp. 738-739).

Preamble :—"The Preamble usually mentions the general object and intention of the Legislature in passing the enactment ; further it is well established that the Preamble cannot restrict the enacting part of the Act, though it may be referred to for the purpose of solving an ambiguity"—*per* Fletcher, J. in *Mani Lal v. Trustees for the Improvement of Calcutta*, 45 Cal. 343 (F.B.). See also *Kesab v. Bhobani*, 18 C.L.J. 187 ; *Powell v. Kempton Park Race Course Co.*, (1899) A.C. 143 ; *Secretary of State v. Maharaja of Bobbili*, 43 Mad. 529, 46 I.A. 302 ; *Inder Singh v.*

State of Punjab, A.I.R. 1955 S.C. 965 : 1956 S.C.R. 995. Preamble must be disregarded when the language of the Act is clear and when an enactment is not clear the preamble may be resorted to to explain it—*per* Modholkar, J in *Burrakur Coal Company v. Union of India*, A.I.R. 1961 S.C. 954.

It is not a consolidating Act, nor does it profess to be a complete Code dealing with transfer of property. It purports to do nothing more than define and amend certain parts of the law relating to transfer of property—*Lachhminarayan v. Janmejay*, A.I.R. 1953 Pat. 193 : 1953 B.L.J.R. 135.

Headings:—Headings prefixed to the sections are regarded as preambles to those sections and therefore a safe guide in interpreting them ; but the headings or sub-headings cannot either restrict or extend the scope of the sections when the language used is free from ambiguity—*Mt. Savitri Devi v. Dwarka Prasad*, I.L.R. 1939 All. 275 ; *Md. Shafi v. District Magistrate*, A.I.R. 1964 J.K. 23.

T. P. Amendment Act, 1929 :—The Transfer of Property Act has been amended by the Transfer of Property (Amendment) Act, XX of 1929.

The amendments made by this Act have come into force from the 1st April 1930.

[For Bill No. 33 of 1927, and the *Report of the Special Committee*, see Gazette of India, August 20, 1927, Part V, pp. 89—131 ; reprinted (as Bill No. 6 of 1929) in the Gazette of India, March 9, 1929, Part V, pp. 30—70 ; for the *Report of the Select Committee*, see Gazette of India, September 7, 1929, Part V, pp. 111-125 ; for Act XX of 1929, see Gazette of India, October 12, 1929, Part IV, pp. 33—44.]

1A. Amendments—whether retrospective :—The general principle as laid down by the Privy Council as to whether an amendment is retrospective is as follows : while provisions dealing with matters of procedure have, in general, retrospective effect, provisions which touch a right in existence are not to be applied retrospectively in the absence of express enactment or necessary intendment—*Delhi Cloth, etc., Mills Co. v. Income Tax Commissioners*, A.I.R. 1927 P.C. 242 (244), following *Colonial Sugar Refining Co. v. Irving*, (1905) A.C. 369 (P.C.).

On the question whether the amendments made in the Act by Act XX of 1929 are retrospective or not, there is a great divergence of opinion in the different High Courts and Chief Courts.

Selection 63 of the Transfer of Property Amendment Act (XX of 1929) lays down that the amendments made thereby in the following sections of the Transfer of Property Act, 1882, namely, sections 2, 3, 15, 16, 17, 18, 53, 56, 58, 63A, 65A, 67 (cl. a), 67A, 68, 69, 69A, 91, 102, 107, 111, 114A, 119, 129 and 130 “shall not be deemed to affect:

- (a) the terms or incidents of any transfer of property made or effected before the first day of April, 1930,
- (b) the validity, invalidity, effect or consequences of anything already done or suffered before the aforesaid date,
- (c) any right, title, obligation or liability already acquired, accrued or incurred before such date, or

(d) any remedy or proceeding in respect of such right, title, obligation or liability ;

and nothing in any other provision of this (Amendment) Act shall render invalid or in any way affect anything done before the first day of April, 1930, in any proceeding pending in a Court on that date ; and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this (Amendment) Act had not been passed."

As regards the amendments made in the sections of the main Act enumerated above, it has been expressly laid down in sec. 63 of the Amending Act that they are not retrospective. But as regards the other amendments made by the said Amending Act (in this class fall the new sections 53-A and 92 of the main Act), according to one set of decisions they are not retrospective—*Kanji v. Shunmugam*, A.I.R. 1932 Mad. 734, *Jagadamba v. Anadi*, A.I.R. 1938 Pat. 337, *Lakshmi v. Shankara*, A.I.R. 1936 Mad. 171, *Bank of Chettinad v. Maung Aye*, A.I.R. 1938 Rang. 306 (F.B.) ; *Srinivasulu v. Damodaraswami*, A.I.R. 1938 Mad. 779, (1938) M.W.N. 708 ; *Kotireddi v. Kaonam*, A.I.R. 1936 Mad. 916, 71 M.L.J. 639, 166 I.C. 535 ; *Janki v. Kanhaiya*, A.I.R. 1936 Oudh 102, 159 I.C. 316 ; *Jagdeo v. Mahabir*, A.I.R. 1934 Pat 127, *Chettyar Firm v. Kaliamma*, A.I.R. 1935 Rang. 423.

But according to the other set of decisions these other provisions mentioned in the latter part of sec. 63 of the Amending Act have retrospective operation—*Suleman v. Patell*, A.I.R. 1933 Bom. 381 ; *Gajadhar v. Bachan*, A.I.R. 1934 All. 768 ; *Banarsi v. Ali Mahammad*, A.I.R. 1936 Lah. 5 ; *Shyam Sundar v. Din Shah*, A.I.R. 1937 All. 10 ; *Ashutosh v. Nalinakhya*, A.I.R. 1937 Cal. 467 ; *Hira Singh v. Jai Singh*, A.I.R. 1937 All. 588 (F.B.), I.L.R. 1937 All. 880, (1937) A.L.J. 840, 171 I.C. 153 ; *Isap v. Umraji*, A.I.R. 1938 Bom. 115, 39 Bom. L. R. 1309, 174 I.C. 188 ; *Ram Dayal v. Chakrapani*, A.I.R. 1936 Pat. 60, 160 I.C. 933 ; *Padma Lochan v. Ajimaddin*, 42 C.W.N. 1106 ; *Md. Hushen v. Jamini*, A.I.R. 1938 Cal. 97, 42 C.W.N. 38, I.L.R. 1938 Cal. 607, 176 I.C. 41 ; *Kundan v. Faquir* A.I.R. 1938 Oudh 127 (F.B.), 174 I.C. 714 ; *Ko Po v. Maung Lu*, A.I.R. 1937 Rang. 402. See also *Wakefield v. Sayeedo Khatun*, A.I.R. 1937 Pat. 36, 15 Pat. 786, 166 I.C. 797 ; *Girdhar Lal v. Alay Hasan*, A.I.R. 1938 All. 221 (F.B.), (1938) A.L.J. 313, 174 I.C. 702 ; *Totaram v. Ram Lal*, 54 All. 897 (F.B.), A.I.R. 1932 All. 489, 1932 A.L.J. 629.

The principal ground, upon which it has been held that the amendments mentioned above are not retrospective, is that where the language employed by the Legislature is ambiguous and not clear and explicit, the Court must not give a construction to the new Act which would take away vested rights—see *Jagadamba v. Anadi*, supra and *Srinivasulu v. Damodaraswami*, supra.

On the other hand, the chief reason which has influenced the contrary view is that sec. 63 of the Amending Act having declared certain sections to be not restrospective says that the other sections are not retrospective in a limited sense only, that is, the amendments will not affect anything already done before 1st April 1930 in any pending proceeding. Therefore, by implication the Legislature has said that where there is no pending proceeding the sections will have retrospective operation.

More recent decisions :—The following recent cases support the view that the provisions mentioned in the latter part of sec. 63 of the Amending Act will have retrospective operation where there is no pending proceeding: *Tukaram v. Atmaram*, A.I.R. 1939 Bom. 31, I.L.R. 1939 Bom. 71, 40 Bom. L.R. 1192 (Broomfield & Macklin, JJ.); *Subraya v. Timmana*, A.I.R. 1938 Bom. 508, 40 Bom. L.R. 1001; *Daw Yi v. Maung Po Sang*, A.I.R. 1939 Rang. 175, 182 I.C. 651; *Jagad Bhusan v. Panna Lal*, A.I.R. 1941 Cal. 287 (Henderson J.); *Rustomji v. Bai Moti*, A.I.R. 1940 Bom. 90, I.L.R. 1940 Bom. 50, 41 Bom. L.R. 1310 (Beaumont, C.J. and Sen, J.); *Kishen Gopal v. Abdul Latif*, A.I.R. 1940 Oudh 97, 15 Luck. 175, (1939) O.W.N. 1045 (Thomas, C.J. & Radha Krishna, J.); *Mangal Sen v. Kewal Ram*, A.I.R. 1940 All. 75, 187 I.C. 274 (Bennet & Varma, JJ.) *Chuni Lal v. Laksmi Chand*, A.I.R. 1940 All. 237, 1940 A.L.J. 234, I.L.R. 1940 All. 212 (Iqbal Ahmad & Bajpai, JJ.); *Tika Sao v. Hari Lal*, 19 Pat. 752 (F.B.), A.I.R. 1940 Pat. 385, 21 P.L.R. 453.

For the contrary view see further *Munna Lal v. Chatan Prakash*, I.L.R. 1940 All. 79, 1939 A.L.J. 1099, A.I.R. 1940 All. 65 where Bennet and Varma, JJ. have held that there is nothing in the amendment of sec. 84, T. P. Act (a section not specifically mentioned in sec. 63 of Act 20 of 1929) to show that the amendment is in any way to be retrospective. It does not, however, appear that the Full Bench decision in *Hira Singh v. Jai Singh*, I.L.R. 1937 All. 880, 1937 A.L.J. 659, A.I.R. 1937 All. 588 was brought to the notice of their Lordships. In *Mangal Sen v. Kewal Ram*, A.I.R. 1940 All. 75, 187 I.C. 274 the same learned Judges have held that the amended sec. 92, T. P. Act, has retrospective operation. In *Serajul Haque v. Dwijendra Mohan*, A.I.R. 1941 Cal. 33, Mr. Justice Biswas seems to have been inclined to the view taken by Wort, J. in *Jagadamba Prasad v. Anadi Nath*, A.I.R. 1938 Pat. 337, 19 P.L.T. 594, 176 I.C. 273; but this latter decision is deemed to have been overruled by the Full Bench case of *Tika Sao v. Harilal*, supra, though supported by the dissentient judgment of Manohar Lal, J. In a recent case the Calcutta High Court has, however, held that the mere fact that certain sections of the Act are expressly made non-retrospective does not necessarily show that the intention of the legislature was to make the other sections retrospective—*Shamsuddin v. Haidar Ali*, A.I.R. 1945 Cal. 194, 49 C.W.N. 104.

In *Janaki Nath v. Pramatha Nath*, 67 I.A. 82, I.L.R. (1940) 1 Cal. 291 (at p. 306), A.I.R. 1940 P.C. 38, their Lordships of the Judicial Committee have noticed that there are conflicting decisions in India on the above question, but their Lordships did not find it necessary to express any opinion thereon.

2. Object of the T. P. Act :—"The chief objects of the Transfer of Property Act are two: first to bring the rules which regulate the transmission of property between living persons into harmony with the rules affecting its devolution upon death and thus to furnish the complement of the work commenced in framing the law of intestate and testamentary succession; and secondly, to complete the code of contract law, so far as relates to immoveable property....Like the Contract Act, it is not and does not purport to be, an exhaustive measure"—Whitley Stokes' *Anglo-Indian Codes*, Vol. I, p. 726.

3. Scope of Act :—The scope of this Act is limited to transfer of property by act of parties as contradistinguished from a transfer by opera-

tion of law, e.g., in case of insolvency, forfeiture or sale in execution of a decree. It relates to transfer of property *inter vivos* and has no application to disposal of property by will—*Raja Parthasarathi v. Rajah Venkata-dari*, 46 Mad. 190 (222), A.I.R. 1922 Mad. 457, 43 M.L.J. 486. Nor does it deal with cases of succession—*Kishori v. Krishna Kamini*, 37 Cal. 377 (382), 11 C.L.J. 401. Principles of justice, equity and good conscience embodied in statutes like T.P. Act, Indian Succession Act should not be applied to all communities alike so far as their personal laws are concerned—*Kamalakshy v. Narayan*, A.I.R. 1968 Ker. 123; I.L.R. (1967) 2 Ker. 268; 1967 Ker. L.J. 671.

4. The Act not a complete Code :—The Transfer of Property Act is not exhaustive; it does not profess to be a complete code—*Satyabadi v. Harabati*, 34 Cal. 223 (228); *Bunsee Das v. Gena Lal*, 12 I.C. 155, 14 C.L.J. 530; *Mahomed Shafikul Huq v. Krishna Govinda*, 23 C.W.N. 284, 47 I.C. 428 (per Richardson, J.); *Kishori Lal v. Krishna Kamini*, 37 Cal. 377 (382); *Bhupendra v. Wajihunnissa*, 2 P.L.J. 293 (300); *Jatindra v. Rangpur Tobacco Co.*, A.I.R. 1924 Cal. 990 (991), 80 I.C. 20; *Chotesha v. Maktum*, A.I.R. 1928 Nag. 223. Thus, for instance, it is not exhaustive on the law of mortgages—*Bhupendra v. Wajihunnissa*, 2 P.L.J. 293 (300), 39 I.C. 564; *Hotchand v. Kishinchand*, 17 S.L.R. 178, 83 I.C. 548, A.I.R. 1924 Sind 23 (24). Sec. 60 does not contain all the instances of severance of mortgages that may be conceived or allowed—*Low & Co. v. Pulin Bihari*, 59 Cal. 1372, 143 I.C. 193, A.I.R. 1933 Cal. 154 (161). It does not apply to a transfer of property by an award—*Amir Bibi v. Arokiam*, 34 M.L.J. 184 (187), 45 I.C. 813. It does not also apply to creation of easements—*Sital Chandra v. Delanney*, 20 C.W.N. 1158, 34 I.C. 450. It simply defines and amends 'certain' parts of the law of transfer of property and it should be noted that the word 'consolidate' has not been used in the preamble.

The Transfer of Property Act is not exhaustive; and where a case is not contemplated by any of the provisions of this Act, the High Court as a Court of Equity is entitled to administer the principles of equity as laid down in English or Indian cases which are not distinctly prohibited by statute—*Mayashankar v. Burjori*, 27 Bom. L.R. 1449, A.I.R. 1926 Bom. 31, 91 I.C. 978; *Kalyan Das v. Jan Bibi*, 51 All. 454, 112 I.C. 765, A.I.R. 1929 All. 12 (14); *Maharaja of Jeypore v. Rukmini*, 42 Mad. 589 (598) (P.C.); *Raja of Kalahasti v. Parthasarathy*, A.I.R. 1942 Mad. 558 (561). Thus, the holder of a statutory charge is entitled to a decree for sale—*Corporation of Calcutta v. Arun Chandra*, A.I.R. 1934 Cal. 862, 61 Cal. 1047, 38 C.W.N. 917. But where the matter entirely falls within the terms of the Transfer of Property Act, the Courts are not at liberty to follow the English Common Law rules—*Venkatacharyulu v. Venkatasubba*, 48 Mad. 821 (823), A.I.R. 1926 Mad. 55, 90 I.C. 725; *Raja of Kalahasti v. Parthasarathy*, supra. In India there being a codified law of mortgage, it is improper for the Courts in India to ignore the law obtaining in India and look for English cases as their guide. It is only where the statutory law in India is of no help, that the Court may look to English cases for rules of justice, equity and good conscience—*Mt. Subratan v. Dhanpat*, A.I.R. 1933 All. 70, 54 All. 1041, 143 I.C. 409.

It is always dangerous to apply English decisions to the construction of an Indian Act where the clauses under consideration are not the same—*Lasa Din v. Mt. Gulab*, A.I.R. 1932 P.C. 207, 7 Luck. 442, 36 C.W.N. 1017,

A.O. 1937 and A.L.O. 1956. The third paragraph was adapted by A.L.O. 1950 and A.L.O. 1956. The Act has been declared in force in Panth Piploda by the Panth Piploda Laws Regulation, 1929. The words *territories to which immediately before the 1st November, 1956 were comprised in Part B States or in the States of Bombay, Punjab and Delhi* were substituted by A.L.O., 1956 for the words "Part B States".

The Act came into force in Cochin on 1-1-1112 (Coch.). The rights and liabilities of the parties to transactions which came into existence before the Act have to be determined in accordance with the principles of the common law which governed the transactions in the State prior to date of commencement of the Act—*Varahadevaswom v. Umer Sait*, A.I.R. 1951 Tr.-Coch. 17.

8. Extent—British India :—"'British India' shall mean, as respects the period before the commencement of Part III of the Government of India Act the territories and places within His Majesty's dominions which were for the time being governed by His Majesty through the Governor-General of India or through any Governor or officer subordinate to the Governor-General of India, and as respects any period after that date and before the date of the establishment of the Dominion of India means all territories for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces, except that a reference to British India in an Indian law passed or made before the commencement of Part III of the Government of India Act, 1935, shall not include a reference to Berar"—Section 3 (5) of the General Clauses Act X of 1897 as amended by A.L.O. 1950. Part III of the Government of India Act, 1935 came into force on 1st April, 1937.

The civil stations of *Wadhwan* and *Rajkot* and the Cantonment of Secunderabad are outside British India—see *Emperor v. Chimanlal*, 14 Bom. L.R. 876; *Queen-Empress v. Abdul Latib*, 10 Bom. 186 and *Hossain Ali v. Abid Ali*, 21 Cal. 177 respectively.

Act IV of 1882 has ceased to be in force in the Naga Hills District (including the Mokokchang Sub-division), the Dibrugarh Frontier Tract, and North Cachar Hills, the Garo Hills, the Khasia and Jaintia Hills, and the Mikir Hills Tract—See *Assam Rules Manual*, Ed. 1893, pp. 408, 409; Ed. 1884, Pt. II, pp. 212 and 795 respectively.

The Act has been declared in force in the Pargana of Manpur by the Manpur Laws Regulation 2 of 1926 and in Panth Piploda by the Panth Piploda Laws Regulation 1 of 1929.

The Act has been repealed or modified to the extent necessary to give effect to the provisions of Madras Act 3 of 1922 in the City of Madras—See s. 13 of Madras Act 3 of 1922.

The Act has been repealed as to Crown grants by the Crown Grants Act, 15 of 1895.

Sind :—The whole Act was extended with effect from 1st January, 1915 to the Province of Sind—See *Bombay Rules and Orders*, Vol. II, p. 194.

Bombay :—This Act has been extended from 1st January 1893 to the whole of the territories (other than the scheduled districts) under the administration of the Government of Bombay. See *Bombay Gazette*, 1892, Part I, p. 1071.

Punjab and N.-W. F. Province :—Although the Transfer of Property Act is not in force in the Punjab and the N.-W. F. Province, the Courts, when deciding cases in which the principles of law dealt with by the provisions of this Act are involved, may adopt those provisions as embodying the law applicable to the case, especially where the law enunciated therein coincides with the principles of equity, good conscience and justice, and for which there is no statutory law applicable in the Punjab—*Bhagwan Devi v. Bunyadi Khanum*, 85 P.R. 1902; *Safdar Ali v. Ghulam*, 103 P.R. 1915, 30 I.C. 526; *Basso v. Mir Muhammad*, 278 P.L.R. 1913, 20 I.C. 291; *Hakim Singh v. Charandas*, 19 P.L.R. 1904; *Jangi Mal v. Pioneer Flour Mills*, 27 I.C. 115, 106 P.R. 1914; *Dula Singh v. Bela Singh*, A.I.R. 1925 Lah. 92, 78 I.C. 374; *Tarachand v. Sher Singh*, A.I.R. 1936 Lah. 944 (945), 38 P.L.R. 702; *Jhuman v. Dulia*, 4 Lah. 439 (441); *Moolchand v. Gangajal*, 11 Lah. 258 (F.B.), 31 P.L.R. 342, A.I.R. 1930 Lah. 356; *Mohammad Abdullah v. Mohammad Yasin*, 34 P.L.R. 245, A.I.R. 1933 Lah. 151 (152); *Nizam Din v. Ram Sukh*, A.I.R. 1938 Lah. 286 (287); *Gian Singh v. Atma Ram*, A.I.R. 1933 Lah. 374, 141 I.C. 596; *Ratan v. Smail*, A.I.R. 1933 Lah. 821; *Gurudas v. Punjab-Sind Bank*, A.I.R. 1933 Lah. 972; *Punjab-Sind Bank v. Kishan Singh*, A.I.R. 1935 Lah. 350, 16 Lah. 881, 156 I.C. 795; *Saifulla v. Chaman Lal*, A.I.R. 1936 Pesh. 43, 160 I.C. 986; *Mila v. Mangal*, A.I.R. 1938 Lah. 156; *Ganda Singh v. Secretary of State*, A.I.R. 1934 Pesh. 101, 152 I.C. 231; *Was Dev v. Dheru Mal*, A.I.R. 1940 Lah. 291, 42 P.L.R. 321, 190 I.C. 525; *Bank of Upper India v. Skinner*, A.I.R. 1942 P.C. 67 (68); *Chela Ram v. Gopi Chand*, A.I.R. 1942 Pesh. 88; *Somnath v. Desai*, A.I.R. 1951 Punj. 404; I.L.R. 1950 Punj. 271; *Ram Gopal Dulat Singh v. Sardar Gurbux Singh*, A.I.R. 1955 Punj. 215.

In a province to which this Act has not been extended the rule embodied in this Act should be allowed in preference to the English procedure—*Kadir Moidin v. Nepean*, 26 Cal. 1 (6, 7) (P.C.).

But although the equitable principles underlying the T. P. Act are followed in the Punjab, the Act itself with its technicalities does not apply to that province, and the Court commits an irregularity in relying upon that Act to dismiss on a purely technical point (e.g., on the ground of absence of a written instrument of assignment of an actionable claim) a claim which is otherwise just and equitable—*Teja Singh v. Firm Kalyan Das*, 6 Lah. 487, A.I.R. 1925 Lah. 575, 26 P.L.R. 679, 91 I.C. 778. Similarly, deeds in that province need not be executed or attested according to the formalities required by this Act—*Kanwar Ram v. Ghugi*, A.I.R. 1928 Lah. 148, 108 I.C. 57. See also *Punjab National Bank v. Jagadish*, A.I.R. 1936 Lah. 390, 163 I.C. 114; *Gurdit v. Kalunal*, A.I.R. 1937 Pesh. 5, 167 I.C. 698; *Kamal v. Gurcharan*, A.I.R. 1936 Pesh. 158, 164 I.C. 153; *Md. Hussain v. Secretary of State*, A.I.R. 1939 Lah. 330, 41 P.L.R. 895, 186 I.C. 45.

Berar :—This Act has been extended to Berar from 1907. Therefore, a suit for foreclosure instituted after 1907 is governed by the T. P. Act, although the mortgage was executed prior to 1907—*Sheoram v. Jamnabai*, 19 N.L.R. 18, A.I.R. 1923 Nag. 273, 65 I.C. 503. See also *Chandrabhaga v. Anandrao*, A.I.R. 1938 Nag. 142, 173 I.C. 85.

Burma :—This Act has been extended from 1st January 1893 to the area included within the limits of Rangoon town and within the Muni-

cipalities of Moulmein, Bassein and Akyab. See *Burma Gazette*, 1904, Part I, pp. 628 and 684. From 1st January 1922, this Act has been extended to the whole of Burma, excepting certain areas. Since 1st April, 1937, Burma has been excluded from the operation of this Act.

"Or any part thereof" :—As to the meaning of these words occurring in the 4th para of this section, see 5 Rang. 7 (P.C.), *infra*.

This Act has also been extended to—

- (i) the States of Tripura and Vindhya Pradesh by Act XXX of 1950 ;
- (ii) Manipur by Acts XXX of 1950 and LXVIII of 1956 ;
- (iii) the States merged in the State of Bombay by Bombay Act IV of 1950 ;
- (iv) the former Madhya Pradesh by M.P. Act XII of 1950 ;
- (v) Shillong by Assam Act VIII of 1947 ;
- (vi) the whole of the then State of Saurashtra by notification in Saurashtra Govt. Gaz. 1951, Extra ;
- (vii) the whole of the State of Rajasthan by Notification in Raj. Gaz. 1952 ;
- (ix) to the Union Territory of Delhi (Except Sec. 129) by Notification in the Gazette of India dated 17-11-62.

Para 5—Power of State Government :—The power to extend any part of the Act to a province to which it did not apply, did not authorize the Local Government to extend particular sections of the Act so as to give those sections a different operation from that which they had in the Act itself read as a whole, e.g., to abrogate in the area to which the extension applied, a rule of Mahomedan Law till then in force there as to which the Legislature had expressly provided that it was to remain unaffected by the Act—*Ma Mi v. Kallander*, A.I.R. 1927 P.C. 22 (23), 5 Rang. 7, 54 I.A. 23.

Exemption :—No such exemption has yet been made.

Para 6 :—Section 54, paras, 2 and 3, and secs. 59, 107 and 123 extend to every cantonment in British India—See sec. 287 of the Cantonments Act, 2 of 1924 and *Punjab & Sind Bank v. Ishar Singh*, A.I.R. 1933 Lah. 1001.

Scheduled Districts :—Since the passing of the Scheduled Districts Act, 1874, an Act passed by the Indian Legislature applies to the Scheduled Districts also if the latter are not expressly excluded—*Collector of Vizagapatam v. Krishna Chandra*, A.I.R. 1928 Mad. 1181 (F.B.), 52 Mad. 1, 55 M.L.J. 584.

8A. Application of Act in excluded matters :—The provisions of the Transfer of Property Act should be carefully applied and the assistance of the Act as a guide on matters which have been excluded from the purview thereof by express words should not be invoked, unless the provisions embody principles of general application—*Namdeo v. Narmadabai*, A.I.R. 1953 S.C. 228.

2. In the territories to which this Act extends for the time being the enactments specified in the schedule hereto annexed shall be repealed
 Repeal of Acts.

to the extent therein mentioned. But nothing herein contained shall be deemed to affect—

Saving of certain enactments, incidents, rights, liabilities, etc.

(a) the provisions of any enactment not hereby expressly repealed ;

(b) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force ;

(c) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any right or liability ; or

(d) save as provided by section 57 and Chapter IV of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction ;

And nothing in the second chapter of this Act shall be deemed to affect any rule of * * Muhammadan * * law.

Amendment :—In the last para, the words “Hindu” and “or Buddhist” have been omitted by sec. 3 of the T. P. Amendment Act (XX of 1929). For reasons, see Note 14 below.

N.B.—This amendment shall not affect any transfer made before 1st April, 1930. See Note 1A, *ante*.

9. Clause (a) :—*Saving of certain enactments :—*The effect of this clause is to maintain intact the statutory force which the Indian Legislature had given to local usage in the Punjab (Act IV of 1872, sec. 7) and Oudh (Act XVIII of 1876, secs. 4, 8). Local usages are also saved by secs. 36, 98 and 108. (Whitley Stokes' *Anglo-Indian Codes*, Vol. I, p. 746 footnote).

By virtue of this clause, a relinquishment made as provided by sec. 74 of the Bombay Land Revenue Code will stand unaffected by the provisions of this Act and can be effected without any registered instrument required under sec. 123 of this Act—*Motibai v. Desai*, 41 Bom. 170 (177, 180), 18 Bom. L.R. 976, 38 I.C. 838.

“It is a fundamental rule in the construction of statutes that subsequent statute in general terms is not to be construed to repeal a previous particular statute, unless there are express words to indicate that such was the intention, or unless such an intention appears by necessary implication”—*per* Bovill, J. in *Queen v. Champneys*, L.R. 6 C.P. 394 (cited in 20 Mad. 481).

10. Clause (c) :—*Saving of rights or liabilities arising before the Act :—*This clause embodies the general principle that Acts are prospective and not retrospective in their operation. See also sec. 6 of the General Clauses Act.

A lease executed in the former Nawanagar State before the Act came into force there would not be governed by the present Act in view of cl. (c) of this section, but will be governed by the common law principles which were usually held applicable by all Courts in India—*Karsandajji*, A.I.R. 1953 Sau. 113.

This clause does not apply where the legal relation was constituted *after* the Transfer of Property Act came into force. Such a case will be governed by the provisions of this Act—*Ulfat Hossain v. Gyani*, 36 Cal. 802 (806).

Although the Transfer of Property Act may not, of its own force, apply directly to a case of *kanom* granted prior to this Act, the rules in this Act, being founded on reason and equity, may properly be applied to the case—*Vasudevan v. Valia Chathu*, 24 Mad. 47 (56) (F.B.). The principle of sec. 111 (g), being a statutory provision in accordance with justice, equity and good conscience, was applied to a lease executed before this Act, although the section itself was not applicable to the case and it was held that the refusal to render specified services did not operate to create a forfeiture—*Maharaja of Jeypore v. Rukmini*, 42 Mad. 589 (598) (P.C.). The rules of the T. P. Act may be applied to a mortgage executed prior to the passing of this Act, in the absence of any rule preventing them and in conflict with this Act—*Gopi Lal v. Abdul*, 26 A.L.J. 887, A.I.R. 1928 All. 381 (383), 116 L.C. 91.

There is nothing in this clause to disentitle the parties from seeking the relief given by *this* Act. The right to a relief arising from a certain relation existing between the parties is a matter of adjective law, and consequently, the parties are entitled, when a new remedy has been provided by a new Act at the time when the relation subsists, to take advantage of that remedy in a Court of law—*Bikkina Ramayya v. Adabala Seshayya*, 30 M.L.J. 338, 34 L.C. 475 (477).

The provisions of this Act apply to the assignment of a mortgage made after this Act came into force, although the mortgage may have been made before the commencement of the Act—*Lala Jugdeo v. Brij Behari*, 12 Cal. 505 (508); *Rathnasami v. Subramanya*, 11 Mad. 56 (60).

Where a tenancy was created before the commencement of this Act, but that tenancy *came to an end* and a *new* tenancy was thereafter constituted *subsequent to the passing of this Act*, the tenant cannot avail himself of the benefit of this clause and evade the operation of this Act—*Durga Nikarini v. Gobordhan*, 19 C.W.N. 525 (527, 528), 20 C.L.J. 448, 24 L.C. 183.

Instances of rights saved by this clause:—

The provisions of Regulation XXXIV of 1803 relating to the maximum rate of interest allowed to the mortgagee are incidents of the mortgagor's rights, and if the mortgage was created before the passing of the Transfer of Property Act, such rights cannot be disturbed by this Act, and the mortgagee cannot claim interest exceeding the rate allowed by the Regulation—*Samar Ali v. Karimullah*, 8 All. 402 (405). But the Bengal Regulation I of 1798 related only to procedure and was not a substantive law. So, even if a mortgage was executed when the Regulation was in force, it would not be governed by the Regulation after its repeal by the present Act—*Khun Khun v. Mahaber*, A.I.R. 1948 All. 261 F.B., 1948 A.L.J. 90.

This Act has no retrospective effect so as to invalidate an order for sale, the right to which arose out of a legal relation between the parties prior to this Act coming into force—*Naranappa v. Samarcharl*, 19 Mad. 382 (384).

The provisions of sec. 59 of this Act relating to attestation do not apply to a mortgage created before the passing of this Act—*Jati Kar v. Mukunda*, 39 Cal. 227 (230).

Where valid and effectual proceedings taken under Regulation XVII of 1806 had come to an end, when the Regulation was still in force, and the mortgagee acquired an immediate right to have a decree declaring the property to be his absolutely, such right would be saved by this clause and therefore would be enforceable even after the T. P. Act came into operation—*Baij Nath Pershad v. Moheswari*, 14 Cal. 451 (456).

Where a mortgagee obtained a decree in 1880 (i.e., before the passing of this Act) declaring his title to certain mortgaged properties of his mortgagor judgment-debtor and authorising a sale thereof, he was entitled to execute the decree without the necessity of bringing a suit under sec. 67 (as provided by sec. 99)—*Dinendra v. Chandra Kishore*, 12 Cal. 436 (437).

In a suit by a landlord to eject the tenant, filed before the coming into operation of the Transfer of Property Act, the provisions as to notice in this Act in the case of leases did not apply, and no notice to quit was necessary—*Ambabai v. Bhau*, 20 Bom. 759 (761, 762).

The provisions of this Act do not apply to Patni taluqs governed by Reg. VIII of 1819—*Surendra Narayan v. Bijoy Singh Dudhoria*, 52 Cal. 655, A.I.R. 1925 Cal. 962, 30 C.W.N. 233, 89 I.C. 785.

The provisions of the Transfer of Property Act do not apply to a tenancy created before the passing of the Act. A non-permanent tenure, created before the Act was in force, is not transferable—*Hiramoti v. Annoda Prosad*, 7 C.L.J. 553; *Kailash v. Hari Mohan*, 13 C.W.N. 541 (544), 1 I.C. 362, 10 C.L.J. 110; *Chota Nagpur Banking Association v. Kamakhya Narayan*, 7 Pat. 341, 109 I.C. 306, A.I.R. 1928 Pat. 431 (433). A tenancy of homestead land from year to year which was in existence before the passing of this Act (and which was not transferable except by custom) is not governed by this Act, and sec. 108 (j) does not make it transferable absolutely or by way of sub-lease—*Ananda Mohan v. Gobinda*, 20 C.W.N. 322, 33 I.C. 565 (567), *Sarada Kanta v. Nalini Chandra*, 54 Cal. 333, A.I.R. 1927 Cal. 39, 97 I.C. 817, 31 C.W.N. 231 (234); *Sulin Mohan v. Raj Krishna*, 25 C.W.N. 420 (423), 33 C.L.J. 193, A.I.R. 1921 Cal. 582, 60 I.C. 826; *Hari Nath v. Raj Chandra*, 2 C.W.N. 122; *Hanuman Prasad v. Deo Charan*, 7 C.L.J. 309. Section 108 (j) of this Act has no application to tenancies (e.g., of homestead land) created before the passing of the Act. The incident of non-transferability was common to tenancies from year to year created before this Act, and the right of transferability cannot be acquired by anything in this Act—*Umakanta v. Kashiram*, 23 I.C. 246 (247) (Cal.); *Madhu Sudan v. Kamini*, 32 Cal. 1023. Even a permanent tenancy created before the passing of this Act for the purpose of habitation cannot be transferred when pucca buildings have not been erected on the land, when the document creating the tenancy does not confer upon the lessee the right to transfer and when there is no evidence of a local custom in favour of such transfer—*Safar Ali v. Abdul*, A.I.R. 1924 Cal. 1012 (1013), 39 C.L.J. 585, 84 I.C. 28.

When tenures were created before the passing of this Act, the acquisitions of such tenures by the holder of the superior right could not merge them in that right under the common law of this country before the pass-

ing of this Act. Section 111 (d), therefore, cannot be applied to such tenures—*Kumar v. Sarat*, A.I.R. 1938 Cal. 128.

Where a mortgage deed was executed before this Act came into force, the rights or liabilities of the parties to the mortgage or the relief in respect thereof are saved by sec. 2 (c)—*Nanu v. Raman*, 16 Mad. 335. "The subsequent creation of suits for foreclosure could not," observed their Lordships of the Judicial Committee, "except by clear enactment, revive the extinct right, and in effect the clear enactment is the other way, for sec. 2, cl. (c) of the Transfer of Property Act says that nothing therein shall affect any right or liability arising out of legal relation constituted before this Act comes into force or any relief in respect of such liability"—*Srinath v. Khettur Mohan*, 16 Cal. 693 (P.C.) at p. 701.

A lease executed before the passing of this Act would be excluded from the application of Chapter V—*Narayana v. Narayana*, 6 Mad. 327 (330); *Ambabai v. Bhau*, 20 Bom. 759. Thus, sec. 108, clause (o) does not apply to a lease created before the passing of this Act—*Meghlal v. Raj Kumar*, 34 Cal. 358 (370). Where a grant of *mokarari* lease was made to a person prior to the Transfer of Property Act, and he subsequently obtained a *patni* lease but kept the two leases distinct and separate, held that as the *mokarari* was granted prior to the T.P. Act, sec. 111 (d) did not apply, and there was no merger of the two interests—*Hirendra v. Hari Mohan*, 18 C.W.N. 860 (864), 22 I.C. 966.

11. Procedure not saved by clause (c) :—The procedure by which a right or liability may be determined or enforced or a relief may be obtained is not a 'right' or 'liability' or 'relief' within the meaning of this clause. Therefore, a suit brought *after* the Transfer of Property Act came into force for foreclosure of a conditional mortgage executed prior to this Act, will be governed by the procedure prescribed by this Act and not by the procedure prescribed under Regulation XVII of 1806, the procedure under the earlier Regulation not being saved by this clause—*Ganga Sahai v. Kishen Sahai*, 6 All. 262 (267) (F.B.). No one has a vested right in any particular form of procedure—*Warner v. Murdoch*, L.R. 4 Ch. D. 750, at p. 752 (*per James, J.*); *Republic of Costa Rica v. Erlanger*, L.R. 3 Ch. 62, 69 (*per Mellish, L.J.*). Clause (c) of sec. 2 preserves the *rights* of the parties in respect of mortgages executed before the commencement of this Act, but after the introduction of this Act the *procedure* for enforcing those rights is governed by its provisions—*Murlidhar v. Parsharam*, 25 Bom. 101 (103). "It does not follow that because a suitor has a cause of action, he has also a vested right to enforce it by a course of procedure and practice which was in force when he began his suit. He has only the right of prosecuting it in the manner prescribed for the time being by or for the Court in which he sues, and if an Act of Parliament alters that mode of procedure, he has no other right than to proceed according to the altered mode"—Maxwell's *Interpretation of Statutes*.

Although a mortgage may be anterior to the passing of the Act, yet when a person comes into Court and claims a remedy under the mortgage, after the commencement of this Act, the procedure of this enactment will apply—*Umda v. Umrao Begum*, 11 All. 367; *Shiva Deri v. Jaru*, 15 Mad. 290; *Mata Din v. Kazim*, 13 All. 432 (F.B.); *Kaveri v. Ananthappa*, 10 Mad. 129; *Bhōbo Sundari v. Rakhal Chunder*, 12 Cal. 583 (589) (F.B.):

Rameshwar v. Mahomed Mehdi Hossain, 26 Cal. 39 (P.C.); *Bikkina v. Adabala*, 30 M.L.J. 338, 34 I.C. 475 (477). See also *Ganga v. Kishen*, 6 All. 262 (F.B.).

If, however, all the steps that were necessary to be taken to foreclose the mortgage had been taken under the earlier Regulation and all that remained was to bring a suit for foreclosure, *held* that the suit for foreclosure would be governed by the earlier Regulation. *Umesh Chunder v. Chunchun*, 15 Cal. 357 (360, 361); *Mohabir Pershad v. Gangadhar*, 14 Cal. 599 (604); *Baij Nath v. Moheswari*, 14 Cal. 451 (456).

12. Pending proceedings :—It is not the intention of the Transfer of Property Act to render ineffectual any suit commenced and decree made under the procedure in force before this Act was passed. Thus, where a plaintiff obtained a decree for the sale of the mortgaged property after the T. P. Act had come into force in a suit instituted before its commencement and the judgment-debtor objected that the decree-holder was not entitled to bring the mortgaged property to sale otherwise than by instituting a suit under sec. 67 of the Act that : *Held* that the objection was not valid, as the decree-holder had acquired rights under the decree which were, under this section, not affected by the provisions of sec. 99 of this Act—*Makund Ram v. Ram Sarup*, 1884 A.W.N. 274. But if the proceedings in respect of a mortgage executed before 1882 are commenced after the passing of this Act, the entire procedure of this Act must be followed, and the decree-holder cannot, by reason of the operation of sec. 99, gain a right to bring the property to sale otherwise than by following the procedure under sec. 67—*Kaveri v. Ananthayya*, 10 Mad. 129; *Ram Prashad v. Ram Prasad*, 4 O.C. 231.

*Rights already extinguished cannot be revived by this Act :—*Where in the year 1878, when no suit for foreclosure could be brought, the right of the mortgagee to possess was wholly extinguished by lapse of time, and the title of the purchasers under the mortgagor became freed from the mortgage, the subsequent creation of suits for foreclosure could not, except by clear enactment, revive the extinct right, and in effect the clear enactment, namely s. 2 cl. (c) of the T. P. Act is in the other way—*Srinath v. Kheller Mohun*, 16 Cal. 693 (701) (P.C.).

13. Clause (d) :—The meaning of this clause is that a transfer by operation of law or in execution of a decree or order of a Court shall not be affected by the various provisions in the Act regulating and codifying the law as to the actual transfers by act of parties—*Promatho v. Kali Prasanna*, 28 Cal. 744 (747).

As to the distinction between a private sale in satisfaction of a decree and a sale in execution of a decree see *Dinendranath v. Tarak Chandra*, 7 Cal. 107 (P.C.) at p. 118.

A transfer by sale in execution of a decree is exempted by this clause from the operation of the Transfer of Property Act; consequently, a registered conveyance under Chap. III of this Act is not necessary to give validity to this transfer—*Balaji v. Dajiba*, 2 C.P.L.R. 137. Similarly, a person purchasing a debt at an execution sale is not affected by sec. 135 of this Act. He can recover the same without regard to the terms of Chap. VIII of this Act—*Krishnan v. Parachan*, 15 Mad. 382. But a charge created by the liquidator of a company in winding up, though under the

orders of the District Court, cannot be treated as a transfer in execution of an order of a Court within the scope of this clause, inasmuch as the District Court's sanction is not an order capable of execution—*Motilal v. Poona C. & S. Manufacturing Co.*, 19 Bom. L.R. 602, 41 I.C. 246.

Sec. 36 has been held inapplicable to a case of transfer by operation of customary law—*Mathewson v. Shyam Sundar*, 33 Cal. 786. See this case cited in Note 158 under sec. 36. But the provisions of sec. 53, being founded on principles of justice, equity and good conscience, have been applied to a case of transfer by operation of law (e.g., a transfer effected by order of Court based upon an award)—*Akram-unnissa v. Muta-af-unmissa*, 51 All. 595, A.I.R. 1929 All. 238 (239), 116 I.C. 445.

Neither s. 51 in terms nor its principle applies to a transfer in execution of a decree. Consideration of equity does not arise in case of such a sale; principle of *caveat emptor* applies—*Lalta Prasad v. Brahmanand*, A.I.R. 1953 All. 449.

Where an order is passed by the Court that assignment of a bond should be made, it is a valid assignment though not in writing signed by the Court, as according to cl. (d) of this section the provisions of the Act do not apply to any transfer made by an order of the Court—*Mani v. Anpurna*, A.I.R. 1943 Pat. 218, 22 Pat. 114.

S. 100 is not excluded from the operation of the saving cl. (d)—*Nawal Kishore v. Municipal Board*, A.I.R. 1943 All. 115 (F.B.). This clause prevents s. 53 operating in the case of transfer under an order or decree of Court—*Ramanathan v. Unnamalai*, A.I.R. 1942 Mad. 632, (1942) 2 M.L.J. 213.

Sec. 136 is controlled by sec. 2 (d) and therefore a purchase by a pleader of claim under a life insurance policy in execution of a decree is not invalid under sec. 136—*National Insurance Co. v. Haridas*, A.I.R. 1927 Cal. 691, 46 C.L.J. 225, 104 I.C. 729. Similarly sec. 5 is controlled by sec. 2 (d)—*Laxmi Devi v. Mukand Kanwar*, A.I.R. 1965 S.C. 834.

A sale by an Official Receiver acting under the provisions of the Provincial Insolvency Act is not a transfer by operation of law or in execution of a decree or order of Court and such a transfer is not exempted from registration under sec. 54—*Narasappa v. Hussain*, 152 I.C. 988, 67 M.L.J. 746. The order of the Court under the Provincial Insolvency Act simply vests the property in the Official Receiver, and on such vesting he is entitled to sell the property, without any leave or order of the Court. Though the property vests in the Receiver by operation of law, the transfer by him is a transfer by one party to another and cannot be said to be a 'transfer by operation of law' in favour of the vendee—*Basava Sankaran v. Anjaneyalu*, 50 Mad. 135 (F.B.), 51 M.L.J. 529, A.I.R. 1927 Mad. 1, 99 I.C. 8. But see *Wazirey v. Mathura Prasad*, A.I.R. 1939 Oudh 55, 15 Luck. 404, 1939 O.W.N. 32, where it has been held that the Official Receiver's sale falls under cl. (d). It is in the nature of a Court sale and its validity really depends on the order of the Insolvency Court vesting the property in the Official Receiver and thus authorising him to sell; therefore such a sale, if held with the sanction of the Court, does not necessitate a sale deed. Where a security bond is executed under O. 32, r. 16, C. P. Code, in favour of the Court, hypothecating certain immoveable property to secure a proper disposal of the money due to certain

minors, an assignment of the security-bond by the Court in favour of the minors on their attaining majority in order to enable them to realise the money from the surety does not require to be effected by a registered instrument. As the transfer takes place by an order of the Court, it is unaffected by the provisions of the T. P. Act requiring registration, by virtue of sec. 2 (d)—*Rer Saran v. Yudhistar*, 53 All 786 (F.B.), 29 A.L.J. 503, A.I.R. 1931 All. 389 (390), 133 I.C. 904. Where the court appointing a guardian actually orders the sale of the property of the minor by auction and sends the auctioneer a robakari directing him to sell the property the fact that the court passed the order on the application of the guardian does not detract from the sale being one in execution of an order of the court and such a sale need not be registered—*Prém Nath v. Sundra Wati*, A.I.R. 1960 Punj. 630.

Application in the Punjab :—Section 2 (d) contains a highly technical provision which is not binding on the Courts in the Punjab and cannot be invoked to defeat a suit by a creditor brought in the Punjab for declaration that his debtor has transferred property with a view to defeat or delay his rights—*Chattru v. Mt. Majdan*, A.I.R. 1934 Lah. 460 (462), Lah. 849, 150 I.C. 888.

14. “And nothing.....Muhammadan Law” :—The reference to Hindu law has been omitted from this clause, as being unnecessary. The word “Buddhist” has been omitted as the Government of Burma had no objection to such omission. The word “Muhammadan” has been retained as the rules in chapter 2 are not in all cases in conformity with the personal law of Muhammadans.

The *Mahomedan Law of gift* is not affected by anything enacted in the Transfer of Property Act—*Sadik Hussain v. Hashim Ali*, 38 All. 627 (646) (P.C.); *Babu Lal v. Ghanesham Das*, 44 All. 633 (634), 20 A.L.J. 466, A.I.R. 1922 All. 205, 70 I.C. 84.

Under the Mahomedan law, the transfer or renunciation of an expectant right of inheritance is invalid; and since the rules of Mahomedan law are not affected by the Transfer of Property Act, it is unnecessary to consider whether such transfer or renunciation would be valid or invalid under this Act—*Asa Beevi v. Karuppan*, 41 Mad. 365 (370). The provisions of sec. 53 are not inconsistent with Mahomedan law; consequently that section has been applied to a waqf created by a Mahomedan for the purpose of defeating his creditors—*Ahmad Husain v. Kalu Mian*, 27 A.L.J. 460, A.I.R. 1929 All. 277 (278), 117 I.C. 97; *Bismillah v. Tahsin Ali*, 1930 A.L.J. 616, A.I.R. 1930 All. 462 (465), 124 I.C. 722. But the general rules in Chapter II apply to Mahomedan transfers unless there is an inconsistent rule of Mahomedan Law—*Muhammad Raza v. Abbas Bandi* (1932) 59 I.A. 237, A.I.R. 1932 P.C. 158.

The right of a Hindu mortgagor to the protection afforded by the rule of *damdupat* was not affected by anything contained in the Transfer of Property Act as it stood before its amendment by the Amending Act 20 of 1929—*Jeewanbai v. Manordas*, 35 Bom. 199 (203), 8 I.C. 694, 12 Bom. L.R. 992.

15. *Crown Grants* :—An exemption from the operation of this Act has been made by the Crown Grants Act (Act XV of 1895), sec. 2 of which lays down that nothing in the Transfer of Property Act shall apply

to any grant or transfer of land or of any interest therein heretofore made or hereafter to be made by the Crown in favour of any person whomsoever and that every such grant and transfer shall be construed and take effect as if the Transfer of Property Act had not been passed. Leases granted by the Crown are outside the operation of the T. P. Act. There is no distinction between grants by virtue of the prerogative rights of the Crown and grants made as a mercantile transaction—*Secretary of State v. Nistarini*, A.I.R. 1927 Pat. 319, 6 Pat. 446, 104 I.C. 209.

16. Maintenance Grants :—A grant of immoveable property to a Hindu widow for maintenance need not be made by a written instrument. The Transfer of Property Act does not apply to such transactions—*Jivan Lal v. Chudaman*, 10 N.L.R. 111, 26 I.C. 835.

Interpretation-clause.

3. In this Act, unless there is something repugnant in the subject or context,—

“immoveable property” does not include standing timber, growing crops, or grass :
 “instrument” means a non-testamentary instrument :

“attested”, in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant ; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary :

“registered” means registered in any part of the territories to which this Act extends under the law for the time being in force regulating the registration of documents :

“attached to the earth :” “attached to the earth” means—

(a) rooted in the earth, as in the case of trees and shrubs ;
 (b) imbedded in the earth, as in the case of walls or buildings ; or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached :

“actionable claim” means a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive,

a person is said to have "notice." 'notice' of a fact when he actually knows that fact or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, 1872, section 229.

Explanation 1.—Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of section 30 of the Indian Registration Act, 1908 (XVI of 1908) from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated :

Provided that—

- (1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908 (XVI of 1908) and the rules made thereunder.
- (2) the instrument or memorandum has been duly entered or filed, as the case may be in books kept under section 51 of that Act, and
- (3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under section 55 of that Act.

Explanation II.—Any person acquiring any immoveable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Explanation III.—A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material :

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud.

Amendments :—The definition of “attested” has been added by the T. P. Amendment Act, 1926 as amended by Act 10 of 1927. See Note 18A.

The definition of “notice” has been amended and the three Explanations added by sec. 3 of the Transfer of Property Amendment Act, 1929. Explanation I has been further amended by the Transfer of Property Amendment Act V of 1930. See Note 26 below. This amendment has no retrospective effect. See Note 1A, *ante*.

In the definition of “registered” the words *British India* were replaced by *a Province* by A.L.O. 1948. This was again replaced by *a Part A State or Part C State* by A.L.O. 1950. Then for this expression the words *any State to which this Act extends* were substituted by the Part B States (Laws) Act III of 1951. The words *any State* thereafter were substituted by A.L.O. (No. 2 of 1956) by the words *any part of territories*.

17. Immoveable Property :—This expression is not defined in this Act. One has to look for its definition to the General Clauses Act which again is not exhaustive—*Mati Lal v. Iswar*, A.I.R. 1936 Cal. 727, 41 C.W.N. 263, 64 C.L.J. 308 ; see also *Daw Yan v. U Min Sin*, A.I.R. 1940 Rang. 102, 1940 R.L.R. 7, 187 I.C. 762.

“Immoveable property” shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.—Section 3 (25), *General Clauses Act* (X of 1897). Therefore an assignment of rents and profits of land can only be made by a registered instrument—*Daw Yan v. U Min Sin*, *supra*. The right to collect rent from the tenants is a right to the benefits arising out of the lands. Therefore a lease of such a right to collect rents (such as a Mustajir lease in Orissa) is a lease of immoveable property within the meaning of sec. 107—*Udayanarayan v. Badia Dasu*, A.I.R. 1952 Or. 116. See also *Ramchandra v. Subraya*, A.I.R. 1951 Bom. 127, I.L.R. 1951 Bom. 692.

“Immoveable property” includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefits to arise out of land and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops, or grass.—Section 2 (6), *Registration Act* (XVI of 1908).

A house which is sold for the purpose of enjoyment as a house with an option to pull it down if the vendee likes, is immoveable property for this Act. *Punnayya v. Chilakapudi*, A.I.R. 1926 Mad. 343, 91 I.C. 754.

The following are immoveable property :—

(a) The ‘equity of redemption’ in mortgaged property is considered

as immoveable property—*Casborne v. Scarfe*, 1 Atk. 603; *Parashram v. Govind*, 21 Bom. 226 (228); *Kanti Ram v. Kutubuddin*, 22 Cal. 33 (41); *Umesh v. Zahur*, 18 Cal. 164.

(a) Reversion in property leased, even if it be for a long term, say 999 years—*Mati Lal v. Iswar*, supra; so it is a vested remainder in land. It is therefore capable of being alienated by the holder of that interest or by any body authorized to sell his immoveable property—*Budhiraju v. Vullipalem*, A.I.R. 1939 Mad. 802, (1939) 2 M.L.J. 600, 1939 M.W.N. 810.

(b) A Hindu widow's life-interest in the income of her husband's immoveable property—*Natha v. Dhunbajji*, 23 Bom. 1 (11).

(c) Office of hereditary priest of a temple—*Krishnabhat v. Kapabhat*, 6 B.H.C.R. A.C. 137.

(d) Right of way—*Bejoy Chandra v. Bunku Behari*, 13 C.W.N. 451, 4 I.C. 116.

(e) Right to collect rents from occupancy raiyats in actual possession—*Innasi v. Sivagram*, 5 M.L.J. 95.

(f) Right to collect dues from a fair on a piece of land—*Sikandar v. Bahadur*, 27 All. 462.

(f1) Right to collect fees of slaughter-houses and fish bazars—*Md. Rowther v. Tinnevely Municipal Council*, A.I.R. 1938 Mad. 746, 48 M.L.W. 74.

(g) A right of ferry—*Krishna v. Akilanda*, 13 Mad. 54.

(h) A right to officiate as priest at funeral ceremonies of Hindus ranks amongst immoveable property according to Hindu Law, but it is not recognised as property in any other system of law.—*Raghoo v. Kassy*, 10 Cal. 73.

(i) A right of *Malikana*, which is an annual recurring charge on immoveable property—*Churaman v. Balli*, 9 All. 591 (597).

(i1) Right under a deed of settlement to receive rents and profits of immoveable property even though such income may have to be received from the hands of trustees. But rents and profits which at the time of the assignment have already been received by the trustees of the settlement (or even have accrued), are not immoveable property—*M. E. Moolta Sons Ltd. v. Official Assignee*, 40 C.W.N. 1253 (P.C.).

(j) A *hat* (market)—*Surendra Narain v. Bhai Lal*, 22 Cal. 752; *Golam v. Parbati*, 36 Cal. 665.

(k) A *toda giras hak*, i.e., a right to receive an annual payment from a village—*Futtehsangji v. Dessai*, 22 W.R. 178 (P.C.).

(l) A *haq-i-chaharum*, i.e., the customary right of the Zemindar to receive a fourth share of the sale proceeds of certain property—*Dhandai Bibi v. Abdar Rahman*, 23 All. 209.

(m) Right to possession and management of *saranjam*—*Narayan v. Vasudev*, 15 Bom. 247.

(n) The right granted by the Peshwa in permanence to levy toll on paddy exported from a particular territory, whether secured on land or not, being according to Hindu law, *nibandha*, is immoveable property.—*Krishnaji v. Gajanan*, 33 Bom. 373, 2 I.C. 489.

(o) Right to the assessment payable on a sub-tenure—*Madhavrao v. Kashibai*, 34 Bom. 287, 5 I.C. 599.

(ol) Where the grant made by a *sanad* is a *nibandha*—*Collector v. Hari*, 6 Bom. 546.

(p) Hereditary offices are regarded by Hindu law as immoveable property—*Balwant v. Parsotam*, 9 B.H.C.R. 99; *Sinde v. Sinde*, 4 B.H.C.R. 51; *Collector of Thana v. Kashinath*, 5 Bom. 322; *Raghoo v. Kassy*, 10 Cal. 73.

(q) Right of fishery—*Parbutty v. Madho Pande*, 3 Cal. 276; *Ram Gopal v. Nurumuddin*, 20 Cal. 446; *Shibu Halder v. Gupisundari*, 24 Cal. 449; *Fadu v. Gour*, 19 Cal. 544; *Bhundal v. Pandol*, 12 Bom. 221; *Ganesh Chandra v. State of West Bengal*, A.I.R. 1958 Cal. 114.

(r) The interest of a mortgagee in immoveable property—*Paresnath v. Nabagopal*, 29 Cal. 1; *Benarsi v. Ram Chandar*, 34 P.L.R. 233, A.I.R. 1933 Lah. 210 (211). A lease is immoveable property—*Indraloke Ltd. v. Santi Debi*, A.I.R. 1960 Cal. 609.

(s) The right to collect *lac* from trees—*Parmanandy v. Birkhu*, 5 N.L.R. 21, 1 I.C. 903; *Kamal Singh v. Kali Mathon*, A.I.R. 1955 Pat. 402.

(t) Factory—*Amratlal v. Keshavlal*, 28 Bom.L.R. 939, A.I.R. 1926 Bom. 495 (496), 98 I.C. 696.

(u) *Varshasans* or annual allowances charged on immoveable property—*Keshav v. Vinayak*, 23 Bom. 22.

(v) The grant of a right to collect *Tendu* leaves (for making *biri*)—*Mulji Sicca & Co. v. Nur Mohammad*, A.I.R. 1938 Nag. 377.

(w) *Sarvottam's* right to assessment of the *Dhara* which is a *nibandha*—*Madhav v. Kashibai*, 34 Bom. 287.

(x) An agreement to grow trees on land owned by one of the parties, to sell them when grown up and divide the sale proceeds—*Appalaraju v. Tyla Yedukondalu*, A.I.R. 1958 Andhra Pra. 713. When a proprietor grants the right to take forest produce the grantee acquires thereby an interest in the proprietary rights of the grantor, and such interest amounts to immoveable property—*Mahadeo v. State of Bombay*, A.I.R. 1959 S.C. 735.

See also Notes under sec. 105.

17A. Mortgage-debt is immoveable property:—Before the amendment of the definition of actionable claim in section 3 of this Act, a *debt secured by mortgage of immoveable property* was held to be an actionable claim; but after the amendment (made by Act II of 1900), the definition of an actionable claim expressly excludes a debt secured by a mortgage of immoveable property; and such a debt will now be treated as immoveable property, and can be transferred only in the same way as an immoveable property is transferred (*viz.*, by a registered instrument)—*Perumal v. Perumal*, 44 Mad. 196 (200, 201); *Sakhiuddin v. Sonaula*, 22 C.W.N. 641 (644), 45 I.C. 986; *Elumalai v. Balakrishna*, 44 Mad. 965 (968), A.I.R. 1922 Mad. 344, 66 I.C. 168; *Imperial Bank of India v. Bengal National Bank*, 34 C.W.N. 605 (610); *Benarsi v. Ram Chandar*, *supra*. A mortgage is a transfer of an interest in specific immoveable property and the mortgagee's interest therein can, even in the case of a usufructuary

mortgage, only be immoveable property and not movable property—*Prahlad v. Maganlal*, A.I.R. 1952 Bom. 454. Thus a mortgage can only be assigned by a registered deed of assignment and not by a document which merely purports to recite a previous partition—*Mirza Md. Osman v. Jambulingam*, A.I.R. 1941 Rang. 122; see also *Bank of Chetnad v. Ma Ba Lo*, 14 Rang. 494, A.I.R. 1936 Rang. 152, 163 I.C. 645; *Vijiaghavalu v. Arunachalam*, A.I.R. 1939 Mad. 165, (1939) 1 M.L.J. 582, 48 M.L.W. 766.

The defendant executed a mortgage to a bank. The bank went into liquidation and an arrangement was come to between the bank and its creditors by which the whole assets of the bank were transferred to a purchasing company, but the agreement was not registered. Subsequently the bank filed a suit on the mortgage: Held by the Privy Council that a suit by the bank in its own name was maintainable—*Skinner v. Bank of Upper India*, A.I.R. 1935 P.C. 108 (113), 57 All. 314, 62 I.A. 115, 39 C.W.N. 834, 155 I.C. 743.

It is the modern practice in ordinary sales of an equity of redemption to insert an express covenant of indemnity by the purchaser and the absence of such a covenant affords a reason for the conclusion that the deed of transfer contains a complete record of the bargain between the parties—*Montreal Trust Co. v. British Columbia, & Agency*, A.I.R. 1936 P.C. 65 (70), 160 I.C. 783.

Even though the debt is secured by an *equitable mortgage* (i.e., where the debt is embodied in a promissory note accompanied by deposit of title deeds), the mortgage-debt is to be deemed an immoveable property and can be transferred only by a registered instrument—*Elumalai v. Balakrishna*, 44 Mad. 965 (968), dissenting from *Perumal v. Perumal*, 44 Mad. 196 (201), where Wallis, C.J., expressed an opinion that a debt secured by an equitable mortgage could be transferred by endorsement of the promissory note alone, and no registered instrument was necessary.

18. The following are not immoveable property :—

(a) A decree for sale of immoveable property on a mortgage—*Abdul Majid v. Muhammad Faizulla*, 13 All. 89 (91); *Ahmad Khan v. Abdul Rahman*, 26 All. 603 (605); *Baij Nath v. Binoyendra*, 6 C.W.N. 5 (6); *Gous Mahomed v. Khawas Ali Khan*, 23 Cal. 450 (453).

(b) Right of purchaser to have the lands registered in his name—*Bhikaji Baji v. Pandu*, 19 Bom. 43.

(c) G. P. Notes—*Doorga v. Pooran*, 5 W.R. 141.

(d) A right of worship (whether a right of exclusive worship, or a *pala*, or turn of worship)—*Eshun Chandra v. Monmohini*, 4 Cal. 683 (685); *Jatkar v. Mukundu*, 39 Cal. 227 (230); *Mohamaya v. Haridas*, 42 Cal. 455, 27 I.C. 400; *Narasingh v. Prolhadman*, 46 Cal. 455, 47 I.C. 25; *Jagdeo v. Ramsaran*, A.I.R. 1927 Pat. 7, 6 Pat. 245, 97 I.C. 332.

(e) A "Yajman Vritti" which primarily denotes an obligation imposed upon the Purohit or family priest to perform certain religious rights—*Kadulal v. Beharilal*, A.I.R. 1932 Sind 60. *Brit jajmani* books are movable property, they may be valuable property, but can in no sense be considered to be immoveable property. The amount payable by a *jajman* as *brit jajmani* to the Panda when he visits Mathura is not a fixed allowance which even under the Hindu law would be deemed to be a

nibandha and is not immoveable property—*Ram Kishan v. Salig Ram*, A.I.R. 1946 All. 472, 224 I.C. 391.

(f) Royalty—*Krishna Kishore v. Kusunda Collieries*, 65 I.C. 673 (Pat.).

(g) A machinery which is not permanently attached to the earth and which can be removed from one place to another—*Meghraj v. Krishna Chandra*, A.I.R. 1924 All. 365, *Perumal Naicker v. Ramaswami Kone*, A.I.R. 1969 Mad. 346.

(h) A right to recover maintenance allowance (even though it is charged on immoveable property) is not in itself immoveable property—*Altaf Begam v. Brij Narain*, 51 All. 612, 27 A.L.J. 367, A.I.R. 1929 All. 281 (285), 116 I.C. 855.

Standing timber:—Standing timber is not immovable property under the Act—*Thangal v. Kutti*, A.I.R. 1952 Mad. 59. "In excepting standing timber, growing crops and grass from the category of immoveable property, regard has probably been had to the fact that they are all things usually contemplated as severable or intended to be severed from the soil"—Shephard and Brown, 7th Edn., p. 14. A standing timber is a tree which is fit to be used in building and repairing houses, and which has not been severed from the ground—*Badan Kumari v. Suraj Kumari*, 3 A.L.J. 20; *Krishna Rao v. Babaji*, 24 Bom. 31. Trees which bear fruit or other forest produce are not standing timber but are considered as immoveable property—*Katwaru v. Ram Adhin*, 10 A.L.J. 516, 17 I.C. 910; *Sakharam v. Vishram*, 19 Bom. 207 (208); *Ali Sahib v. Mohideen*, 13 Bom.L.R. 874, 12 I.C. 375. Thus where mango trees were mortgaged with the condition that the mortgagee must not cut down the trees so as to convert them into timber but must use them for the purpose of enjoying fruits, the trees must be regarded as immoveable property, and not moveable—*Shiv Dayal v. Puttu Lal*, 54 All. 437, 140 I.C. 491, A.I.R. 1933 All. 50 (52, 53); see also *Bodha v. Ashloke*, 5 Pat. 765 A.I.R. 1927 Pat. 1, 98 I.C. 779. But if according to the custom of a particular locality, a fruit-bearing tree is used in building or repairing houses, it can be taken to be a timber tree—*Badan v. Suraj*, A.L.J. 20; *Krishna Rao v. Babaji*, 24 Bom. 31; *Nahanchand v. Modi*, 31 Bom. 185 (197).

Having regard to the uses to which it is put in this country, *babul trees* would come within the scope of "*timber*"—*Ram Kumar v. Krishna Gopal*, A.I.R. 1946 Oudh 106, 21 Luck. 48.

A contract for the cutting of all kinds of trees to be converted into charcoal excepting such trees as produce fruit or other forest produce is not a contract for sale of an interest on land—*Ali Saheb v. Mohideen*, supra; see also *Mathura v. Jadubir*, 28 All. 277. A grove consisting of *shisham* and *neem* trees does not constitute immoveable property—*Nanhe Lal v. Ram Bharose*, A.I.R. 1938 All. 115, 174 I.C. 315. But palm and date trees are trees the produce of which can be got and hence cannot be considered as timber and are therefore immoveable property—*Moti v. Deoki*, A.I.R. 1936 Pat. 66, 160 I.C. 1054.

An agreement assigning for consideration a right to enjoy the produce of, and to cut and remove the trees, grass, etc., growing on land for a period of four years is an instrument conveying an interest in immoveable property—*Seeni Chetiar v. Sanatnathan*, 20 Mad. 58 (60) (F.B.). But a document which entitles certain persons merely to cut and remove all

kinds of trees in a certain forest for two years, but *not to enjoy the produce* of the trees, is a mere sale of standing timber, and not one which conveys an interest in immoveable property—*Mathura Das v. Judubir*, 28 All. 277 (278). The principle of these decisions is that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold, and from further vegetation, the contract is to be considered as one creating an interest in land; but where the process of vegetation is over, and the parties agree that the thing shall be immediately withdrawn from the land, the land should be considered as a mere warehouse of the thing sold, and the contract is one for sale of moveable property. See also *Mammikutti v. Puzhakkal*, 29 Mad. 353 (357); *Natesa v. Thangavelu*, 38 Mad. 883 (885); *Rajindra v. Madhu*, A.I.R. 1919 Oudh 93, 112 I.C. 156.

Growing crops.—This term must be held to include all vegetable growths, whether in the form of fruit, bark or roots—*Atmaram v. Doma*, 11 C.P.L.R. 87. A lease of the crop of a mango grove for a certain period and entitling the lessee to the grass on the land, is a lease creating an interest in the trees and the land itself, and is therefore in respect of immoveable property. The deed creating such lease, therefore, require registration—*Mahabir v. Enayat*, A.I.R. 1951 All. 608. A crop of sugarcane is not immoveable property, and an endorsement of a bond hypothecating such crops does not require registration—*Kalka Prasad v. Chandan*, 10 All. 20. A “growing crop” necessarily means a crop which is in existence and which is in the process of coming to fruition—*Imamali v. Priyawati*, A.I.R. 1937 Nag. 289, I.L.R. 1938 Nag. 31, 171 I.C. 553. A deed of mortgage of immoveable property and also of the produce realized therefrom every year operates, in respect of the produce on the land as mortgage of movable property. The moment the crop comes into existence, the mortgagee gets title to the crop—*Venkatachallam v. Venkatrami*, (1940) 2 M.L.J. 456, A.I.R. 1940 Mad. 929, 1940 M.W.N. 978; see also *Misri Lal v. Morzhar Hossien*, 13 Cal. 262 and *Colyer v. Isaacs*, 19 Ch. D. 342.

Grass.—Though grass is movable property right to cut grass being an interest in land is immoveable property—*Crosby v. Wadsworth*, (1805) 6 East. 602. An agreement for the sale of growing grass, growing timber, or growing fruit is a contract for the sale of an interest in land unless made with a view to their immediate severance and delivery as chattel to the purchaser—*Seeni Chettiar v. Santhanathan*, (1897) 20 Mad. 58 F.B.

18A. Attestation.—The definition of ‘attested’ has been added by the Transfer of Property Amendment Act XXVII of 1926 as amended by Act X of 1927 sec. 2 and sch. I.

The object of attestation is to ensure that there is no fraud or other such circumstance in the execution of the deed. A party to a document cannot attest the same—*Gomathi v. Krishna*, A.I.R. 1954 Mad. 126; but a person interested in the transaction may be an attesting witness—*Durga Din v. Suraj Baksh*, (1931) 7 Luck. 41, A.I.R. 1931 O. 285 F.B.

The party who sees the document executed is in fact a witness to it; if he subscribes as a witness, he becomes an attesting witness—*Alagappa v. Ko Kala*, A.I.R. 1940 Rang. 134, 1940 R.L.R. 199, 188 I.C. 759; see also *Shamu Patter v. Abdul Kadir*, 35 Mad. 607 and *Burdett v. Spilsbury*,

10 Cl. & Fin. 340. The affixing of signature of the attesting witnesses in the presence of the executant is the ordinary mode of attestation as defined in this section—*Rajeshwar v. Sukhdeo*, A.I.R. 1947 Pat. 449. The statement of an attesting witness that the document was read out and explained by the writer and then the executants and the attesting witnesses signed it, implies that the attesting witnesses signed in the presence of the executants and therefore the attestation must be deemed to have been duly proved within the meaning of this section—*Surajpal v. Udit Panch*, 1939 A.L.J. 604, A.I.R. 1939 All. 604, 183 I.C. 270. Under this section it is not necessary that the executant must have seen the attesting witnesses sign the document. It is sufficient if they sign in the presence of the executant—*Vinayak v. Md. Hanif*, A.I.R. 1954 Nag. 11. Where the executant of a mortgage deed, a lady who did not observe strict *pardah*, was inside the room while the attesting witnesses and others were outside in the adjoining veranda and there was no curtain in the door of the room and the witnesses signed the instrument in the veranda: *Held* that that attesting witnesses must be held to have signed the instrument in the presence of the executant, *ibid*.

The words "signed the instrument" in the definition of "attested" are governed by the definition of "sign" in sec. 3 (52), General Clauses Act, and therefore the word "sign" in the T. P. Act includes also a mark by the attester—*Nagamma v. Venkataramayya*, A.I.R. 1935 Mad. 178, 58 Mad. 220, 153 I.C. 777. *Contra*—*Venkataramayya v. Nagamma*, A.I.R. 1932 Mad. 272 (274), 136 I.C. 343. An illiterate person may attest the signature of the executant by putting his mark—*Hira Lal v. Gokul*, A.I.R. 1944 All. 61, I.L.R. 1944 All. 186. A document may be attested by an illiterate person, signature being affixed by the scribe—*Biswanath v. Babu Ram*, A.I.R. 1957 Pat. 485. It is also not necessary that somebody else should attest the mark of the attesting witness. It is enough if some one proves that the witness has made his mark on the document in his presence—*M. R. M. Firin v. Ma E Nyo*, A.I.R. 1937 Rang. 293, 172 I.C. 613.

Where the executant signed in the presence of the two witnesses and they signed in the presence of each other, and there was nothing to show that the execution and attestation was not done in the same sitting, it was *held* that there was valid attestation, as the attesting witnesses must be deemed to have signed the document in the presence of the executant—*Bhimasingh v. Fakirchand*, A.I.R. 1948 Nag. 155, I.L.R. 1947 Nag. 649; *Ghansilal v. Smt. Bhuridevi*, A.I.R. 1964 Raj 39. Where one of the two attesting witnesses to a mortgage deed signs for himself and also on behalf of the other at his instance and in his presence the signature would be a good signature, though no mark is affixed by the other witness—*Dabu v. Jamadar*, A.I.R. 1951 Pat. 368, 28 Pat. 158. When attestation is not specifically challenged and when a witness is not cross-examined regarding the details, it is sufficient for him to say that the document was attested by the other witness and himself. That is enough to prove attestation—*Kuwarlal v. Rekhlal*, A.I.R. 1950 Nag. 83, I.L.R. 1950 Nag. 321. But where the document was written and attested on the same day but before it was executed, that is, signed by the party, the attestation was not valid—*Sant Lal v. Kamla Prasad*, A.I.R. 1951 S.C. 477, 1951 S.C.J. 768.

The words "and must be deemed always to have meant" have been added by the Repealing and Amending Act, X of 1927 (see Gazette of India, 1927, Part IV, p. 24). The meaning of this Amendment is that the definition of the word "attested" in sec. 3, as introduced by the Amendment Act of 1926 shall have *retrospective effect*; in other words, all documents *executed prior to the passing of the T. P. Amendment Act XXVII of 1926*, in which the attesting witnesses did not actually see the executant sign the deed but received from the executant a personal acknowledgment of his signature on the deed, and then attested the deed, must be deemed to have been validly attested—*Veerappa v. Subramania*, 52 Mad. 123 (F.B.), 55 M.L.J. 794, 116 I.C. 367, A.I.R. 1929 Mad. 1; *Radha Mohan v. Nripendra*, 47 C.L.J. 118, A.I.R. 1928 Cal. 154, 31 C.W.N. clx; *Motilal v. Kasambhai*, 29 Bom.L.R. 1334, 105 I.C. 864; *Abinash v. Dasarath*, 56 Cal. 598, 32 C.W.N. 1228; *Yacub Khan v. Gujar Khan*, 52 Bom. 219, A.I.R. 1928 Bom. 267; *Gangaram v. Umaji*, A.I.R. 1928 Nag. 70.

The effect of the addition of the above words by the Repealing and Amending Act X of 1927 is to overrule the decision in *Girija Nandan v. Hanumandas*, 49 All. 25 (F.B.), 24 A.L.J. 921, A.I.R. 1927 All. 1 99 I.C. 161. See also *Nepra v. Sajer*, A.I.R. 1927 Cal. 763, 55 Cal. 67, 103 I.C. 662 in which it was held that the definition of the word 'attested' had *no* retrospective effect and did not apply to documents executed prior to 25th March, 1926 (on which the T. P. Amendment Act XXVII of 1926 came into force). The decision in *Balaji v. Gangamma*, 51 M.L.J. 641, A.I.R. 1927 Mad. 85, 99 I.C. 143, and *Mohamedi v. Kashi*, A.I.R. 1926 All. 725, 96 I.C. 775 will stand as correct. It has been held in a recent Allahabad case that the new definition of "attested" as added by the T. P. Amendment Act XXVII of 1926 has no retrospective effect, even by virtue of the Repealing and Amending Act X of 1927—*Balbhadar v. Lakshmi Bai*, 1930 A.L.J. 623, A.I.R. 1930 All. 669 (672), 125 I.C. 507. This proposition, it is submitted, is not correct. It is curious that no reference has been made to 52 Mad. 23 (F.B.) and other recent cases. But the actual decision in the case was right. The facts of the case are that a deed of gift purported to be attested by three witnesses, of which one only was produced at the date of suit. Another witness had died, and the third was not called in as he was hostile. The witness who came to Court deposed that the executant signed the document in his presence, and that the two other witnesses were not then present. *Held* that the document was not properly attested. [As the other witnesses, could not be called in, it was impossible to prove whether the other witnesses signed the deed after receiving from the executant a personal acknowledgment of his signature.] But where the witness who was called in Court stated that he did not see the executants sign their names but that they admitted execution before him and the other witness, and thereupon he and the other witness signed as witnesses, *held* that the deed was duly attested—*Provakar v. Indra Narayan*, 53 C.L.J. 326, 134 I.C. 531. In this case it was held that the definition of "attested" had retrospective effect because of Act X of 1927.

The Amendment Act XXVII of 1926 is retrospective in its operation. Consequently, though at the time of the trial of the suit the law in force was the old Act, still if at the time of the hearing of the appeal, the

Amendment Act (1926) came into force, the new Act applied to the case ; consequently the attestation made by a witness who signed upon the mortgagor admitting his signature, was valid—*S. M. A. R. L. Firm v. R. M. M. A. Firm*, 5 Rang. 772, A.I.R. 1928 Rang. 101, 109 I.C. 469 ; *Radha Mohan v. Nripendra*, 47 C.L.J. 118, A.I.R. 1928 Cal. 154 (156).

But although the amendment was intended by the Legislature to have retrospective effect and to validate mortgages which were executed before the amending Act was passed, still the Legislature did not intend to validate mortgages which were pronounced by a competent Court to be invalid for want of proper attestation according to the law then in force—*Harbhagwandas v. Ghulam Shah*, 25 S.L.R. 59, A.I.R. 1931 Sind 64 (65), 131 I.C. 719.

Attestation by Registering Officer:—The acknowledgment of execution before the Registering Officer and the signature of that officer affixed to the registration endorsement amount to sufficient attestation within the meaning of the definition given in this section—*Radha Mohan v. Nripendra Nath*, 47 C.L.J. 118, A.I.R. 1928 Cal. 154 (156), 105 I.C. 422 ; *Veerappa v. Subramanya*, 52 Mad. 123 (F.B.), 55 M.L.J. 794, 116 I.C. 367, A.I.R. 1929 Mad. 1 ; *Ram Charan v. Bhairon*, 53 All. 1, A.I.R. 1931 All. 101 (102) ; *Budhar v. Rahimtulla*, A.I.R. 1928 Sind 93 (94), 107 I.C. 216 ; *Kanchedi v. Zabbarshah*, A.I.R. 1936 Nag. 171. But it must be shown that the Sub-Registrar affixed his seal or signature to the document in the presence of the executant—*Neelima v. Jaharlal*, A.I.R. 1934 Cal. 772, 61 Cal. 525, 38 C.W.N. 753, 151 I.C. 1033 ; *Haripada v. Ananda*, A.I.R. 1930 Cal. 750, 129 I.C. 97 ; *Atul v. Krishna*, 67, C.L.J. 31 ; *Dhanapala v. Goverchand*, A.I.R. 1938 Mad. 959 (962), (1938) M.W.N. 938 ; *Venkataramayya v. Nagamma*, A.I.R. 1932 Mad. 272 (274), 136 I.C. 343 ; *Abinash v. Dasarath*, 56 Cal. 598, 52 C.W.N. 1228 (1232), 14 I.C. 84, A.I.R. 1929 Cal. 123 ; *Mitha Lal v. Gehari Lal*, I.L.R. (1961) 11 Raj 1211 ; *Shanmughavelu Mudaliar v. Seth Hiranand Narasingdas*, (1967) 2 M.L.J. 388. The effect of the decisions is that a document is validly executed if it is attested by one witness only the registering officer being treated as the second witness, and this was what actually happened in these cases. See also *Sarada Prasad v. Triguna*, 1 Pat. 300 (305). This proposition was however first doubted in *S. M. etc., Firm v. R. M. etc., Firm*, A.I.R. 1928 Rang. 101, 5 Rang. 772, 109 I.C. 469 and was subsequently negated in the following cases—*Lachman v. Surendra*, A.I.R. 1932 All. 527 (F.B.), 139 I.C. 1 ; *Harkisan v. Dwarka*, A.I.R. 1936 Bom. 94, 37 Bom. L.R. 913, 161 I.C. 374 ; *Amir Hussain v. Abdul Samad*, A.I.R. 1937 All. 646, I.L.R. 1937 All. 723, 171 I.C. 743 ; *Benarsi Das v. Collector of Saharanpur*, A.I.R. 1936 All. 712, 165 I.C. 498, 1936 A.L.J. 1262 ; *Ma Thein Shin v. Ma Ngwe Nu*, A.I.R. 1939 Rang. 211, 1939 R.L.R. 388, 182 I.C. 924. The grounds of these decisions are that what takes place before the registering officer had nothing to do with attestation. The duty imposed by sec. 34 of the Registration Act is quite different. The registering officer is not bound by sec. 59 of that Act to affix the date and his signature in the presence of the executant of the instrument. Section 47 of the Act assumes that the document which is sought to be registered is a document complete in all essentials before it is presented for registration. Further, neither the registering officer nor the witnesses identifying the executant sign as attesting witnesses. See *Harkisan v. Dwarka*, supra ; *Amir Hussain v.*

Abdul Samad, supra. This latter view seems to be the correct one—*Budepal v. Kanasgeri*, A.I.R. 1948 Bom. 322, 50 Bom. L.R. 260 ; *Sakharam v. Sushilabai*, A.I.R. 1953 Nag. 339 and *Sundrabai v. Ramabai*, A.I.R. 1947 Bom. 396, 49 Bom. L.R. 298 ; *Mayurbhanj State Bank v. Bhobatosh Das*, A.I.R. 1961 Orissa 178. The words “attested by two or more witnesses” show that the attestors must be *witnesses i.e.*, they must sign their names as witnesses to the document. The registering officers or identifiers before him hardly fulfil this condition. Where the identifying witness had not been proved to have seen the executants put their thumbs to the deed, it was held that the signature of the identifying witness did not amount to a valid attestation—*Sundrabai v. Ramabai* supra. Where a deed of gift, unsigned by the executant, is presented for registration and the executant admits the execution, and on the endorsement of the Sub-Registrar that the executant has admitted execution, the executant puts his thumb impression in the presence of two witnesses attesting the signature, the deed is validly executed and attested—*Donapati Rami Reddi v. Kanchan Reddi*, (1968) 1 An. W. R. 359. Signature affixed by Sub-Registrar in course of duty is not attestation—*Shammughvelu Mudaliar v. Niranand Naraindas*, (1967) 2 Mad. L. J. 338 : 80 Mad. L.W. 728. Under sec. 3 it is essential that the witness should have put his signature *animo attestendi*, that is for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of signature. If a person puts his signature on the document for some other purpose e.g., to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness—*Abdul Jabbar Sahib v. Venkata Shastri*, (1969) 1 S.C.C. 573 ; A.I.R. 1969 S.C. 1147 ; 2 (1969) S.C.A. 129.

No doubt the attesting witnesses must sign in that capacity and must attest the execution of the document. But if their signatures appear on the document, and there is clear and conclusive evidence that they actually saw the executant sign the document and they themselves signed in his presence, notwithstanding the fact that they signed the document not against the signature of the mortgagor but against his signature where he has signed the receipt clause, there is sufficient and adequate attestation of the document—*Kaderbhai v. Falmabai*, A.I.R. 1944 Bom. 25, I.L.R. 1944 Bom. 388.

For further cases see Note 352 under sec. 59 *post*.

Attestation of documents executed by Pardanashin ladies:—See Note under section 59.

Attestation by scribe:—See Note 352 under sec. 59. When an identifier sign his name before the registering officer as identifier he cannot be regarded as an attesting witness.—*Dharmdas v. Kashi Nath* (1958) 1 C.L.J. 123. The mortgagee can validly attest the mortgage deed—*Harishchandra v. Bansidhar*, A.I.R. 1965 S.C. 1738.

No form of attestation is necessary:—This definition lays down that no particular form of attestation is necessary. A person may be a witness to the execution of a document and yet may not have written his name at the time by way of saying that he was a witness. Ordinarily a string of signatures towards the end of an instrument or somewhere on the instrument without any explanation will be quite sufficient to show that

the persons put their signatures as witnesses—*Abinash v. Dasarath*, 56 Cal. 598, 32 C.W.N. 1228 (1231), A.I.R. 1929 Cal. 123, 114 I.C. 84.

Estoppel:—Attestation of a deed itself estops a man from denying nothing whatever except that he witnessed the execution of the deed. Of course, there may be cases in which coupled with other evidence of consent and acquiescence in the execution of the document, it would be otherwise—*Raj Lukhee v. Gokool*, 13 M.I.A. 209; *Bhagwan v. Ujagar*, A.I.R. 1928 P.C. 20, 32 C.W.N. 538, 47 C.L.J. 189, 107 I.C. 20; *Mt. Jasodar v. Mt. Sukurmani*, A.I.R. 1937 Pat. 353, 170 I.C. 1005; *Pandurang v. Markandaya*, 49 Cal. 334 (P.C.), 49 I.A. 16; *Sunder Kuer v. Udey Ram*, A.I.R. 1944 All. 42, 1944 A.L.J. 19; *Abbasali v. Mohammad*, A.I.R. 1951 M.B. 92; *Alla Diya v. Sona Devi*, A.I.R. 1942 All. 331, 1942 A.L.J. 443; *Nainsukhdas v. Gowardhandas* A.I.R. 1948 Nag. 110, I.L.R. 1947 Nag. 510. The mere attestation of a document is no proof that the attesting witness is aware of the contents of the document—*M. R. M. Firm v. Ma E Nyo*, A.I.R. 1937 Rang. 293, 172 I.C. 613; *Banga Chandra v. Jagat Kishore*, 44 Cal. 186 (P.C.); *Fazal v. Jiwan*, A.I.R. 1933 Lah. 551, 14 Lah. 369, 141 I.C. 454. Mere attestation is not enough to involve the witnesses with knowledge of the contents of the deed. This is equally true of the witnesses who identify the executant before the Registrar—*Rajammal v. Sabapathi*, A.I.R. 1945 P.C. 82, (1945) 1 M.L.J. 397. See also *Gurmukh v. Sadhu*, A.I.R. 1951 Pepsu. 71. In the absence of evidence that the person attesting knew what the document contained and he was asked to affix his signature to it in token of his acceptance of the transaction, attestation does not amount to consent—*Jasmer Singh v. Ajaib Singh*, A.I.R. 1953 Pepsu. 86. The burden of proving that he had such knowledge and was a consenting party to the transaction lies upon the party who relies upon the document—*Sirajuddin v. Mt. Rahiman*, A.I.R. 1936 Lah. 978, 165 I.C. 997. See also *Corea v. Appuhamy*, (1912) A.C. 230. But where an attesting witness was present at the transaction and attested the deed after having heard the contents, it was held that he was estopped from challenging the right of the transferee—*Bhagwat v. Gorakh*, A.I.R. 1934 Pat. 93.

19. Registered :—A document cannot be said to have been duly registered if the registration has been made in contravention of the provisions of the Registration Act, e.g., if the description of the property given in the document is erroneous or insufficient or misleading for the purposes of identification or if the document has been registered by an officer of another district in which the property is not situate or if the document was presented by a person who had no authority to do so—*Beni Madhab v. Khatir Mondul*, 14 Cal. 449 (450); *Baij Nath v. Sheo Sahay*, 18 Cal. 556 (569) (F.B.); *Joginee Mohan v. Bhootnath*, 29 Cal. 654 (663).

Where a document not duly stamped is admitted for registration, the mistake is an error of procedure and is cured by sec. 87—*Ma Pwa May v. Chettier Firm*, A.I.R. 1929 P.C. 279, 7 Rang. 624, 56 I.A. 379, 34 C.W.N. 6.

20. Attached to the earth :—This expression occurs only in two places in the Act, viz, in sec. 8, para. 2, and in sec. 108, cl. (h).

These words are apparently used to denote what are termed 'fixtures'

in the English law but the principles applied in English law for determining whether a thing is a 'fixture' or not ought not to be applied for the determination of the question whether it is "attached to the earth" under the Indian law.

In England, the law as to fixtures is based on the maxim "*quicquid plantatur solo, solo cedit*" (whatever is planted on the soil belongs to the soil). A gas engine was let out on hire purchase system under an agreement in writing. The engine was affixed to freehold land of the hirer by bolts and screws to prevent it from rocking and was used by him for the purposes of his trade. Default having been made in the payment of the instalment, the engine was claimed by the owner and also by the mortgagee in possession, who took his mortgage after the hiring agreement without notice: Held that the engine passed to the mortgagee as part of the freehold—*Hobson v. Gorringe*, (1897) 1 Ch. 182 (C.A.). See *Reynolds v. Ashby & Son*, (1904) A.C. 466. See also *Vandeville Electric Cinema v. Muriset*, (1923) 2 Ch. 74. Where the plaintiff erected advertisement hoardings which were affixed in a very substantial manner to the land, it was held that the hoardings, although removable by the plaintiffs at the end of the tenancy, were fixtures and not mere chattels—*Provincial Bill Posting Co. v. Low Moore Iron Co.*, (1909) 2 K.B. 344 (C.A.). Looms put up by the lessee of a cotton mill for his convenience during the existence of his term, and fastened to the floor by nails driven through the loom feet into wooden plugs fitted into the floor are, though easily removable without injury to the freehold, fixtures which would pass under an assignment of "the mill, fixed machinery and hereditaments, with all looms and other machinery, fixed or moveable". The primary intention in this case was that these looms should be considered as fixtures during the terms of the lease—*Body v. Shorrock*, L. R. 5 Eq. 72 (79). A fire engine set up for the benefit of a colliery by a tenant for life was, however, considered as part of his personal estate, the reasons for public benefit and convenience having weighed with the Lord Chancellor—*Lawton v. Lawton*, 3 Atk. 13.

The principle upon which the rule of law in England that fixtures pass with the soil was relaxed in favour of trade had no application where the parties who affixed the machinery were themselves owners in fee of the soil—*Mather v. Fraser*, 2 K. & J. 536. See *Fisher v. Dixon*, 12 Cl. & Fin. 312. *Climie v. Wood*, (1869) 4 Exch. 328 is the leading authority on the applicability of the principle to trade fixtures where it was held that trade fixtures which had been annexed to the freehold for the more convenient using of them, and not to improve the inheritance, and which were capable of being removed without any appreciable damage to the freehold, passed under a mortgage of the freehold to the mortgagee. See also *Holland v. Hodgson*, L.R. 7 C.P. 328 in which *Climie v. Wood*, supra, was followed.

With regard to other fixtures also the later decisions show a relaxation. Lord Blackburn laid down the rule in the following words: "When-
ever the chattels have been annexed to the land for the purpose of the better enjoying the land itself, the intention must clearly be presumed to be to annex the property in the chattels to the property in the land, but the nature of the annexation may be such as to show that the intention was

to annex them only temporarily The degree and nature of the annexation is an important element for consideration ; for where a chattel is so annexed that it cannot be removed without great damage to the land, it affords a strong ground for thinking that it was intended to be annexed in perpetuity to the land ; and as Lord Hardwick said in *Lawton v. Lawton* (3 Atk. 15), 'You shall not destroy the principal thing by taking away the accessory to it'. Where valuable tapestries were affixed by a tenant for life to the walls of a house for the purpose of ornament and the better enjoyment of them as chattels and they could be removed without doing any structural injury, it was held by the House of Lords that the tapestries put up with that purpose and attached in that manner, did not pass with the freehold to the remainder man, but formed part of the personal estate of the tenant for life and were removable by her executor—*Leigh v. Taylor*, (1902) A.C. 157. In a recent case the Court of Appeal in England held that in determining whether a particular chattel was a tenant's or a landlord's fixture, the Court had to consider what were the object and purpose of the annexation, and what would happen if the annexed chattel were removed. So long as the chattel could be removed without doing irreparable damage to the demised premises, neither the method of attachment nor the degree of annexation, nor the quantum of damage that would be done either to the chattel itself or the demised premises by the removal, had any bearing on the right of the tenant to remove it, except in so far as it threw a light upon the question of the intention with which the tenant affixed the chattel to the demised premises—*Spyer v. Phillipson*, (1931) 2 Ch. 183 (C.A.).

The maxim which is found in English law, viz., *quicquid plantatur solo, solo cedit* has at the most only a limited application in India. There is nothing in the laws or customs of India to show any traces of the existence of any absolute rule of law that whatever is affixed or built on the soil becomes a part of it and is subjected to the same rights of property as the soil itself—*Narayan v. Jatindra*, A.I.R. 1927 P.C. 135 (137), 54 Cal. 669, 54 I.A. 218, 31 C.W.N. 965, 102 I.C. 198. See also *Mofiz v. Rasik*. 37 Cal. 815 ; *Chaturbhuj v. Bennet*, 29 Bom. 323 ; and *Ghazanfar v. Muzaffar*, A.I.R. 1936 Lah. 511, 164 I.C. 262 ; *Venkatasubbiah v. Thirupurasundari*, A.I.R. 1965 Mad. 185 ; *Jnan Chand v. Jugul Kishore*, A.I.R. 1960 Cal. 331. If a thing is imbedded in the earth or attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached, then it is a part of the immovable property. But if the attachment is merely for the beneficial enjoyment of the chattel itself, then it remains a chattel, even though fixed for the time being so that it may be enjoyed. In deciding whether or not a transaction relating to an engine is a transaction relating to immoveable property regard must be had not merely to the nature of the attachment by which the engine is fixed on the ground, but also to the circumstances in which it came to be fixed, the title of the person fixing it and the object of the transaction by which the engine is transferred or bound—*Subramanian Firm v. Chidambaram*, A.I.R. 1940 Mad. 527, 1940 M.W.N. 38, 190 I.C. 825. Thus where the tenants installed an oil engine as part of a cinema in the premises leased, not with the intention of making a permanent improvement to the premises, but with the object of utilizing the machinery for their own profit so long as they had the use of the premises

and selling it if and when their lease terminated, a security bond pledging the oil engine cannot be deemed to be a transaction relating to immovable property so as to attract the provisions of Explanation to this section—*ibid.* Where the property mortgaged included a rice mill and various parts of machinery pertaining to the engine or to the huller which was intended to be set up with the help of the engine, a sheller system subsequently attached to the huller by a belt and thus worked (the two could be separated by taking away the belt), it was held that the machinery pertaining to the sheller system was not comprised in the mortgage security—*Satyanarayanamurthi v. Gangayya*, (1939) 1 M.L.J. 692, A.I.R. 1939 Mad. 684, 1939 M.W.N. 383. Unless machinery is attached to the building for its permanent beneficial enjoyment, it is not immoveable property, specially where the building is really put up for the purpose of sheltering the machinery and protecting it from the weather—*Meghraj v. Krishna*, A.I.R. 1924 All. 365, 46 All. 286, 78 I.C. 243. Sludge from sedimentation tank is movable property—*Bengal Agricultural and Industrial Corporation Ltd. v. Corporation of Calcutta*, A.I.R. 1960 Cal. 123.

The question whether a particular machinery is imbedded in the earth is a question which depends upon the circumstances of each case—*Comr. of Income-tax v. Bhurangiya Coal Co.*, A.I.R. 1953 Pat. 298. In order to determine what is or what is not immoveable property as a result of attachment or annexation to land, two tests have been laid down, viz., (1) the degree or mode of annexation, and (2) the object of annexation. Of these the latter is the more important—*Subhiah v. Govindrao*, A.I.R. 1953 Nag. 224, 1953 N.L.J. 104. Where a tenant running the factory in the premises of another instal machinery, it will always be presumed that he installs the same with the intention of removing it whenever he chooses to vacate the premises—*Addu Achiar v. Custodian Evacuee Property*, A.I.R. 1953 Hyd. 14; *L. J. U. Mandir v. Kalooram*, A.I.R. 1965 Raj 15. A petter engine mounted and fastened to cement base cannot be viewed as a permanent fixture, that it to say, immoveable property—*Perumal Naicker v. T. Ramaswami Kone*, (1968) 2 M.L.J. 493. In all these cases intention is a very important factor to be taken into consideration, *ibid.*

Where one of two brothers owning certain land in equal shares, builds a house and plants a garden on a portion of it entirely at his own expense, the other brother is not entitled to claim a share in the house and the garden—*Ghazanfar v. Muzaffar*, *supra*. A house built on the soil of another does not become attached to the soil in such a way as to go with the soil. The person who builds the house is entitled to remove the materials of the house, but only so far as he is able to do so without appreciably damaging the soil or making the land less fit than it was before for use as a house site. He is also not entitled to remain indefinitely on the land which is not his—*Maung Ba v. Bailiff*, A.I.R. 1936 Rang. 68, 161 I.C. 659.

A verandah, the lower part of which is supported on posts fixed to the ground, is a thing attached to the earth—*Penry v. Brown*, 2 Stark. 403. A structure so long as it stands on the land is immoveable property—*Ajit Kumar Saha v. Nagendra N. Saha*, A.I.R. 1960 Cal. 484. The definition of immoveable property in the T.P. Act is co-extensive with its definition in the Registration Act—*Inan Chandra v. Jugul Kishore*, A.I.R. 1960 Cal.

331. An exclusive right of fishery, without any interest in land or water is immovable property—*Sarada Charan Parija v. State*, I.L.R. (1957) Cut. 621.

See also Note 78 under sec. 8 and Note 579 under sec. 108 (h).

21. Actionable claim :—*The following are actionable claims :*

(a) Claim for arrears of rent—*Hiralal v. Tripura Charan*, 40 Cal. 650 (651); *Rameshwar v. Riknath*, A.I.R. 1923 Pat. 165, 67 I.C. 451; *Sheo Gobind v. Gouri*, 4 Pat. 43, A.I.R. 1925 Pat. 310; *Madhabilata v. Butto Kristo*, A.I.R. 1944 Pat. 129, 10 B.R. 652; *Daya Debi v. Chapala Debi*, 63 C.W.N. 976; *Kane N.K. v. Biharilal*, 1968 Jab. L.J. 337. Even though the arrears of rent may be said to be a charge on the holding or tenure, still they cannot be said to be a debt secured by a mortgage of immovable property—*Sheo Govind v. Gouri*, (supra). But the Nagpur High Court has held that the right to recover arrears of profits assigned in a conveyance of a village share to a co-sharer is not an actionable claim, but a benefit arising out of land and therefore immovable property—*Kamal v. Shyam Lal*, A.I.R. 1936 Nag. 217 (218), 165 I.C. 414.

(b) A claim for rent to fall due in future is an actionable claim, for it is an 'accruing' debt within the meaning of the definition—*Poothakka v. Annamalai*, 1926 M.W.N. 774, A.I.R. 1926 Mad. 1173, 98 I.C. 263; *Chidambaram v. Doraisami*, 31 I.C. 473 (Mad.).

(c) The benefit of an executory contract for the purchase of goods is a 'beneficial interest in moveable property' and is therefore an actionable claim within the meaning of this section—*Jaffer Meher Ali v. Budge-Budge Jute Mills*, 34 Cal. 289 (on appeal from 33 Cal. 702); *Chiman Mal v. Ganesh*, A.I.R. 1952 Raj. 187.

(d) A right to get by division a piece of land reserved by a donor for his own use in his deed of gift (but possession of which was with the donee) is an actionable claim—*Rudra Perkash v. Krishna Mohun*, 14 Cal. 241 (245).

(e) A share in a partnership—*In re Bainbridge*, 8 Ch. D. 218.

(f) The right to recover the arrears of an annuity though it be charged upon immovable property, is not secured by a mortgage; so the claim amounts to an actionable claim—*Satindra v. Jatindra*, A.I.R. 1935 P.C. 165, 39 C.W.N. 1191, 61 I.A. 265, 157 I.C. 419.

Where a deed of *wakf* provided certain sums to be given annually as stipends to certain relatives of the *wakif* and after them to their *aulad* (descendants), it was held that the annuities were actionable claims—*Mt. Alimunnessa v. Abdul Aziz*, A.I.R. 1936 Pat. 527, 165 I.C. 298.

(g) A right to receive money for license given to another to remove bark from the licensor's trees is transferable—*Ramaswami v. Abdul*, A.I.R. 1926 Mad. 978, 97 I.C. 548.

(h) Where there is a completed contract its benefit can be assigned—*Sakalaguna v. Chinna*, A.I.R. 1928 P.C. 174, 32 C.W.N. 850, 55 I.A. 243, 51 Mad. 533. The benefit of a contract for sale and purchase of immovable property can also be assigned—*Bhabhootmal v. Moolchand*, A.I.R. 1943 Nag. 266, I.L.R. 1943 Nag. 643.

(i) A claim for a definite sum of money which the lessee is bound

23. Constructive notice :—Constructive or implied notice may be defined to be "knowledge which the Court imputes to a person, from the circumstances of the case, upon a legal presumption, so strong that it cannot be allowed to be rebutted, that the knowledge must exist though it may not have been formally communicated"—*Hewitt v. Loosemore*, 9 Hare 449. "It may be considered to consist in those circumstances under which the Court concludes that notice must be imputed on grounds of public policy to an innocent person, or that the party has been guilty of such negligence in not availing himself of the means of acquiring it, as, if permitted, might be a cloak to fraud and which, therefore, the common interests of society require, should in its consequences, be equivalent to actual notice."—*Dart's Vendors and Purchasers* (6th Edn.), p. 971.

"We think" observed Westropp, C.J., "that the doctrine of constructive notice is only to be resorted to where the parties are on a level in equity, and that it is a doctrine not to be extended, and we decline to presume notice in favour of a person who contributed to make the transaction secret—*Hormasji v. Mankuvarbai*, 12 Bom. H.C.R. 262 (266).

If there is no actual notice and no wilful or fraudulent turning away from an inquiry into and consequent knowledge of facts which the circumstances would suggest to a prudent mind, then the doctrine of constructive notice ought not to be applied—*Doorga v. Baney Madhub*, 7 Cal. 199 (201).

The cases of *Daniels v. Davison*, 16 Ves. 249, and *Barnhart v. Green-shields*, (1855) 9 Moo. P.C. 18, as well as other cases are freely quoted and applied by Indian Courts, and the result is that the doctrine of constructive notice is carried to great lengths. When the Indian Courts apply the principle that a man has notice because if he had made reasonable inquiries he would have ascertained the facts and if he has not ascertained the facts he has been guilty of gross negligence—the Courts must carefully regard all the circumstances of the case and of the people to whom the Courts are going to apply the principle—*Kalyani v. Krishnan*, 55 Mad. 519, 138 I.C. 78, A.I.R. 1932 Mad. 305 (309).

Intending purchasers of property in municipal areas, where the property is subject to a municipal charge which has been made a first charge on the property by statute, have a constructive knowledge of the tax and the possibility of some arrear being due. If they fail to make inquiries as to the amount of tax which is due, this failure amounts to a wilful abstention or gross negligence within the meaning of this section and notice must be imputed to them—*Lala Nawal Kishore v. Municipal Board, Agra*, A.I.R. 1943 All. 115 (F.B.), I.L.R. 1943 All. 453 overruling *Municipal Board v. Roop Chand*, A.I.R. 1940 All. 456, I.L.R. 1940 All. 669; See also *Chanduram v. Municipal Comrs.*, A.I.R. 1951 Cal. 398.

Where A purchases property from C on the latter's representation that the property has not been transferred to anybody in any manner, though in fact it had been transferred in favour of D under a prior registered sale deed, this section imputes constructive notice of the prior registered sale deed and its contents to A—*Ganeshdas v. Kamalabai*, A.I.R. 1952 Nag. 29. But an agreement for a mortgage does not give rise to a charge over the property and is not compulsorily registrable; therefore though in fact registered, it cannot be used as constructive notice of the

transaction—*Hirachand v. Kashinath*, A.I.R. 1942 Bom. 339, 44 Bom. L.R. 727.

Where a bank pass-book showed that a certain rate of interest was being charged by the bank for the customer's overdraft it was held by M. N. Mukherjee, J., that means of knowledge was equivalent to knowledge or reasonable grounds of belief so as to fix the customer with adoption or ratification of the rate of interest—*Batakrisna v. Bhowanipur Banking Corpn.*, 59 Cal. 662 at p. 666.

A transfer by an executor as such is valid unless it is established that the transferee had notice that the executor was acting in breach of trust. Mere failure to scrutinize the will does not amount to constructive notice that the money was not required for the purposes of administration—*Geetarani v. Narendra Krishna*, 60 Cal. 394.

The principle of constructive notice should be applied to arrears of taxes, which form a charge under the Municipalities Act, on the property sold at an auction sale. The purchaser is not entitled to presume that the taxes have been paid—*Municipal Board, Lucknow v. Ramji Lal*, A.I.R. 1941 Oudh 305, 1941 O.W.N. 122, 1941 O.L.R. 263, 163 I.C. 290; see also *Akshoy Kumar v. Corporation of Calcutta*, 42 Cal. 625, 19 C.W.N. 37.

Where the register of the Registrar did contain a reference to a particular agreement which created a charge on a certain land, but the agent of the mortgagee omitted to look at the entries, the mortgagee would be deemed to have constructive notice of the charge—*Renukabai v. Bhedsan Hapsaji*, A.I.R. 1939 Nag. 132, 1939 N.L.J. 129, 185 I.C. 33 relying on *Mohori Bibi v. Dharmadas Ghose*, 30 Cal. 539 (545) (P.C.), 30 I.A. 114. But see *Kausalai v. Sankaramuthu*, (1941) 1 M.L.J. 815, A.I.R. 1941 Mad. 707, 1941 M.W.N. 621 where it has been held that an omission to make inquiries is not sufficient to constitute constructive notice within the meaning of sec. 3 (relying on *Joshua v. Alliance Bank of Simla*, 22 Cal. 185). Where a decree for pre-emption refers to an agreement to resell executed by the vendee, a transferee from the pre-emptor has constructive notice of the agreement to resell—*Ganga Singh v. Santosh Kumar*, A.I.R. 1963 All. 194.

24. Wilful abstention :—The words "wilful abstention from inquiry and search" must be taken to mean such abstention from inquiry or search as would show want of *bona fides*—*Joshua v. Alliance Bank of Simla*, 22 Cal. 185. The word "wilful" in this section makes it clear that the abstention from inquiry should be designed and due to a desire to avoid an inquiry which would lead to ultimate knowledge—*Kausali v. Sankaramuthu*, (1941) 1 M.L.J. 815, A.I.R. 1941 Mad. 707, 1941 M.W.N. 621. Cases in which constructive notice has been established resolve themselves into two classes : *first*, cases in which the party charged has had actual notice that the property in dispute was in fact charged, encumbered or in some way affected, and the Court has thereupon bound him with constructive notice of facts and instruments to a knowledge of which he would have been led by an inquiry after the charge, incumbrance or other circumstances affecting the property, of which he had actual notice; and *secondly*, cases in which the Court has been satisfied from the evidence before it that the party charged had designedly

An amount found due on adjustment of accounts of transactions for sale of yarns is a debt and as such is an actionable claim—*Nagappa v. Badridas*, A.I.R. 1930 Bom. 409, 32 Bom. L.R. 894, 127 I.C. 410.

Unascertained amounts neither due nor payable but accruing, the payment of which is dependent on work being executed, can be assigned—*Jat Mal v. Hakam Mal*, A.I.R. 1930 Lah. 820, 128 I.C. 494. But a liability to arise in the future on the part of an unknown person, out of a relationship, contractual or otherwise, which does not yet exist, cannot be described as a debt, still less can it be described as an "existing" debt. Neither can it be "accruing" or "conditional," and it cannot be "contingent." A contingency is something that may happen in future which affects a present relationship. For instance, a contingent interest, such as a contingent life interest presupposes an existing interest which may or may not develop into interest in possession. The interest is there all the time. It is even saleable as such. When the definition of an "actionable claim" refers to an "existing" debt, it intends thereby to exclude a debt which does not yet exist at all—*In re Stephens*, A.I.R. 1938 Rang. 1, 175 I.C. 786.

The amount due under a policy is a debt within the meaning of the definition—*Varjivandas v. Magunlal*, A.I.R. 1937 Bom. 382, 39 Bom. L.R. 493, 170 I.C. 850. It is within the competence of a policy-holder to make a conditional assignment of each of the policies taken out by him whether such policy is an ordinary life policy or an endowment policy providing therein that in the event of the death of the assignee the benefits to the policy would revert to him and the assignee alone is entitled to receive the sum assured in case of the death of the insured before the day named—*Shamdas v. Sabitribai*, A.I.R. 1937 Sind 181, 170 I.C. 225.

An assignment of a debt must be of the whole debt and not of a part of the debt—*Ghisulal v. Gumbhirmall*, 62 Cal. 510, 39 C.W.N. 606, 141 I.C. 11.

A debt which otherwise amounts to an actionable claim does not cease to be so merely because a cause of action in respect thereof has not arisen or because the time of its payment has not arrived. A claim to unpaid dower debt is an actionable claim—*Amir Hasan v. Muhammad Nazir*, 54 All. 499, 136 I.C. 833, A.I.R. 1932 All. 345 (347).

An uncertain sum cannot be included in the word 'debt'. Thus an uncertain right in an unascertained property cannot be the subject of assignment—*Bebie Tokai v. Davod Mullick*, 6 M.I.A. 510.

Where under a sale-deed the vendee is directed to pay part of the consideration to the vendor's creditor, it is a debt and is an actionable claim which can be transferred under sec. 130—*Agrenath v. Ram Ratan*, A.I.R. 1938 All. 544, (1938) A.L.J. 851.

The assets of a partner, as yet unascertained, in a partnership business, which are in the hands of a receiver, cannot be assigned, since until the dissolution of partnership and the ascertainment of the share in the assets of the partners, such share cannot be treated as a debt—*Abott v. Abott*, 5 B.L.R. 382.

22. Notice :—*Application in the Punjab*:—This Act is not in force in the Punjab ; consequently the technical rule as to notice is not strictly

applicable in that Province. The question whether registration is or is not notice would depend upon the facts of each case—*D. A. V. College v. Umrao Singh*, A.I.R. 1935 Lah. 410, 157 I.C. 92; *Mt. Ghulam Fatima v. Mt. Gopal Devi*, A.I.R. 1940 Lah. 269, 190 I.C. 599.

The Transfer of Property Act contemplates three kinds of notice, namely: (1) actual notice; (2) constructive or implied notice (*i.e.*, when but for wilful abstention from inquiry or search or for gross negligence he would have known); and (3) notice to agent.

Essentials of notice:—An actual notice, to constitute a binding notice, must be *definite* information given by a person *interested* in the thing in respect of which the notice is issued; for it is a settled rule that a person is not bound to attend to vague rumours or statements by mere strangers, and that a notice to be binding must proceed from some person interested in the thing—*Barnhart v. Greenshields*, 9 Moo. P.C. 18; *Ashiq v. Chaturbhuj*, A.I.R. 1928 All. 159, 50 All. 328, 26 A.L.J. 41, 108 I.C. 152. A mere casual conversation in which knowledge of a certain thing is imparted, is not notice of it. In other words, the party imputing notice must show that the other party had knowledge which would operate upon the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired—*per* Lord Cairns, L.C., in *Lloyd v. Banks*, L.R. 3 Ch. 488. A vague or general report or the mere existence of suspicious circumstances is not in itself notice of the matter to which it relates—*Weymouth v. Bayer*, 1 Ves. J. 425.

A *general* claim is not sufficient to affect a purchaser with notice of a deed of which he does not appear to have had knowledge—*Jolland v. Stainbridge*, 3 Ves. 478. Where a creditor obtained two decrees against his debtor, one being a charge decree to enforce his lien on certain property, and the other a simple money decree, and in execution of the second decree the property subject to lien was purchased by a third party at a court sale, and thereafter the creditor brought another suit to enforce his lien on the property in the hands of the auction-purchaser the suit was dismissed as the plaintiff (creditor) failed to show that the auction-purchaser purchased with notice of the lien. It was held that the fact that for some purpose at sometime or other the judgment-creditor informed the Court of the lien was not evidence of notice on the auction-purchaser—*Nursing v. Roghoobur*, 10 Cal. 609. But if a person *knows* that another has or claims an interest in property with which he is dealing, he is bound to enquire what that interest is, and if he omits to do so, he will be bound, although the notice was inaccurate as to the particulars of the extent of such interest—*Gobinda Chunder v. Doorga*, 22 W.R. 248.

The notice must be given in the same transaction. A person is not bound by notice given in a previous transaction which he may have forgotten—*Warrick v. Warrick*, 3 Atk. 294. Notice to a purchaser by his title papers in one transaction will not be notice to him in an independent subsequent transaction in which the instruments containing the recitals are not necessary to his title; but he is charged constructively with notice merely of that which affects the purchase of the property in the chain of title of which the paper forms the necessary link—*Bepin v. Priyabrata*, 26 C.W.N. 36 (46), 34 C.L.J. 256, A.I.R. 1921 Cal. 730, 66 I.C. 345.

by his contract with the lessor to repay him—*Manmatha v. Hedait Ali*, A.I.R. 1932 P.C. 32, 36 C.W.N. 280, 11 Pat. 266, 59 I.A. 41, 135 I.C. 635.

(j) Usufructuary mortgagee's liability to pay to the mortgagor the balance left after paying the mortgagor's creditors—*Tikam Singh v. Bhola Nath*, A.I.R. 1937 All. 470 (471, 472), I.L.R. (1937) All. 666, 170 I.C. 975.

(k) A document of *pahunch* evidencing acknowledgment of a debt—*Jhangaldas v. Chetumal*, A.I.R. 1938 Sind 24 (26, 27), 173 I.C. 591.

(l) Both ordinary and endowment life policies—*Shamdas v. Sabitribai*, A.I.R. 1937 Sind 81, 170 I.C. 225.

(m) The claim for a money decree on account of unrealised bills is an actionable claim—*Purna Chandra v. Barna Kumari*, I.L.R. (1939) 2 Cal. 341, 43 C.W.N. 953, A.I.R. 1939 Cal. 715; *Ambica v. Ram Chariter*, A.I.R. 1951 Pat. 415.

(n) The right to the proceeds of a business—*Alkash Ali v. Nath Bank, Ltd.*, A.I.R. 1951 Ass. 56, I.L.R. (1951) 3 Ass. 1.

(o) Provident fund amount payable after retirement and not presently—*Official Trustee v. Chippendale*, A.I.R. 1944 Cal. 335, I.L.R. (1943) 2 Cal. 325, 47 C.W.N. 441.

(p) The benefit arising out of a contract, not involving any personal element, is an actionable claim during its subsistence—*Jaffer Meher Ali v. Budge Budge Jute Mills*, (1906) 33 Cal. 702. The rights under a contract of carriage are an actionable claim—*Shah Mulji Deoji v. Union of India*, A.I.R. 1957 Nag. 31. A benefit under a letter of credit is an actionable claim—*Joseph Pyke & Son Ltd. v. Kedarnath*, A.I.R. 1959 Cal. 328. A railway receipt is an actionable claim—*Alliance Assurance Co. v. Union of India*, A.I.R. 1959 Cal. 563.

What are not actionable claims :—

(a) A decree is not an actionable claim. A debt is an actionable claim, but a debt which has already passed into a decree is not so—*Afjal v. Ram Kumar*, 12 Cal. 610; *Dagadu v. Vanji*, 24 Bom. 502. *Govindarajulu v. Ranga Rao*, 40 M.L.J. 124, 62 I.C. 255; see also *Jugal Kishore Saraf v. Raw Cotton Co. Ltd.*, A.I.R. 1955 S.C. 376. In *Annamalai v. Muthukaruppan*, 8 Rang. 645, 35 C.W.N. 145, A.I.R. 1931 P.C. 9, certain sums of money were advanced by S.K.T. firm to Vijayan Servai and after his death in 1904 to his administrator upto 1906. One-fourth of the advances was provided by R.M.A.T. firm. In 1906 in heirs of Vijayan filed suit for administration impleading S.K.T. as one of the defendants. In May 1907 a decree was passed in favour of S.K.T. The decree was set aside on appeal in August, 1909. In March 1908, R.M.A.T. transferred $\frac{1}{4}$ share in the decree then under appeal to A.M.K. firm. Held: the instrument transferred to A.M.K. not the decree under appeal, but an actionable claim, namely all the interest of R.M.A.T. in any monies to be recovered by S.K.T. in the administration suit.

(b) The right to sue for accounts and to recover money which might be found due on taking accounts from an agent is not an actionable claim because it is not a right to recover a *specific* sum of money but an *indefinite* amount which may or may not be found due on the taking of accounts; such a right is a mere right to sue (sec. 6) and is incapable

of transfer—*Kshetra Mohan v. Biswa Nath*, 51 Cal. 972 (977), A.I.R. 1924 Cal. 1047, 82 I.C. 411.

(c) The right of a person to recover damages by way of interest or otherwise for the breach of a contract is merely a right to sue and is not an actionable claim which is capable of transfer—*Indar v. Raghubir*, A.I.R. 1930 Oudh 88, 5 Luck. 547, 125 I.C. 174; *Abu Mohomed v. S. C. Chunder*, 36 Cal. 345; *Hirachand v. Nemchand*, 47 Bom. 719 (720); *Nakhola v. Kokaya*, 69 I.C. 238 (Nag.); *Moti Lal v. Radhey Lal*, 1933 A.L.J. 1009, A.I.R. 1933 All. 642 (646).

(d) A claim to mesne profits is not an actionable claim but a mere right to sue (sec. 6), and therefore cannot be transferred—*Jai Narain v. Kishun Dutta*, 3 Pat. 575 (580), A.I.R. 1924 Pat. 551, 78 I.C. 705.

(e) A right to recover profits from a co-sharer is not an actionable claim—*Lallu Singh v. Chunder Sen*, A.I.R. 1934 All. 155 (F.B.), 147 I.C. 937.

(ee) Transfer of immovable property to which an ex-minor has lost his title by not challenging an alienation by his guardian during his minority, within 3 years after attaining majority, is not the transfer of an actionable claim—*Natha v. Thakur*, A.I.R. 1939 Oudh 122, 1939 O.W.N. 241, 180 I.C. 329.

(f) Relinquishment of the interest of a retiring member of a joint Hindu family business in favour of the continuing coparcener—*Brij Mohan v. Mahabir*, 40 C.W.N. 808.

(ff) A copy right.—*Savitri v. Dwarka*, I.L.R. 1939 All. 275, 1939 A.L.J. 71, A.I.R. 1939 All. 305.

(g) Debts secured by mortgage of immoveable property or hypothecation of moveable property. See the words of the section. Before the T. P. Amendment Act II of 1900, these debts were included in actionable claim. See Note 17A, *ante*, and *Rani v. Ajudhia*, 16 All. 315 (317). The Amendment Act of 1900 has changed the law.

But although under this definition, a secured debt does not fall within the meaning of actionable claim, it does not follow that a debt without the security cannot be made the subject of transfer at all. A debt is distinct from the security, and the debt can be transferred apart from the security—*Imperial Bank of India v. Bengal National Bank*, 59 Cal. 377 (P.C.), 35 C.W.N. 1034 (1039), A.I.R. 1931 P.C. 245, 134 I.C. 651.

Where the mortgagor completes his part of the contract by executing the mortgage and by putting the mortgagee in possession, but the mortgagee fails to discharge the consideration, the mortgagor has a transferable claim and his assignee is entitled to sue the mortgagee for the amount—*Sardar Khan v. Ram Mal*, A.I.R. 1936 Lah. 196, 162 I.C. 698.

Debt:—The term 'debt' includes a sum of money due by one person to another, and which is actually payable at the time, as well as a sum of money which is due though not actually payable then. It must be a perfected and absolute debt, and not merely a sum of money which *may* or *may not become* payable at some future time, or the payment of which depends upon contingencies which may or may not happen—*Haridas v. Baroda Kishore*, 27 Cal. 38; *Palikandy v. Krishnan Nair*, 40 Mad. 302 (303); *Varjivandas v. Maganlal*, A.I.R. 1937 Bom. 382, 170 I.C. 850.

abstained from inquiry for the very purpose of avoiding notice—*Jones v. Smith*, 1 Hare 43 (*per* Wigram V.C.); *Manji Karimbhai v. Hoorbai*, 35 Bom. 342 (348); *Puthenpurayil v. Kandiyal*, 34 I.C. 906 (908); *Macneil & Co. v. Saroda Sundari*, 33 C.W.N. 526, 48 C.L.J. 374, A.I.R. 1929 Cal. 83, 114 I.C. 142.

A purchaser who wilfully departs from the above principle in order to avoid acquiring knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted his business in the ordinary way. That is what is meant by "reasonable care"—*Manj v. Hoorbai*, *supra*, at p. 41; see also *Agra Bank v. Barry*, L.R. 7 H.L. 135 (157); *Rajo Kuer v. Brij Bihari Prasad*, A.I.R. 1962 Pat. 236. But it would be stretching the doctrine of constructive notice too far to say that in every case in which a person wants to bid for property liable to municipal taxes he ought to make inquiries before making the bid, whether any municipal tax is outstanding against the property or to hold that he was grossly negligence if he did not make such enquiry—*Ramji v. Municipal Board*, A.I.R. 1937 Oudh 31, 12 Luck. 353, 164 I.C. 1034.

Where one partner has permitted another partner to deal with partnership property as an ostensible owner and such property is mortgaged by the latter to a bank, knowledge on the part of a member of the investigating committee of the bank in his personal capacity that the property belongs to the partnership is not itself sufficient to justify an inference as to knowledge on the part of the bank—*Punjab & Sind Bank v. Rustomji*, A.I.R. 1935 Lah. 821.

A person refusing a registered letter sent by post must be deemed to have constructive notice of it, and he cannot afterwards plead ignorance of its contents, because he had wilfully abstained from receiving it and acquainting himself with its contents—*Lootf Ali v. Peary Mohun*, 16 W.R. 223; *Jogendra v. Dwarka*, 15 Cal. 681; *Ismail v. Kali Krishna*, 6 C.W.N. 134; *Edulji v. Collector*, 1 M.I.A. 295; *Nirmala Bala v. Provat* 52 C.W.N. 659; *Sushil v. Ganesh*, 62 C.W.N. 193.

If a mortgagee causing a search to be made refrains from making himself sure that the property mortgaged is free from incumbrance, his conduct amounts to wilful abstention—*Ranukabai v. Bheosan Hapsaji*, A.I.R. 1939 Nag. 132.

Wilful abstention from inquiry should, however, be distinguished from mere want of caution in not making the inquiry, especially where the party who would have made the inquiry is misinformed as to the true state of facts, and the circumstances are not sufficient of themselves to arouse suspicion—*Damodara v. Somasundara*, 12 Mad. 429 (435); *Shan Maun Mull v. Madras Building Co.*, 15 Mad. 268 (279). If mere want of caution, as distinguished from wilful blindness, is all that can be imputed to the purchaser, then the doctrine of constructive notice will not apply—*Chettyar Firm v. Kalliamma*, A.I.R. 1935 Rang. 423 (425-26), 161 I.C. 221.

A prudent purchaser should not rest content with merely seeing a mutation entry. He ought to ascertain what are the entries in the Record-of-Rights, and whether the vendor has got full proprietary right

or mortgage-right. If he fails to do so, constructive notice will be imputed to him—*Harilal v. Mulchand*, 52 Bom. 883, 30 Bom.L.R. 1149, A.I.R. 1928 Bom. 427 (429), 113 I.C. 27. If A before purchasing the property of B which is tenanted comes to know that the tenants pay rent to X but does not care to enquire about the title of X, he is guilty of wilful abstention—*Hunt v. Luck*, [1901] 1 Ch. 429. Similarly, if the mortgagee does not search the register, he must be deemed to have wilfully abstained from making the search, or he has been guilty of gross negligence in not making it—*Churaman v. Balli*, 9 All. 591 (599). If the lease provides for interest at a high rate the purchaser of the lessee's interest shall be taken to have had full knowledge of the terms of the lease—*Hamiduddin v. Ramani Kanta*, 56 C.L.J. 590, A.I.R. 1933 Cal. 321 (322). A lessee has constructive notice of the lessor's title and his conduct in not enquiring into the matter amounts to wilful abstention—*Patman v. Harland*, L.R. 17 Ch. D. 253.

Where a certain property was at first mortgaged by deposit of title-deeds, and then a subsequent transferee (mortgagee or purchaser) took a transfer of the same property without inquiring whether the title-deeds were already pledged, *held* that the subsequent transferee was fixed with notice—*Imperial Bank of India v. U. Rai Gyaw Thu & Co., Ltd.*, 51 Cal. 86 (130) (P.C.), 1 Rang. 637, A.I.R. 1923 P.C. 211, 28 C.W.N. 470, 76 I.C. 910; *Kshetra Nath v. Harsukhdas*, 31 C.W.N. 703, A.I.R. 1927 Cal. 538 (543), 102 I.C. 871.

But the fact that a person is in occupation of a *small part* of a house does not put the purchaser on constructive notice of that person's rights as to the whole house, and the failure of the purchaser to inquire from everybody in the house as to what his title may be in the house, does not amount to wilful abstention or gross negligence. *Parthasarathy v. Subbaraya*, 45 M.L.J. 175, A.I.R. 1924 Mad. 67 (69), 72 I.C. 559. If further inquiry into title in respect of a small part of the estate would have revealed a defect in title as to the whole estate, the purchaser is not held to have constructive notice of that defect—*Hunter v. Walters*, (1871) 7 Ch. 75, 25 L.T. 765.

A person cannot be fixed with constructive notice where the circumstances are such that he is not bound to make any inquiry. Thus, where there is an endorsement at the foot of a sale deed that the price has been received in full in addition to a statement to that effect in the body, a person taking a mortgage of that property is not bound to enquire whether the price has been paid in full and hence the vendor's lien cannot be enforced against him—*Tehitram v. Kashibai*, 33 Bom. 53 (68, 69), 10 Bom.L.R. 403, 1 I.C. 614.

25. Negligence :—Negligence may be stated to be the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do—*Blyth v. Birmingham Water Works Co.*, 11 Ex. 784. It means the absence of such care, skill and diligence, as it is the duty of the person to bring to the performance of the work which he is said not to have performed—*per* Willes, J., in *Grill v. General Iron Screw Collier Co.*, 35 L.J.C.P. 330.

of that possession to all who may have to deal with any interest in the property, and persons so dealing cannot be heard to deny notice of the title under which the possession is held—*Barnhart v. Greenshields*, 9 Moo. P.C. 18; *Holmes v. Powell*, 8 DeG.M. & G. 572. Constructive notice of all the rights of the person in possession of a property sold or mortgaged is to be imputed to the purchaser or mortgagee of that property who made no enquiry of the person in occupation. But the unknown occupation of a *portion* of the premises by a tenant or other person does not put the purchaser or mortgagee on inquiry as to the possible right of the occupier over the *remainder* of the premises—*Parthasarathy v. Subbarayya*, 45 M.L.J. 175, 72 I.C. 559, A.I.R. 1924 Mad. 67 (69). The possession by a person, who entered into an agreement for the purchase of the land, of a *portion* of the land, does not amount to constructive notice of the agreement to subsequent purchasers in respect of the entire property—*Hari Charan v. Kaula*, 2 P.L.J. 513, 40 I.C. 142.

Where a prior usufructuary mortgagee was in possession under an unregistered instrument, which was not compulsorily registrable, a subsequent mortgagee under a registered instrument must be presumed to have had notice of such possession, and could not claim priority over the holder of the unregistered instrument—*Bhiki Rai v. Udit Narain*, 25 All. 366 (370); *Krishnamma v. Suranna*, 16 Mad. 148 (170).

“There is no authority for the proposition that notice of a tenancy is notice of the title of the lessor, or that a purchaser neglecting to inquire into the title of the occupier is affected by any other equities than those which such occupier may insist on”—*Barnhart v. Greenshields*, 9 Moo. P.C. 18; *Gunamoni v. Bussunt Kumari*, 16 Cal. 414. If the mortgagor under a usufructuary mortgage remain in possession as the tenant of the mortgagee and agrees to sell the mortgaged land to the mortgagee but in breach of the agreement sells to a third party it cannot be said that the purchaser had constructive notice of the agreement to sell to the mortgagee—*Radha Rai v. Ram Rekha Rai*, A.I.R. 1964 Pat 144. Where a monthly tenant is in possession a subsequent purchaser cannot be charged with the notice of contract of sale in favour of the monthly tenant—*Muralidhar Marwari v. Lalit Mahan Sahu*, A.I.R. 1962 Orissa 86; *Shiv Dayal v. Smt. Sumitra Devi*, 1960 Raj. L.R.W. 103.

In benami purchases, possession or receipt of rent is an important criterion in determining the question whether the purchase was benami or not. When the real owner has all along remained in possession and enjoyment of the property, that circumstance is constructive notice of the benami nature of the transaction—*Ram Sarup v. Maya Shankar*, 46 P.R. 1918, 43 I.C. 556.

In a case arising in a State where the Transfer of Property (Amendment) Supplementary Act, 1929 does not apply, a subsequent purchaser for consideration of immovable property deriving his title under a registered sale-deed has priority over a purchaser who is in possession of the same property under an unregistered sale-deed which is compulsorily registrable. The possession of the prior purchaser being that of a trespasser, the question of notice by possession does not arise—*Chanan Singh v. Sham Lal*, A.I.R. 1950 Pepsu. 34.

Constructive possession is not notice:—Possession, in order to be equivalent to notice, must be *actual* and not merely *constructive*. In two cases governed by the Registration Act of 1877 it was held by the Bombay High Court that constructive possession by a person purchasing by an unregistered instrument through the seller continuing in possession as his tenant did not operate as notice of his prior title to a subsequent purchaser by a registered deed—*Chunilal v. Ramchandra* 22 Bom. 213 (216); *Moreswar v. Dattu*, 12 Bom. 569. Where a purchaser pays only a part of the consideration money after purchasing a property in the possession of tenants and the property is put up to sale in execution of a decree against the purchaser without any mention of the charge in the sale proclamation, the notice of the charge cannot be imputed to the auction-purchaser—*Manna Singh v. Wasli Ram*, A.I.R. 1960 Punj. 296.

Occupation of property which has not come to the knowledge of the party charged is not constructive notice of any interest in the property—*Manji v. Hoorbai*, 35 Bom. 342.

30. Notice of a deed is notice of the contents:—Actual notice of a deed is also a constructive notice of all the material facts affecting the property, which appear on the face of the deed or could be reasonably inferred from its contents—*Talner v. Flouner*, 1 Ch. C. 269; *Moore v. Bennett*, 2 Ch. C. 246. Every person who acquires a lease-hold interest is bound to investigate the title of his lessor and is affected with constructive notice of any covenant contained in any document forming part of the chain of title of his lessor—*Lodna Colliery Co. v. Bipin*, 1 P.L.T. 84, 55 I.C. 113.

Moreover, actual notice of an instrument affecting one's title is constructive notice of all documents which are recited in the instrument and which an examination of the instrument would have brought to his knowledge, provided the documents relate to the title and *form part of the chain of title*—*Patnam v. Harland*, 17 Ch. D. 353. Thus where a vendee, in spite of his attention being drawn by the recitals in the sale deed to a deed of partition as the foundation of the vendor's title, omits to ascertain the contents of the partition deed he shall be deemed to have constructive notice of the covenant for pre-emption contained in the deed of partition—*Raja Ram v. Krishnasami*, 16 Mad. 301.

Where a property subject to a maintenance charge was sold and the purchaser, even though knowing that there were several maintenance allowances, did not make enquiries whether any other allowance was made a charge on the property, and omitted to inspect title deeds: *held* that the purchaser must be deemed to have constructive notice of the charge—*Md Yunus v. Special Manager, Court of Wards*, A.I.R. 1937 Oudh 301, 167 I.C. 962.

30A. Attestation does not amount to notice:—The above rule applies only to the parties to an instrument, and not to the attesting witnesses. A witness subscribing to a deed does not know the contents of the deed, for a witness in practice is not privy to the contents of the deed—*Hipkins v. Amery*, 2 Gif. 212; *Beckett v. Cordley*, 1 Ves. J. 55. Therefore, attestation of a document does not by itself import consent to or knowledge of the contents of the document, nor fix him with notice of

in consonance with the view expressed by some of the other High Courts :
Vide, Note 1A, ante.

Cases after amendment:—Registration of a mortgage deed is notice of the deed in view of Expl. II to the definition of "a person is said to have notice" in this section—*Sadiq Hussein v. Co-operative Central Bank*, A.I.R. 1952 Nag. 106. The inspection of the Registration Index for 12 years prior to the date of inquiry is not sufficient, as a rule, to discharge the burden in case of mortgages, though it may be so in case of sale transactions in some cases, *ibid.* Where the previous mortgage was a registered one, the fact that at the time of the subsequent mortgage the mortgagor conceals the existence of such previous mortgage does not help the subsequent mortgagee to avoid the former mortgage—*Jawahir Singh v. Municipal Committee*, A.I.R. 1937 Pesh. 74, 170 I.C. 63.

An omission of the particulars pertaining to a registered document from the index kept in the registration office does not invalidate the registration, but is only a matter for the purpose of notice—*Sita Ram v. Raj Narain*, A.I.R. 1934 Oudh 283, 150 I.C. 145.

Explanation 1. Object:—The object of Explanation I is to protect the interests of persons who have acquired good title under a previous registered document. The Explanation however does not alter or modify the criminal liability of a party who deliberately suppressed material facts—*Kuldip v. State*, A.I.R. 1954 Punj. 31.

27. Registration, how far notice:—If a conveyance is registered, it would amount to implied notice to the person subsequently acquiring any interest in the property comprised in the sale deed—*Ramchandra v. Kondoo Jonga*, A.I.R. 1940 Nag. 7, 1939 N.L.J. 496, 184 I.C. 797 ; *Sk. Moula Buksh v. Dharamchand Raniwala*, 65 C.W.N. 881, but it would be pushing the doctrine of constructive notice too far to hold that it would be notice also of the unregistered documents under which the holders of the registered document derived their title—*Chunilal v. Ramchandra*, 22 Bom. 213 (216) ; *Sharfuddin v. Govind*, 27 Bom. 452 (467).

Registration is notice for some purposes, but it cannot be treated as notice for the purpose of vitiating payments made by a mortgagor to his mortgagee without actual notice of the sub-mortgage—*Sahadev v. Shekh Papa Miya*, 29 Bom. 199 (202), following *William v. Sorrell*, (1799) 4 Ves. 389 ; *Prabhu v. Chatter*, A.I.R. 1925 All. 557, 88 I.C. 398. The creation and registration of a simple mortgage deed by a tenant in common over joint property cannot by itself be deemed to be a notice to the other tenants-in-common—*Ameer Bibi v. Chinnammal*, A.I.R. 1968 Mad. 83.

Though a will is registered, except the executant or his agent no one else is competent to take inspection or copies and it will be scarcely justifiable to take registration as sufficient notice—*Gopal v. Thakur*, A.I.R. 1935 Lah. 313.

Unless there are circumstances from which a presumption could be raised, the mere fact that the deed was registered did not fix the plaintiff with the knowledge of its execution on a certain date—*Teja Singh v. Hamir Singh*, A.I.R. 1952 Pepsu, 31. The Patna High Court has held in *Bhimraj Banshidhar v. C.I.T.*, A.I.R. 1955 Pat. 172, 26 I.T.R. 185 that

the registration of a firm is notice to all parties concerned including creditors. This view however is not supported by the language of Explanation I to the definition of notice in sec. 3.

Where by a registered agreement between two persons one agreed not to alienate property without the other's consent but no specific property was mentioned in the agreement, mere registration could not be treated as notice to a vendee.—*Mt. Pran Dei v. Sat Deo*, A.I.R. 1929 All. 85, 111 I.C. 761. If a charge is registered but the particulars are not entered in the index under sec. 55 Registration Act, there is no constructive notice of the charge—*Raichand Gulabchand v. Dattatraya Shankar Mote*, A.I.R. 1964 Bom. 1.

Where by mistake a prior mortgage was recorded in Book IV and not in Book I and the subsequent mortgagee wilfully abstained from making inquiries in the registration office, he would be deemed to have constructive notice of the prior mortgage—*Varadaraja v. Kailasam*, A.I.R. 1947 Mad. 175, (1946) 2 M.L.J. 355.

28. Possession amounts to notice :—See Explanation II.

Possession amounts to notice of such title as the person in possession may have; and any other person who takes a mortgage or other charge upon or purchases or takes a lease of the immoveable property without ascertaining the nature and extent of the claim or interest of the person in possession, does so at his own risk—*Lakshman Das v. Basrat*, 6 Bom. 168 (188); *Sharfuddin v. Govind*, 27 Bom. 452 (470); *Jugal Kishore v. Kartic*, 21 Cal. 116 (120); *Kondiba v. Nana*, 27 Bom. 408; *Bisheshar v. Muirhead*, 14 All. 362 (364); *Shobhagchand v. Bhaichand*, 6 Bom. 193. Title includes the right arising out of part performance under sec. 53A—*Ramkrishna Singh v. Mahadei Halwai*, A.I.R. 1965 Pat. 467. If the property to be sold is not in the possession of the vendor but of another person, it is the duty of the purchaser to make enquiries from that person, and he is bound by all the equities which the party in possession may have in the property—*Balchand v. Bulaki*, 8 Pat. 316, 117 I.C. 170, A.I.R. 1929 Pat. 284; *Prvathathammal v. Sivasankara*, A.I.R. 1952 Mad. 265. Consequently, where a mortgagor agreed to sell the property to the plaintiff, a mortgagee in possession, but subsequently sold it to a third person and the mortgagee brought a suit for specific performance of the agreement to sell, the purchaser could not contend that the possession of the plaintiff would put him on notice only of his rights as a mortgagee and of no more, *ibid*; *Faki Ibrahim v. Faki Gulam*, 45 Bom. 910, A.I.R. 1921 Bom. 459, 60 I.C. 986. "If a purchaser or a mortgagee had notice that the vendor or mortgagor is not in possession of the property, he must make inquiries of the person in possession—of the tenant who is in possession—and find out from him what his rights are. And if he does not choose to do that, then whatever title he acquires as purchaser or mortgagee will be subject to the right of the tenant in possession"—*per* Vaughan-Williams, L.J., in *Hunt v. Luck*, [1902] 1 Ch. 428; see also *Jones v. Smith*, 1 Hare 43 (60); *Barnhart v. Greenshields*, 9 Moo P.C. 18; *Tiloke Chand v. Beattie & Co.* A.I.R. 1926 Cal. 204; *Baburam v. Madhab* 40 Cal. 565; *Daniels v. Davison*, (1809) 16 Ves. 247. Possession being *prima facie* evidence of title and also the only visible badge of ownership, a man in possession is entitled to impute knowledge

No general definition of "gross negligence" has been or can be laid down. Each case must depend upon the facts proved in it and reasonable inferences from such facts—*Damodara v. Samasundara*, 12 Mad. 429 (431). The term "gross negligence" is nowhere defined in this Act, but in sec. 78, gross neglect, fraud and misrepresentation have been used as equivalent in their legal consequences. See *Shan Moun Mull v. Madras Building Company*, 15 Mad. 268 (276). "Gross negligence" is a degree of negligence so gross that a Court of Equity may treat it as evidence of fraud—impute a fraudulent motive to it—and visit it with the consequences of fraud, although morally speaking the party charged may be perfectly innocent—*West v. Reid*, 2 Hare 257, (*per Wigram V.C.*). The conduct in question need not be such as would entail a jury to find that there has been actual fraud, but must be characterised by negligence so gross as would justify the Court in concluding that there has been fraud in an artificial sense of the word—*Oliver v. Hinton*, [1899] 2 Ch. 264 (275). The real distinction between gross negligence and ordinary negligence lies in the difference between the extent of duty to take care imposed in each case—In *re. City Equitable Fire Insurance Co.* (1925) Ch. 407, 428. At one time the tendency of the Equity Court in England was to equate gross negligence with fraud, but in later decisions the distinction between the two has been emphasised. Negligence is not fraud, for negligence implies carelessness and inadvertence while fraud is active dishonesty. Fraud leads men to do or omit doing a thing not carelessly but for a purpose—*Northern Counties of England Fire Insurance Co. v. Whipp*, (1884) 26 Ch. D. 482, 489. See also Note 479 under sec. 78.

Where the circumstances are such that the slightest pains could have enabled the mortgagee to discover an earlier charge, he will be fixed with constructive notice of the charge if he refrained from making any inquiry—*Bank of Bombay v. Suleiman*, 33 Bom. 1 (P.C.).

An equitable mortgagee must be fixed with the notice of the vendor's lien if, in spite of a statement in the sale deed that the vendee undertakes to pay the balance of the price remaining unpaid, he refrains from enquiring whether the balance of the price has been paid—*Alwar Chetty v. Jagannath*, 54 M.L.J. 109, 108 I.C. 291.

The wilful or negligent abstention on the part of the vendee to call for the title deeds will deprive him of the protection which a Court of Equity would extend to a *bona fide* purchaser for value without notice—*Ram Charan v. Joy Ram*, 17 C.W.N. 10, 16 I.C. 825; *Doorga Narain v. Baney Madhub*, 7 Cal. 199. The omission on the part of an intending mortgagee to search the register to ascertain the title to the property or the charges (if any) upon it, amounts to gross negligence on his part—*Churaman v. Balli*, 9 All. 591 (599).

A purchaser cannot be said to be guilty of negligence in not asking for the title-deeds of an adjoining property. As between the vendor and the purchaser, it is the vendor who is to disclose to the purchaser any covenant restricting the enjoyment of the property sold—*Chaturbhuj v. Mansukhram*, 27 Bom.L.R. 73, 86 I.C. 19, A.I.R. 1925 Bom. 183.

This section speaks of *gross negligence*. Any *slight negligence* on the part of a person does not fix him with constructive notice—*Damodara v. Somasundara*, 12 Mad. 429 (435).

26. Registration, whether amounts to notice—Old law :—According to the Calcutta High Court, registration was not of itself a sufficient notice—*Joshua v. Alliance Bank of Simla*, 22 Cal. 185 ; *Inderdawan v. Gobind Lal*, 23 Cal. 790 ; *Preo Nath v. Asutosh*, 27 Cal. 358 ; *Magniram v. Mehdi Hossein*, 31 Cal. 95 (102) ; *Atul Kristo v. Mutty Lal*, 3 C.W.N. 30 ; *Nanda Lal v. Abdul Aziz*, 43 Cal. 1052 (1084). The same view was taken by the Madras High Court in *Shan Maun Mull v. Madras Building Co.*, 15 Mad. 268 (279) ; *Madras Building Co. v. Rowlandon*, 13 Mad. 383 (388) ; *Damodara v. Somasundara*, 12 Mad. 429 (435) ; *Rangasami v. Annamali*, 31 Mad. 7 (10).

In *Manindra v. Troylukho*, 2 C.W.N. 750 (755) and *Bunwari v. Ramjee*, 7 C.W.N. 11, the Calcutta High Court held that the question whether registration amounts to notice was one of fact and must be decided according to the particular circumstances of each individual case. And this view was approved of by the Privy Council in *Tilakdhari v. Khedan Lal*, 48 Cal. 1 (at pp. 15-16).

The Allahabad High Court laid down that registration was of itself no notice to all the world, but where it was the duty of a person to search or where a reasonably prudent man would in his own interests make a search, then the fact that the search if made would have disclosed a document affecting the property, would affect that man with notice of that document and put on him the necessity of further inquiry—*Janaki Prasad v. Kishen Dat*, 16 All. 478 (482). This case was followed in *Ashiq Husain v. Chaturbhuj*, 50 All. 328, 26 A.L.J. 41, 108 I.C. 152, A.I.R. 1928 All. 159. But see *Matadin v. Kazim*, 13 All. 432 (F.B.).

The Bombay High Court held that registration of sale or mortgage gave notice to the subsequent purchasers or mortgagees—*Lakshman v. Basrat*, 6 Bom. 168 ; *Dundaya v. Chenbasapa*, 9 Bom. 427 ; *Chintaman v. Dareppa*, 14 Bom. 506 (510) ; *Narayan v. Bapu*, 17 Bom. 741 ; *Balmukundas v. Moti*, 18 Bom. 444 ; *Dhondo v. Raoji*, 20 Bom. 290 ; *Chunilal v. Ramchandra*, 22 Bom. 712 ; *Dina v. Nathu*, 26 Bom. 538. But see *Gordhandas v. Mohanlal*, 45 Bom. 170 (173), 59 I.C. 506.

The Rangoon High Court held that in Burma a search of the registration records was particularly easy and a failure by a subsequent purchaser from a mortgator in possession to make a search is a circumstance which warranted the imputation of a notice to him of the previous mortgage—*Vaz v. Muni Singh*, A.I.R. 1929 Rang. 34, 117 I.C. 565.

The Privy Council ruling in *Tilakdhari v. Khedan Lal*, 48 Cal. 1 was followed in *Parbhu Lal v. Chatter*, 88 I.C. 398, A.I.R. 1925 All. 557 ; *Kali Din v. Madho*, 77 I.C. 862, A.I.R. 1923 All. 169 ; *Ghulam Mahummad v. Mirza*, 5 Lah. 368, 84 I.C. 174 ; *Gunabai v. Motilal*, 89 I.C. 625, A.I.R. 1925 Nag. 398 ; *Chettiar Firm v. Chettiar Firm*, 4 Rang. 238, A.I.R. 1926 Rang. 195, 98 I.C. 19.

Explanation—whether retrospective :—Sec. 63 of the Amending Act 20 of 1929 shows that sec. 3 of the main Act which contains the definition of "notice" has not been given retrospective effect ; so the Explanation to definition of notice does not affect the terms or incidents of transfers made before 1st April, 1930—*Azizuddin v. Mt. Arifa Begam*, A.I.R. 1937 Oudh 1, 12 Luck. 563, 165 I.C. 718. This view, however, is not

its provisions—*Mollaya v. Krishnaswami*, 47 M.L.J. 622, A.I.R. 1925 Mad. 95, 85 I.C. 855; *Rama Aiyar v. Narayanasami*, 51 M.L.J. 313, A.I.R. 1926 Mad. 609, 96 I.C. 483; *Bepin Behari v. Trailakya*, 31 C.W.N. 448 (449), A.I.R. 1927 Cal. 933, 102 I.C. 398; *Tarabaz v. Nanak Chand*, 33 P.L.R. 685, A.I.R. 1932 Lah. 566, 138 I.C. 263; *Hamidmiya v. Nagindas*, 35 Bom.L.R. 252, A.I.R. 1933 Bom. 217 (220); *Fazal Hussain v. Jiwan Shah*, 14 Lah. 369, 141 I.C. 454, A.I.R. 1933 Lah. 551 (553); *Banga Chandra v. Jagat*, 44 Cal. 186 (199) (P.C.). For it constantly happens that persons subscribe deeds as witnesses without having the least notion of what they contain, and if people were to be held bound by an instrument which they so subscribe, it might be a dangerous thing to witness any other man's signature—*per* Garth, C.J., in *Ram Chunder v. Hari Das*, 9 Cal. 463 (468); *Abhoy Charn v. Attarmani*, 13 C.W.N. 931, 3 I.C. 415. But there may be circumstances under which the witness may be deemed to have notice of the contents of the document he is attesting—*Tarabaz v. Nanak Chand*, *supra*; *Abdul v. Abdul*, A.I.R. 1933 Mad. 715, 65 M.L.J. 390. Thus, where the attester was *present throughout* the transaction and attested the deed after *hearing its contents*, he must be fixed with notice of its contents, and cannot afterwards challenge the right of the transferee—*Bhagwat Rai v. Gorakh*, A.I.R. 1934 Pat. 93 (95).

31. Government :—The doctrine of constructive notice is equally applicable to Government, but the Court should be more strict in applying it to Government than to private individuals, and it must be more cautiously applied as it is based on a fiction—*Secretary of State v. Dattatraya*, 3 Bom. L.R. 923. One is not bound by an order until it is communicated to him—*Bachhittar Singh v. State of Punjab*, A.I.R. 1963 S.C. 395; *M. Sen v. Director of Panchayats*, W.B., 68 C.W.N. 1109.

32. Notice to agent :—The law as to when notice to an agent amounts to notice to the principal, has been amended by Explanation III.

To affect the principal with notice, five things are necessary :—(a) The agent must have received the notice during the agency; (b) The knowledge must come to him as agent; (c) It must be in the same transaction; (d) It must be material to the transaction; (e) It must not have been fraudulently withheld from the principal—*Kettlewal v. Watson*, 21 Ch. D. 685 (706).

The information must be communicated to the agent as such; for information not so derived was not obtained in the course of the business transacted by him for his principal, and which he was not bound to disclose to him. The knowledge of an agent, not acquired in the matter for which he was agent, cannot be imputed to a principal and such knowledge cannot be used for upsetting a transaction of a date before the agency commenced—*Chabildas v. Dayal Mowji*, 31 Bom. 566 (P.C.), 34 I.C. 179. See also Illus. (b) to sec. 229, contract Act.

A notice to an agent is notice to the principal, since otherwise notice might be avoided in every case by employing an agent—*Akshoylingam v. Ramayya*, A.I.R. 1929 Mad. 426, 120 I.C. 876. "It would be a pretty harsh thing", observed Lord Hardwick, "to affect the lender of the money with all kind of knowledge the agent may have of the title of the borrower; but still I will not lay it down, as a general rule, that where the same person is concerned for the mortgagor and mortgtgee, that notice to such

person will not be good constructive notice to the mortgagee"—*Warrick v. Warrick*, 3 Atk. 291 (294). But this principle is subject to the following exception, namely: Where the act done by the agent is such as cannot be said to be done by him in his character of agent, but is done by him in the character of a party to an independent fraud on his principal, that is not to be imputed to the principal as an act done by his agent—*Cave v. Cave*, 15 Ch. D. 639 (644); see also *Texas & Co. v. Bombay Banking Co.*, 44 Bom. 139 (P.C.).

The information to a pleader engaged only for a previous suit and obtained by him during the pendency of that litigation cannot be said to be information to his employer or to his authorized agent—*Prakash v. Birendra*, A.I.R. 1933 Oudh 333 (340), 132 I.C. 51.

Enactments relating to contracts to be taken as part of Contract Act.

4. The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872.

And sections 54, paragraphs 2 and 3, 59, 107 and 123 shall be read as supplemental to the Indian Registration Act, 1908.

33. The second para. of this section was added by the Transfer of Property Amendment Act III of 1885.

Before this para. was added, a difficulty arose in the case of the sale of immoveable property of value less than Rs. 100. Thus, while an unregistered sale-deed of property of less than Rs. 100 would convey a good title under the Registration Act, it would be wholly ineffectual under the T. P. Act, unless it was accompanied by delivery of possession (*Narain v. Dataram*, 8 Cal. 597, 612).

This difficulty has now been removed and sec. 54 has been made supplemental to the Registration Act. A sale of immoveable property of value less than Rs. 100 can be made only by a registered instrument or by delivery of the property, and that if made otherwise, e.g., by an unregistered instrument unaccompanied by delivery of possession, the sale is inoperative and confers no title on the vendee—*Makhan Lal v. Banku*, 19 Cal. 623 (626) (F.B.) (overruling *Khatu Bibi v. Madhuram*, 16 Cal. 622). The effect of secs. 4 and 54 of the T. P. Act is that if a sale of immoveable property is made by a written instrument, the instrument is compulsorily registrable, irrespective of the value of the property comprised therein—*Muthu Karuppan v. Muthu Samban*, 38 Mad. 1158 (1161), 25 I.C. 772, 27 M.L.J. 497; *Sohan Lal v. Mohan Lal*, 50 All. 986 (F.B.), 26 A.L.J. 1084, A.I.R. 1928 All. 726 (729).

This section properly read means, so far as it is applicable to the case of mortgages, that if and when a document of mortgage is executed, it must be registered as provided in the Registration Act, but this section does not in any way do away with the effect of sec. 59 which expressly provides that in certain areas a mortgage can be effected merely by deposit of title deeds—*Gurudas v. Punjab & Sind Bank*, A.I.R. 1933 Lah. 972.

Behind every transfer of immoveable property there is a contract which, when carried out, terminates in a completed transfer. So long as it is inchoate, it is contract enforceable by specific performance—*Udayanarayan v. Badia Dasu*, A.I.R. 1952 Or. 116.

An instrument which was intended to create a lease but has failed

to do so on account of a technical defect, namely, non-registration of the document, is to be treated as a contract to lease, *ibid.* Where the lessor delivers possession to the lessee in part performance of the contract, he is entitled to a decree for the sum agreed to be paid under the lease by way of specific performance of the contract to lease, *ibid.*

Charge :—This section has nothing to do with charges, because a charge is outside the domain of the Registration Act and is valid even though unregistered—*Manekchand v. Ganeshlal*, 35 Bom.L.R. 588, 145 I.C. 582, A.I.R. 1933 Bom. 298 (299).

34. Lease :—A lease for a period of less than a year, if made in writing, must be registered under sec. 107 of the T. P. Act, though it is not compulsorily registrable under sec. 17 of the Registration Act—*Ram Sahu v. Gowro*, 44 Mad. 55 (64) (F.B.), 59 I.C. 350. Where oral lease accompanied by possession has been established, the deed of rent can be used as a corroborative piece of evidence to support the terms of the lease—*Taj Din v. Abdul Rahim*, A.I.R. 1939 Lah. 423 (425), 41 P.L.R. 498.

35. Contract Act :—Notwithstanding the terms of this section, the provisions of section 39 of the Contract Act does not apply to the case of a mortgage so as to enable the mortgagor to rescind the mortgage, on the ground of non-payment of a part of the consideration, when an interest in the mortgaged property has actually vested in the mortgagee upon execution and registration of the mortgage-deed—*Makhan Lal v. Hanuman*, 2 P.L.J. 168 (171), 38 I.C. 877.

It is significant that the whole of the Contract Act has not been made applicable to a transfer of immoveable property. This section merely makes certain provisions of the T. P. Act relating to contracts as part of the Contract Act, and not *vice versa*. There is a clear distinction between a contract which still remains to be performed and specific performance of which may be sought, and a conveyance by which title to property has actually passed. Cases of mere contract are governed by the provisions of the Contract Act. Cases of transfer of immoveable property are governed by the Transfer of Property Act. A mere contract to mortgage or sale would not amount to an actual transfer of any interest in the immoveable property (see sec. 54), but a deed of sale or mortgage, if duly registered, would operate as a conveyance of such interest. Once a document transferring immoveable property has been registered, the transaction passes out of the domain of a mere contract into one of conveyance. Such a completed transaction would be governed by the provisions of the Transfer of Property Act and of only so much of the Contract Act as are applicable thereto—*Dip Narayan v. Nageshar*, 52 All. 338, 1930 A.L.J. 45, A.I.R. 1930 All. 1 (2), 122 I.C. 872.

Registration Act :—The expression "supplemental to the Registration Act" in this section is not intended to mean that the sections mentioned in it are to be taken as part of the Registration Act. It would follow that they cannot be governed by the definitions in the Registration Act, but must be governed by those in the T. P. Act. Hence sec. 107 is not governed by the definition of the term "lease" in the Registration Act, but by the definition in sec. 105, T. P. Act—*Taj Din v. Abdul Rahim*, A.I.R. 1939 Lah. 423 (425), 41 P.L.R. 498 relying on *Ram Krishna v. Jai Nandan*, 14 Pat. 672 (F.B.), 16 P.L.T. 451, A.I.R. 1935 Pat. 291.

CHAPTER II

OF TRANSFERS OF PROPERTY BY ACT OF PARTIES

(A)—*Transfer of Property, whether Moveable or Immoveable*

5. In the following sections "transfer of property" means "Transfer of property" an act by which a living person conveys defined. property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons and "to transfer property" is to perform such act.

In this section 'living person' includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.

Amendment:—The italicised words have been added by sec. 6 of the Transfer of Property Amendment Act (XX of 1929). For reasons, see Note 40 below.

35A. Construction:—The Act is to be construed irrespective of the fact whether the property is inside or outside India or in a State to which the Act applies or not—*Central Bank v. Nusserwanji*, A.I.R. 1932 Bom. 642, 34 Bom. L. R. 1384.

It should be noted that nothing in this Chapter is to be deemed to affect any rule of Mahomedan law—See sec. 2, *ante*.

36. "Act of parties":—The word "transfer" is not concerned with transfers which take place by judicial process, but with such transfers only as take place between living persons by virtue of their own voluntary acts—*Gopal Pandey v. Parsotam Das*, 5 All. 121 (187). But a sale executed by Court in pursuance of a decree for specific performance has all the characteristics of a transfer inter vivos—*Christine Pais v. K. Ugappa Shetty*, A. I. R. 1966 Mys. 299.

A purchase by an auction purchaser in an execution sale is not a transfer to which this Act applies. While in private sales there is an implied warranty of title there is none in the auction sale. An auction purchaser, therefore, cannot assume the position of a *bona fide* purchaser for value without notice. He gets the property subject to the same restrictions which the judgment-debtor himself was subject to—*Har Narain v. Bank of Upper India*, A. I. R. 1938 Oudh 84, 172 I.C. 855.

Not confined to contracts:—There is nothing in this Act to suggest that it was intended to confine the operation of the Act to transfers by contract. Thus, the term is wide enough to include a deed of appointment executed by virtue of a power given under a settlement—*Joshua v. Alliance Bank*, 22 Cal. 185.

37. Transfer:—The term 'transfer' is used in law in the most generic signification comprehending all the species of contract which pass

real rights in property from one person to another—*Gopal Pandey v. Purnotam*, 5 All. 121 (137); *Mata Din v. Kazim*, 13 All. 432 (473) (per Mahmood, J.). The word has long been recognised to be a technical term of law in all countries where English is the language of the Legislature and of the Courts of Justice. It is often used as a convertible term with *alienation*, *conveyance* and *assignment*—per Mahmood, J., in 5 All. 121 (137).

The definition of “transfer of property” in this section is to be taken as the definition for the purposes of determining what is transfer within the meaning of s. 2, Proviso of Bombay Act XVII of 1942—*Soniram Dwarkabai*, A. I. R. 1951 Bom. 94, I. L. R. 1951 Bom. 679.

Where a testator grants a life estate to A with a right to alienate the property or any portion thereof permanently, the disposition is valid—*Beni Madho v. Harihar*, A. I. R. 1947 Oudh 71, 22 Luck. 19.

The term ‘transfer’ does not necessarily import conveyance of *all* the transferor’s interest in the property. Thus, a mortgage or a lease is treated as a transfer under the Act, although it does not exhaust the whole interest which the transferor is capable of passing—*Narandas v. Parsoram*, 4 B.L.R. 550; *Ram Kinkar v. Satya Charan*, (1939) 43 C.W.N. 281 (P.C.).

It is within the contemplation of this section that there may be a “transfer” by a person exercising powers over the property of another. Hence it is a case of transfer when the donee of a power of appointment, having a power to appoint a beneficial interest in property, exercises that power—*U Thita v. U. Areseinna*, A.I.R. 1939 Rang. 76 (78), 1938 R.L.R. 678, 179 I.C. 903.

The definition of transfer of property is sufficiently wide to cover cases in which on dissolution of a partnership certain partners are paid off and in return they give up or assign their interests in the assets of the partnership—*Virbhandas v. Dasumal*, I. L. R. 1939 Kar. 344, A.I.R. 1939 Sind 288, 185 I.C. 28.

A *partition* is not a transfer, because it merely effects a change in the mode of enjoyment of property, and is not an act of *conveying* property from one living person to another—*Indoji Jithaji v. Kothapalli*, 10 L.W. 498; 54 I.C. 146 (151); *Pohkar v. Dulari*, 52 All. 716, 1930 A.L.J. 688, 125 I.C. 1, A.I.R. 1930 All. 687 (691). But see *contra*—*Rasa Goundan v. Arunachela*, 44 M. L. J. 513, A. I. R. 1923 Mad. 577, 72 I.C. 978 (dissenting from 10 L.W. 498); *Ramaswami v. Kathamuthu*, 24 L.W. 180, 97 I.C. 70, A.I.R. 1926 Journal 167; and *Waman v. Gampat*, A.I.R. 1936 Bom. 10, 60 Bom. 34, 160 I.C. 242; *Jatru Pahan v. Mahatma Ambikajit Prasad*, A.I.R. 1957 Pat 570; *Sharin v. Ajit Kumar* A.I.R. 1966 S.C. 432. But see *Raman Pillai v. Madhavan Pillai*, A.I.R. 1959 Ker 235.

Where, in a dispute regarding her husband’s property, a Hindu widow arrived at a compromise with the reversioner whereby she agreed to keep the property for her life and undertook not to sell or mortgage the same and that any such sale or mortgage, if made

would be invalid, and she also consented that after her death the reversioner would be the owner of the property, held that the compromise was a family arrangement and did not amount to a transfer of property—*Basangowda v. Irgowdatti*, 47 Bom. 597 (603), A.I.R. 1923 Bom. 276, 73 I.C. 196. But where a Hindu woman inheriting property from her father with the limited interest of a Hindu widow surrendered her entire estate in such property in favour of her sons so as to accelerate their succession to it, the transaction amounted to a "transfer" within the meaning of s. 7 of the U. P. Encumbered Estates Act, 1934—*Joti Prasad v. Basdeo*, A.I.R. 1946 All. 267, I.L.R. 1946 All. 341.

A family arrangement or compromise by which the antecedent right of the parties is acknowledged and defined, is not a transfer of property, as it does not convey any new distinct title to either of the parties—*Khumni Lal v. Gobind*, 33 All. 356 (P.C.), 15 C.W.N. 545 (552), 10 I.C. 477; followed in *Hanuman v. Abbas*, 4 Luck. 452, A.I.R. 1929 Oudh 193 (201), 120 I.C. 387; *Ram Gopal v. Tulsi Ram*, 51 All. 79 (F.B.), 116 I.C. 861, A.I.R. 1928 All. 641, 643; *Jatru Pahan v. Mahatma Ambikajit Prasad*, A.I.R. 1957 Pat 570; *Yendapalli v. Yendapalli*, A.I.R. 1958 Andhra Pr. 147; *Bulkan Sah v. Guneya Devi Nathani*, A.I.R. 1964 Pat 214. A deed of release cannot pass title, but the admission in a release deed can be used for rebutting the presumption of the settlement record of rights—*Pankajini Devi v. Sudhir Dutta*, A.I.R. 1956 Cal. 669. When an under-tenure is purchased by a Patnidar in a certificate sale, the release of the under-tenure amounts to a transfer requiring registration—*Baidyanath Rai v. Sm. Jay Kumari*, A.I.R. 1957 Pat 706. Even a registered release deed may operate as a sale if the intention to transfer is clear and if it is for valuable consideration—*Lakshman Naik v. Smt. Sushila Swain*, A.I.R. 1968 Pat, 274. A deed of release cannot operate as transfer without adequate words of conveyance—*Kunju v. Chandrika*, 1959 Ker. L.J. 395. A release deed can only feed title but cannot transfer title—*K. Hutchi Gowder v. H. Bheema Gowder*, A.I.R. 1960 Mad. 33.

A bona fide settlement of doubtful claims is not a transfer of property at all, but really a recognition of the title of the opposite party and an abandonment of all further claims to it. Such an arrangement is not a "transfer" within the meaning of the Act—*Inder Pal v. Sarnam Singh*, A.I.R. 1951 All. 823. Though it would be open to the members of a family who had not joined in a family settlement to challenge it, it would bind such members as had joined in it—*Ram Pratap v. Indrajit*, A.I.R. 1950 All. 320. Members of a family who have no proprietary interest in the property in their possession, can enter into a family arrangement with respect to such right as they may possess in the property, *Ibid.* For essentials of family settlement see *Kisto Chandra Mondal v. Mt. Anila Bala Dasi*, A.I.R. 1968 Pat 487. If a Hindu governed by Dayabhaga distributes his estate in separate shares among his grandsons the transaction is a gift and not a family settlement—*Ibid.* A family settlement is not invalidated by the mere inclusion

of strangers to the family or their properties—*Narayani Amma v. Bhaskaran Pillai*, A.I.R. 1969 Ker. 214.

Where a dispute as to the joint family property was referred to arbitration and a decree was passed in terms of the award, it was held that the agreement was neither a transfer nor an agreement to transfer but was in the nature of a family settlement—*Bachchu v. Harbans*, A.I.R. 1953 All. 213.

Where both sides claim an equal title to the property and each agree to recognise a part of the title claimed by the other, the transaction is not a sale, gift or exchange, as there is no transfer of title from one to the other—*Balkrishna v. Rangnath*, A.I.R. 1951 Nag. 171, I.L.R. 1950 Nag. 618. Where a mortgagor delivers possession of the property mortgaged to the simple mortgagee in satisfaction of the debt, the transaction does not amount to a compromise of disputed claims as no title vests in the mortgagee, *Ibid*. An invalid gift-deed cannot be construed as a family settlement—*Sulaiman v. Kader*, A.I.R. 1953 Mad. 161, (1952) 2 M.L.J. 104. For a family settlement the parties thereto must have competing titles in respect of the properties in dispute, *Ibid*.

A *relinquishment* connotes the extinction of a right and in that case there is nothing left to transfer. A sale or transfer on the other hand presupposes the existence of the property. It presupposes the transfer from one person to another of the right in property—*Provident Investment Co. v. Comr. of Income-tax*, A.I.R. 1954 Bom. 95. A *relinquishment* by a reversioner of his reversionary interest does not amount to a transfer—*Barati Lal v. Salik Ram*, 38 All. 107; *Sundar Lal v. Gur Saran*, A.I.R. 1938 Oudh 65, 172 I.C. 637. Similarly, *relinquishment* of interest in the joint family property by a member of a Mitakshara joint Hindu family in favour of sons to be born in future does not constitute transfer of property and the after born sons derive no benefit from such *relinquishment*—*Katragadda China Anjaneyulu v. Katragadda China Ramayya*, A.I.R. 1965 Andh. Pra. 177 (F.B.). But see *Dhoorjeti v. Dhoorjeti*, 30 Mad. 201 (203), where *relinquishment* has been held to effect a transfer. A registered instrument styled release deed releasing right, title and interest of the releasor without consideration may operate as gift—*Kuppuswami Chettiar v. Arumugam*, A.I.R. 1967 S.C. 1395.

The creation of an easement is not a transfer of property, and is outside the scope of this Act—*Sital Chandra v. Delanney*, 20 C.W.N. 1159 (1163), 34 I.C. 450; *Traders Miners, Ltd. v. Dharendra*, A.I.R. 1944 Pat. 261, 23 Pat. 115.

A dedication of property to a temple is not a transfer within the meaning of this Act—*Biopatrio v. Ram Chandra*, A.I.R. 1926 Nag. 469, 96 I.C. 1004. But such dedication is a transfer within the meaning of the West Bengal Estates Acquisition Act (1 of 1954), sec. 5A (7) (iii)—*Champa Bibi v. Panchiram Mahata Siva Bigraha*, A.I.R. 1963 Cal. 551.

38. Property :—The word "property" may be used in the objective sense of a concrete thing which is the subject of ownership or other

rights; or it may be used in the sense of the rights and interests of the owner or other person in the property. It is in the latter sense that the term is used in this Act—*Umrao Singh v. Kacheru Singh*, I.L.R. 1939 All. 607, 1939 A.L.J. 308, A.I.R. 1939 All. 415 (F.B.) (*per Allsop, J.*, at p. 425). The following are included in the term “Property” :—

(a) Actionable claim or chose-in-action—*Rudra Perkash v. Krishna*, 14 Cal. 241 (244); *Muchiram v. Ishan Chunder*, 21 Cal. 568. Provident Fund money due to a subscriber is an actionable claim and therefore “property” within the meaning of this section—*Bhupati v. Phanindra* 63 Cal. 578, 62 C.L.J. 359, 40 C.W.N. 102.

(b) Equity of redemption—*Muchiram v. Ishan*, 21 Cal. 568; *Kanti Ram v. Kutubuddin*, 22 Cal. 33; *Mata Din v. Kazim Husain*, 13 All. 432 (474).

(c) Vested remainder—*Umesh v. Zahur*, 18 Cal. 164.

(d) A share in an estate—*Mahomed v. Kashi Nath*, 3 C.W.N. 180.

(e) The office of a shebait—*Monohar Mukherjee v. Bhupendra Nath Mukherjee*, 37 C.W.N. 29.

(f) A Hindu Idol is property and may be recovered in a suit, though it cannot be made the subject of unrestricted alienation—*Subbaraya v. Chellappa*, 4 Mad. 315. A Gagawali gaddi is property—*Murarilal Kuti v. Narayan Lal*, A.I.R. 1956 Pat 345.

(g) A hat is property, so that the rents and profits derivable therefrom may be validly transferred—*Golam Mohiuddin v. Parbati*, 36 Cal. 665.

(h) The right to perform religious services of an idol—*Nagiah Bathudu v. Muthachary*, 11 M.L.J. 215. A Shebaitship of a religious endowment is a species of property with peculiar characteristics and limitations, but it is not such property as can be partitioned in the ordinary way. It cannot be disposed of by will—*Angurbala v. Debarata*, A.I.R. 1947 Cal. 278, 53 C.W.N. 348.

(i) The interest of a mortgagee in the property mortgaged to him—*Ram Shankar v. Ganesh*, 29 All. 385 (F.B.), dissenting from *Mata Din v. Kazim Hussain*, 13 All 432, in which it was held that the term ‘property’ meant the actual physical property and not any interest in such property.

(j) A right to conveyance of land—*Narasingerji v. Panaganti*, 1921 M.W.N. 519, A.I.R. 1921 Mad. 498.

(k) A contingent interest—*Ma Yait v. Official Assignee*, A.I.R. 1930 P.C. 17, 8 Rang. 8; 57 I.A. 10, 34 C.W.N. 173, 121 I.C. 225.

Under this Act “debt” belongs to a particular species of property, namely, actionable claim which has been defined as “a claim to any debt which the Civil Courts recognize as affording grounds for relief” (*vide* sec. 3 *ante*). It follows that a claim to a debt which cannot be enforced by action, *e.g.*, when the debt is barred by limitation, is not “property”. The same limitation must apply to a part of a debt and in order to determine whether or not it is “property”, it must be found out whether an action can be sustained to recover it—*Durg Singh v. Kesho Lal*, 18 Pat. 839, A.I.R. 1940 Pat. 170, (*per Harries, C.J.*, and Fazl Ali, J.).

A mortgage deed cannot be challenged on the ground that a part of the property embraced by it was outside India—*Prithi Singh v. Ganesb Singh*, A.I.R. 1951 All. 462

38A. Legal and equitable estates:—In India there is no such conception as legal estates and equitable estates. All interests in property, whether the full ownership or an interest carved out of full ownership, are rights *in rem*, the essence of which is that where the right is infringed, the Court has no option but to give relief, provided the remedy is invoked within the period of limitation. The Court cannot refuse relief in the exercise of its discretion—*Ali Hossain v. Rajkumar*, A.I.R. 1943 Cal. 417 (F.B.).

39. "In future":—A transfer means a conveyance of property not only in present but also in future—*Sumsuddin v. Abdul Husein*, 31 Bom. 165 (172). The conveyance may be in present or in future, but the property itself must be in existence, at least potentially, as the property of the grantor—*Petch v. Turin*, 15 M. & W. 110; *Sumsuddin v. Abdul*, 31 Bom. 165. The words "in present or in future" govern the word 'conveys' and not the word "property". This is indicated by a comma occurring after the word "property". Therefore, it is clear that there is nothing in this section to indicate that future property can be transferred—*Venkatapathiraja v. Subhadrayamma*, 47 I.C. 563; *Chief Controlling Revenue Authority v. Sudarshanam Picture*, A.I.R. 1968 Mad. 319 (F.B.). But see *Solomon v. Official Assignee*, A.I.R. 1939 Rang. 8 (10), where it has been indicated by Roberts C.J. and Spargo J., that there may be a transfer of future property, e.g., future book-debts, which creates an interest in it and gives the transferee a security which he can enforce even after the assignor's insolvency. But it must be future property in which the assignor has an interest to transfer. See also *Purna Chandra v. Barua Kumari*, A.I.R. 1939 Cal. 715, where it has been held that an assignment of future or non-existent property is quite valid and the transfer becomes operative as soon as the property comes into existence (in this case assignment by way of security of a decree that might be passed in suit already instituted was held to be valid. See also *Holroyd v. Marshall*, 10 H.L.C. 191; *Collier v. Isaacs*, 19 Ch.D. 342, 45 L.T. 567 and *Palaniappa v. Lakshmanan*, 16 Mad. 429. A purported transfer of property, not in existence at the time of the contract, can only operate as a contract to be performed in future—*Chief Controlling Revenue Authority v. Sudarshanam Picture*, A.I.R. 1968 Mad. 319 (F.B.), *Judraloke Studio Ltd. v. Santi Devi*, A.I.R. 1960 Cal. 609.

It has been decided by the Privy Council that where the estate or interest which a deed of assignment purports to assign has at the date no existence, it is well settled that neither at law nor in equity can the assignment of such an interest operate according to its tenor—*Ditcham v. Miller*, A.I.R. 1931 P.C. 203; *Jugal Kishore Saraf v. Raw Cotton Co. Ltd.*, A.I.R. 1955 S.C. 376.

Mortgage of future crops, etc.:—A mortgage of property which is to come into existence in future (e.g., indigo crops, indigo cakes, etc.), is recognized and enforced in this country as an executory agreement, bind-

ing on the parties to the transaction which is not governed by the T. P. Act, or the Contract Act, in so far as it is neither a mortgage of immoveable property nor a pledge of existing moveable property. It is in the nature of an agreement to mortgage moveable property that may come into existence in future and as such it creates an equitable charge which is valid and enforceable—*Ram Sarup v. Mohan Lal*, A.I.R. 1924 All. 883. A man cannot in equity, any more than at law, assign what is not in existence. But a man can contract to assign property which is to come into existence in future, and when it has come into existence, equity treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment. The equitable title arising in a transaction of this kind would, no doubt, not avail against a subsequent transferee for value without notice of that title—*Co-operative Hindustan Bank v. Surendra*, A.I.R. 1932 Cal. 524. See also *Misri Lal v. Mozhar*, 13 Cal. 261; *Collyer v. Issacs*, 19 Ch. D. 342; *Baldeo v. Miller*, 31 Cal. 667. As to the assignment of future book-debts, see *Talby v. Official Receiver*, 13 App. Cas. 523. A permanent lease of all the trees in the village includes not only the existing trees but also the trees that may come into existence in future—*Kamal Singh v. Kali Mahton*, A.I.R. 1955 Pat. 402.

Under secs. 5, 21 and 100 a present charge as security for discharging a contingent liability can be validly created. A charge to secure a liability which will arise only, if at all, in future is a present charge under sec. 100. Thus a direction in a decree that the amount shall be realisable from certain property if the mortgaged property was found insufficient to satisfy the debt, creates a valid contingent charge—*Shrinivas v. Jamanadas*, A.I.R. 1952 M.B. 16.

It has been held by the Lahore High Court that there can be no mortgage of profits that would accrue from year to year, because such profits are not an interest in immoveable property. Such profits cannot be pledged also as pledge can be of moveable property or goods, and such profits are neither moveable property or goods—*Punjab National Bank v. Punjab Co-operative Bank*, A.I.R. 1939 Lah. 15.

It is, however, obvious from sec. 5 that the T. P. Act is not intended to cover transfers in future.—*Harnam Singh v. Md. Akbar*, A.I.R. 1937 Pesh. 76, 170 I.C. 136; *Muttu Kumara v. Veerappa*, A.I.R. 1931 Rang. 160, 131 I.C. 509.

Offerings which may, in future, be made to a Hindu idol is not a saleable property—*Shoilajanand v. Peary*, 29 Cal. 470.

40. "Or to himself" :—Under the old law, a person could not convey property to himself though he could create a trust in his own favour—*Bai Mahakorc v. Bai Mangala*, 35 Bom. 403 (407); he could only transfer property to himself *conjunctly with another*. But the law has now been changed by the addition of the words "or to himself." "We have amended sec. 5 to make it clear that a transfer can be made by a person *to himself*, as for instance by a person making a settlement or trust in which he constitutes himself a trustee."—*Report of the Select Committee* (1929).

"Living persons":—The term "living persons" no doubt includes also juridical persons, such as corporation and the like, since such persons being the creatures of law are regarded as standing on the same footing as other living beings—*Biopatrao v. Ramchandra*, A.I.R. 1926 Nag. 469. Gour's *Law of Transfer*, 4th Edition, Vol. 1, p. 117. This is now expressly provided by the new second para. of this section. Section 3 (39) of the General Clauses Act (1897) also defines a "person" as including any company or association or body of individuals whether incorporated or not. But "the Court is not", as observed by the Judicial Committee, "a judicial person. It cannot be sued. It cannot take property, and as it cannot take property, it cannot assign it"—*Raj Raghbir v. Jai Indra*, 42 All. 158 (P.C.); *Akshoy Zemindary Co. v. Ramanath*, 40 C.W.N. 1281.

A dedication of property to an idol or a temple is not a transfer (gift) to a "living person" within the meaning of this Act but is a gift to God; consequently, the requirements of writing and registration do not apply to such a gift—*Ramalinga v. Sivachidambara*, 42 Mad. 440 (443); *Narasimhaswami v. Venkatalingam*, A.I.R. 1927 Mad. 636; *Harihar v. Guru Granth Saheb*, A.I.R. 1930 Pat. 610 (612). An idol may be regarded by a fiction of law as a juristic person, clothed for some purposes with the rights of persons; but though a juristic person [*Pramatha v. Pradumna*, A.I.R. 1925 P.C. 139] it is not always a "living person"—*Harihar v. Guru Granth*, supra. See note 630 under sec. 123. The transfer of property to an idol is not bad if it is not covered by the present section. Such a transfer is not subject to the provisions of the T. P. Act—*Kalika Singh v. Sri Radha Krishnaji*, A.I.R. 1946 Oudh 256, (1946) O.W.N. 234.

Unborn persons:—Although this Act deals with alienations made as between living persons, still an interest may be created in favour of persons yet unborn. subject to certain restrictions. See sections 13, 14 and 20.

Section 3 of the Hindu Disposition of Property Act (XV of 1916), validates all dispositions made by a Hindu in favour of unborn persons, subject to the limitations contained in Chapter II of the Transfer of Property Act.

6. Property of any kind may be transferred, except as ^{What may be trans-} otherwise provided by this Act or by any ^{ferred.} other law for the time being in force.

(a) The chance of an heir apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman or any other mere possibility of a like nature, cannot be transferred.

(b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.

(c) An easement cannot be transferred apart from the dominant heritage.

(d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

(dd) *A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred.*

(e) A mere right to sue cannot be transferred.

(f) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.

(g) Stipends allowed to military, *naval, air force* and civil pensioners of the Government and political pensions cannot be transferred.

(h) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872, or (3) to a person legally disqualified to be transferee.

(i) Nothing in this section shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee.

Amendment :—Clause (dd) was added by sec 7 of the Transfer of Property Amendment Act (XX of 1929). For reasons, see Note 53. The words "air force" were added in clause (g) by the Repealing and Amending Act, X of 1927, and the word "naval" was inserted by Act XXXV of 1934.

By A.L.O. 1937, in paragraph (g) above "the Crown" was substituted for "Government". Then by A.L.O. 1950, the word "Government" was substituted for "the Crown".

40A. Decisions under C. P. Code not to be applied :—Much which under the law cannot be sold in execution is capable of being dealt with by voluntary transfers, and it would be wholly unsafe to apply to this Act the decisions which have been given with regard to the Civil Procedure Code—*Brahmadeo v. Harjan*, 25 Cal. 778; *Bal-krishna v. Paj Singh*, 52 All. 705, A.I.R. 1930 All. 593 (594). While the prohibitions against attachment found in sec. 60 C. P. Code and the prohibitions against transfer found in sec. 6, T. P. Act, have been both enacted on grounds of public policy, the prohibition against attachment so far as it relates to some of the properties mentioned in sec. 60, C. P. Code (such as tools of artisans, necessary cooking vessels, etc.) is not intended to interfere with the right of the owner to effect private alienation of those properties—*Palikandy v. Krishnan Nair*, 40 Mad. 302 (307).

41. Property of any kind is transferable :—The general rule is that property of any kind may be transferred as laid down in this section,

and the person urging non-transferability must prove the existence of some law or custom which restricts the right of transfer—*Mohammad Ali v. Madarisah*, A.I.R. 1927 Oudh 297, 102 I.C. 626; *Hari Kishan v. Ratan Singh*, A.I.R. 1934 All. 973, 150 I.C. 562; *Bhoopal v. Shiam* A.I.R. 1929 All. 781, (1929) A.L.J. 724.

Under this section the owner of property may transfer it unless there is some legal restriction to the contrary—*Hari Kishan v. Ratan Singh*, supra; *Katar Singh v. Bishamber*, A.I.R. 1929 All. 578, (1929) A.L.J. 1151. In this last-mentioned case it was held that buildings belonging to a co-sharer could be sold by him in spite of the fact that after partition under sec. 118, U. P. Land Revenue Act, the site on which the buildings stood was assigned to the Kura of another co-sharer who, under the said section was entitled to a reasonable ground rent, but not to the buildings.

When a grant is made to a *riya*, it is usually made subject to certain conditions of escheat; but once the house has escheated to the landlord, these limitations disappear. The landlord then gets in the house a transferable right which entitles him to transfer the house even after he has lost the ownership of the land—*Vidya Sagar v. Bankey Lal*, A.I.R. 1943 Oudh 209, (1943) O.W.N. 15.

A permanent tenancy created before the passing of the Transfer of Property Act, to which if created after the passing of that Act its provisions would be applicable, is transferable—*Madhumati v. Harendra*, 33 I.C. 502 (Cal.).

A non-permanent tenure created after the passing of the Transfer of Property Act and before the Bengal Tenancy came into operation is transferable—*Mahanta Bhagaban Das v. Bisweswar*, 44 C.L.J. 434, A.I.R. 1927 Cal. 220, 100 I.C. 302 (distinguishing 7 C.L.J. 553).

A lease from year to year is transferable under this section unless there is anything to the contrary in the contract of lease—*Bandhulal v. Lagin*, 36 I.C. 1005 (Cal.).

In the absence of any custom or agreement to the contrary, a tenant who has planted a grove with the permission of the zemindar has the right to transfer the trees of which the grove consists—*Lal Baijnath v. Chandrapal*, 47 All. 55.

When either immoveable or moveable property is offered as security, the proprietary interest of the surety is not automatically extinguished, but merely a first charge is created on the security which will have to be available in the first instance for the purpose for which it has been offered. Although the depositor cannot defeat that purpose, his power of disposal of his security subject to that charge will subsist, and his interest in the surplus which may remain over is both transferable and attachable. Such an interest does not come within any of the exceptions mentioned in this section—*Shanthanand v. Basudevanand*, 52 All. 619 (F.B.), 1930 A.L.J. 402, A.I.R. 1930 All. 225 (242), 125 I.C. 477.

A vested life interest under a will in a definite fund or income of property is property within the meaning of this section and is transfer-

able—*Khemchand v. Hemandas*, A.I.R. 1937 Sind 306, 173 I.C. 40. So also a contingent interest—*Ma Yait v. Official Assignee*, A.I.R. 1930 P. C. 17, 8 Rang. 8, 57 I.A. 10, 34 C.W.N. 173, 121 I.C. 225,

In equity the benefit of a lien or a charge may be assigned with the debt. A mortgage of a chargee's right would be valid—*Mohan Singh v. Sewa Ram*, A.I.R. 1924 Oudh 209, 75 I.C. 579.

Before any of the clauses (a), (d), (dd), and (f) can apply to a transaction, there must be a transfer of one of the various things mentioned in these clauses—*Sarfaraz v. Ahmad*, A.I.R. 1944 All. 104, I.L.R. 1944 All. 141.

42. Clause (a) :—"Chance of an heir-apparent":—

In England also, the expectancy of an heir-apparent is not capable of being made the subject of assignment—*per* Lord Eldon in *Carleton v. Leighton*, 3 Mer. 667 (671). The law in this respect was laid down by Kay, J. in the following words : "It is indisputable law that no one can have any estate or interest, at law or in equity, contingent or other, in the property of a living person to which he hopes to succeed as heir at law, or next-of-kin of such living person. During the life of such person no one can have more than a *spes successionis*, an expectation or hope of succeeding to the property."—*In re Parsons*, 45 Ch. D. 51 (55-56). Such an interest is not assignable at law—*In re Madge*, (1914) 1 Ch. 115 (C.A.). In equity, however, "future property, possibilities and expectancies are all assignable [*Tailby v. Official Receiver*, 13 App. Cas. 523 (543)]. But when the assurance is not for value, a Court of Equity will not assist a volunteer"—*Law v. Burne*, (1903) 1 Ch. 697. The principles of equity on which English Courts grant relief in such cases when the property actually vests cannot be given effect to in the face of express prohibition in cl. (a)—*Ramasami v. Ramasami*, 30 Mad. 255; *Shamsuddin v. Abdul*, 8 Bom.-L.R. 781.

There is a general principle of law that only *present* rights can be dealt with as property and not inchoate future rights such as *spes successionis*, a right to future rent or a future right to maintenance. Public policy demands that such rights ought to be inalienable. Such rights are also not attachable or saleable under sec. 60 (1), C. P. Code—*Zahiruddin v. Chokhey Lal*, A.I.R. 1952 All. 662. See in this connection *Krishna v. Damodaram*, A.I.R. 1952 Tr.-Coch. 351. If in a suit for injunction instituted by a widow against her grandson to restrain the latter from interfering with her share under the Hindu Women's Right to Property Act there is a compromise to the effect that the grandson will be entitled to the disputed share after her death, the gift over being a *spes successionis* confers no title on the grandson—*Rangaswami Naicker v. Chinnammal*, 77, Mad. L.W. 9.

The right of a presumptive reversionary heir under the Hindu Law or the bare chance of surviving another and succeeding to his inheritance is no more than a *spes successionis* (hope of succession) or expectancy. A Hindu reversioner has no right or interest *in presenti* in the property which the female owner holds for her life. His right becomes concrete only on her demise; until then it is a mere *spes successionis*—

Amrit Narayan v. Gaya Singh, 45 Cal. 590 (P.C.). This chance of succession cannot be transferred under clause (a) of this section—*Manikram v. Ramalinga*, 29 Mad. 120; *Venkatanarayana v. Subbammal*, 38 Mad. 406 (410); *Dhoorjeti v. Dhoorjeti*, 30 Mad. 201 (202); *Ghulam Mahomed v. Tekchand*, 2 Lah. 199; *Shamsundar v. Achhan Kumar*, 21 All. 71 (P.C.) (virtually overruling *Brahmadeo v. Harjan*, 25 Cal. 778); *Har Nath v. Inder Bahadur*, 45 All. 179 (183) (P.C.); *Annada Mohan v. Gour Mohan*, 48 Cal. 536; *Nand Kishore v. Kanee Ram*, 29 Cal. 355 (358); *Anandi Bai v. Rajaram*, 22 Bom. 984; *Babu v. Ratnoji*, 21 Bom. 319; *Bai Parvati v. Dayabhai*, 44 Bom. 488; *Dwarka v. Nasir Ahmad*, A.I.R. 1925 Oudh 16; *Bhagwan v. Mannu*, 15 O.C. 122, 13 I.C. 495; *Dio Chand v. Imam Din*, 41 I.C. 347, 135 P.L.R. 1917; *Jagannath v. Dibbo*, 31 All. 53; *Bahadur Singh v. Mahar Singh*, 24 All. 94 (P.C.); *Bhagwati v. Jagdam*, 6 P.L.J. 604, 2 P.L.T. 471, 62 I.C. 933; *Gurbhai v. Lachhman*, A.I.R. 1925 Lah. 341; *Ramasami v. Ramasami*, 30 Mad. 255; *Ram Bharosey v. Bhagwandin*, A.I.R. 1943 O.W.N. 5; *Shenbhagavadiammal v. Mupidathi Ammal*, A.I.R. 1942 Mad. 720; *Subba Reddi v. Gunturu Govind Reddi*, A.I.R. 1955 Andhra 49. Where a Hindu dies leaving behind his widow and a daughter by a pre-deceased wife, and the widow succeeds to the property of her husband taking a widow's interest therein, and subsequently the daughter in consideration of her getting a portion of the property from the widow, her step-mother, executes a deed of relinquishment in respect of the rest the relinquishment being of her reversionary right is invalid and not binding on her—*Karusing v. Narasimha* A.I.R. 1938 Bom. 121; I.L.R. 1937 Bom. 395. See also *Nitayanand Ghorai v. Snehalata Deyee*, 65 C.W.N. 1115. So an agreement between only two members of a family either to convey or to relinquish their future reversionary right is unenforceable. Such agreement, when not acted upon when the succession opens on the widow's death, does not estop a party from bringing an action for his share of the property—*Joti Lal v. Beni Madho*, A.I.R. 1937 Pat. 280. A transfer by a Hindu of a reversionary interest is void under this clause, and the same cannot be given effect to by applying sec. 43, after the reversioner becomes full owner upon the death of the widow. The chance of a female succeeding as a reversioner if a partition had taken place according to the provisions of Madras Aliyasanthana Act is merely a spes successionis—*Smt. Ratnamala v. State of Mysore*, A.I.R. 1968 Mys. 216. See Note 202 under sec. 43.

A reversioner cannot transfer his interest even in moveable property (e.g., promissory notes)—*Hargowan v. Baij Nath*, 32 All. 88.

However illegal and unenforceable a bare relinquishment or renunciation may be of the chance of an heir-apparent it would be valid if it is based on a settlement of conflicting claims or *bona fide* disputes between the contracting parties—*Shah Nawaz v. Ghulam Murtaza*, A.I.R. 1942 Lah. 138 (142). Similarly, a partition is not a transfer; and therefore the daughters who had possession of the property during their mother's lifetime could effect a partition of the property—*Pokhar v. Dulari*, A.I.R. 1930 All. 687 (691). Where a Hindu died leaving a widow and three daughters, some of whom had sons and the widow claiming absolute title to certain properties entered into an arrangement with

her daughters and grandsons for dividing up the properties between them in absolute right, and one of the daughters conveyed one item of property which fell to her share to a predecessor of the defendant, and the plaintiff another daughter, after the death of her other sisters sued to recover this property : Held that the plaintiff who was a party to the arrangement made to divide the property at a time when the rights of the widow and the daughters were in doubt could not repudiate the same and impeach a sale made on the faith of it—*Mt. Hardei v. Bhagwan*, 24 C.W.N. 105 (P.C.). So also, an *acknowledgment* by a reversioner of the widow's absolute right in her husband's property under his will does not amount to a transfer of the reversionary right in favour of the widow—*Chetty v. Chetty*, 31 Mad. 474. A contract between a reversioner and the widow is not binding on the reversioner when the succession opens on the death of the widow—*Bahadur v. Mohar Singh*, 24 All. 94 (P.C.). An admission by a reversioner for consideration that the disputed properties never formed part of the estate of the person from whom he claims as a reversioner, does not amount to a transfer of reversionary right—*Kamaraju v. Kocherlakota*, A.I.R. 1925 Mad. 1943.

Family settlement :—A family settlement deciding in what proportion the contesting parties would inherit when successions open is valid.—*Mangal v. Ghasita* (infra). Converting an expectancy into certainty and avoiding chance of litigation in future is good consideration for a family arrangement. There may be a valid family settlement even in the absence of an existing family dispute; it need not necessarily be a compromise of doubtful rights.—*Pokhar Singh v. Mt. Dulari*, A.I.R. 1930 All. 687. See also *Mt. Hiran v. Mt. Sohan*, 18 C.W.N. 929. In cases of family arrangements the consideration is not the sacrifice of any right but the settlement of a dispute. Equity leans towards the maintenance of family arrangements—*Kamal Kumari v. Narendra Nath*, 9 C.L.J. 19.

A family arrangement is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title was. It cannot be deemed to be a transfer of property, because by such arrangement no right, either vested or contingent is conveyed by one party to another—*Rani Mewa Kuwar v. Rani Hulas Kuwar*, 1 I.A. 157; *Sadhu Madho Das v. Pandit Mukand Ram*, A.I.R. 1955 S.C. 481. In *Baikunth v. Jhulan*, A.I.R. 1950 Pat. 488 it was however held that where an *ekrarnama* in the guise of a family arrangement seeks to transfer property likely to come into the hands of the reversioner on the death of the widow still alive, the *ekrarnama* is hit by sec. 6 (a).

If a dispute regarding joint family property is referred to arbitration and the parties agree that after the death of the widows the property in the possession of the widows will be divided equally among the parties and an award followed by a decree is given accordingly, the agreement is not hit by sec 6 (a)—*Bachchu v. Harbans*, A.I.R. 1953 All. 213.

A *family arrangement* in the nature of a partition is not a transfer, even though one of the results of the arrangement is to put one of the parties in the same position as if he had taken a transfer—*Chahlu v.*

Parmal, 41 All. 611 (616); *Raghubir v. Narain*, 1930 A.L.J. 1541, A.I.R. 1930 All. 498 (502). If on the death of H and S, two out of the four separated brothers, the surviving brothers agree that one of them, who married the widow of H, will retain the share of H and the other will get the share of S on the death of the widow of S, the arrangement not being a transfer is valid—*Chahlu v. Parmal*, 41 All. 611 (618). See also *Muthuraman v. Ponnuswamy*, 29 I.C. 549, 29 M.L.J. 214. Where the next reversioner agreed with another member of the family that during the life time of the widow each party would remain in possession of a moiety and on her death each would share the inheritance equally, and the parties actually divided the properties in their possession in accordance with the agreement, the arrangement was valid as a family arrangement and did not offend against the provisions of cl. (a) of this section—*Ram Pratap v. Indrajit*, A.I.R. 1950 All. 320. A provision in a family settlement whereby certain Hindu brothers divided the family property belonging to them among themselves and agreed that upon any of them dying without male issue his share would pass to the surviving brothers, was merely an agreement among the expectant heirs to divide a property in a particular way and did not amount to a transfer, and therefore it was not in contravention of the provisions of the Hindu law or of this section—*Kanti Chandra v. Ali Nabi*, 33 All. 414; *Ram Nirajan v. Prayag Singh*, 8 Cal. 138; *Mangal Singh v. Ghasita*, A.I.R. 1929 Lah. 485 (487), 116 I.C. 312. A consent by the nearest reversionary heir (a female) to a gift of property made by the widow in possession, the donee undertaking to maintain the reversioner, does not amount to a transfer of *spes successionis* by the reversioner. The transaction is in the nature of a family arrangement—*Annu v. Shripati*, 32 Bom. L.R. 705, A.I.R. 1930 Bom. 373 (374), 127 I.C. 332. Where a Hindu widow in possession of her husband's estate entered into a compromise of a claim by a reversioner, and the compromise was in the nature of a family settlement it was held to be binding upon the estate—*Mata Prasad v. Nageswar Saha*, 52 I.A. 398, A.I.R. 1925 P.C. 272. In another case decided by the Privy Council, an appellant entered into and took the benefit of a compromise into which he entered at a time when he had no right of any kind to any share in the property but had the mere expectancy of a reversion: Held that he was precluded from claiming as reversioner subsequently—*Kanhai Lal v. Brij Lal*, 45 I.A. 118, A.I.R. 1918 P.C. 70. Alienations made by a Hindu widow under a transaction which was regarded as a family arrangement was held binding on the reversioner who had attested the deeds by which the alienations had been made and had himself acquired a part of the estate by one of such alienations, all such alienations being regarded as parts of one and the same transaction—*Ramgowda Annagowda v. Bahu Saheb*, 54 I.A. 396, A.I.R. 1927 P.C. 227.

The Patna High Court, however, holds that an agreement (by way of family settlement) entered into between the reversioners during the life time of a widow to the effect that on her death her life-estate should revert to a particular reversioner, is null and void, whether it is treated as a family arrangement or relinquishment. But as in this particular case the agreement was entered into in 1868 before the T. P. Act came

into force, it was given effect to—*Lalita Prasad v. Sarnam*, 14 P.L.T. 27, A.I.R. 1933 Pat. 165 (172, 173).

Under the Mahomedan Law also the chance of an heir-apparent is nothing more than an expectancy which is neither transferable nor reasonable—*Shamsuddin v. Abdul*, 31 Bom. 165 (171); *Abdul Hossein v. Golam Hossain*, 30 Bom. 304; *Hossain Ali v. Narid*, 11 All. 456; *Muranjani v. Labhai*, 24 M.L.J. 258; *Rebati Mohun v. Ahmed Khan*, 9 C.L.J. 50. Even the *relinquishment* by an heir-apparent of his right of inheritance is invalid under the Mahomedan Law—*Asa Beevi v. Karuppan*, 41 Mad. 365 (370); *Sumsuddin v. Abdul*, 31 Bom. 165 (171); *Abdul Gafoor v. Abdul Razack*, (1958) 2 Mad. L.J. 492; *Valanhiyil v. Engayil*, I.L.R. (1964) 1 Ker 335. But in an Allahabad case where there was an arrangement between the husband and wife whereby the wife accepted in lieu of her dower a life estate in a portion of the property of her husband, and the husband accepted a life estate in other portions of his property, and it was further stipulated that on the death of the wife the husband would not succeed to her property but that the estate would devolve on their children, *held* that this was in the nature of a family settlement and the relinquishment by the husband of his right to succeed as heir to his wife was valid as it did not amount to a transfer—*Nasir-ul-Huq v. Faiyazul Rahman*, 33 All. 457 (462).

Punjab :—The T. P. Act not being in force in the Punjab, it has been held there that a sale of reversionary right of succession, though at the time of the sale it does not effect a transfer of property, gives rise to a right which the Court will enforce when the inheritance falls into possession—*Narayan v. Dharam Singh*, A.I.R. 1930 Lah. 928, 129 I.C. 29.

43. Transfer of vested interests :—Where the right created is a vested interest or a vested remainder, it is transferable—*Lakshman v. Babani*, A.I.R. 1932 Bom. 244, 34 Bom. L.R. 366, 139 I.C. 642; *Shujaal Hasan v. Md. Moiz*, 25 A.L.J. 41. Vested remainder in immovable property is present interest in property and can be sold or attached in execution of a decree—*Gulamhusein v. Farmahomed*, A.I.R. 1947 Bom. 185, 48 Bom. L.R. 733. Where by a will a life-estate is given to two persons with a remainder to certain other persons, the interest in the remainder is not a mere chance or possibility but a vested interest. It is not property of the nature described in cl. (a) and so is transferable—*Kali Prosad v. Ram Golam*, A.I.R. 1937 Pat. 163, 167 I.C. 831. Where the donee is not entitled to take possession of a portion of the gifted property until after the death of the donor and his wife, the donee gets a vested interest subject to the life interest of the widow—*Lachman v. Baldeo*, 21 O.C. 312, 48 I.C. 396 (398). Where there is an agreement between a widow and her adopted son postponing the son's estate during the life time of the widow, the interest in favour of the son is a vested one—*Balwant v. Joti Prasad*, 40 All. 692 (703), 16 A.L.J. 765, 47 I.C. 599. Where a will gives power to the widow of the testator to adopt and provides that the widow shall administer and enjoy the estate and that during her life time the adopted son will only get an allowance of Rs. 20 per month, the son has a vested interest in the

remainder, which he can transfer—*Sashi Kanta Acharjee v. Promode Chandra Roy* A.I.R. 1932 Cal. 600 (610). If under a settlement any interest created is always ready from its commencement to its end to come into possession the moment the prior estates happen to determine, it is then a vested remainder. The gift is immediate, but the enjoyment must necessarily depend on the determination of the estates of those who have a prior right to the possession. Such an estate is not a mere *spes successionis* and is transferable—*Ma Yait v. Mahomed Ibrahim*, 5 Rang. 145, 102 I.C. 690, A.I.R. 1927 Rang. 165.

43A. Transfer of contingent interest :—There is nothing in this clause to prohibit the transfer of a contingent interest—*Phulwanti v. Janeshar*, 46 All. 575 (592), A.I.R. 1924 All. 625, 83 I.C. 782; *Commissioner of Wealth-tax, Gujrat v. Sri Ashok Kumar Ramanlal* A.I.R. 1967 Guj 161. By a settlement the settlor directed the trustees to hold the properties specified in the first three schedules during the life of the widow and till attainment by the youngest child of the age of 20, distributing the income between the widow and the children in certain proportions, to sell the properties after the youngest child reaching 20 and distribute the proceeds equally between them. The trustees, further, were to have charge of the properties mentioned in the fourth schedule to be held up to the death of the youngest child and then to be divided among the children then living. One of the sons of the settlor transferred his interest under the settlement while the properties were in the hands of the trustees and the transfer was held to be valid—*Ma Yait v. Official Assignee*, 8 Rang. 8 (P.C.), 34 C.W.N. 173 (176), 32 Bom. L.R. 125, 1930 A.L.J. 119, 58 M.L.J. 83, A.I.R. 1930 P.C. 17, 121 I.C. 225, on appeal from *Ma Yait v. Md. Ibrahim*, 5 Rang. 145, 102 I.C. 690, A.I.R. 1927 Rang. 165.

44. Contract to transfer right of expectancy :—Even a contract to transfer a right of expectancy is invalid. Thus, a contract by a Hindu to sell immoveable property to which he is the then nearest reversionary heir, expectant upon the death of a widow in possession, and to transfer it upon possession accruing to him, is void. Section 6 (a) of the Transfer of Property Act, which forbids the transfer of a right of expectancy, would be futile if a contract of the above character were enforceable—*Annada Mohan v. Gour Mohan*, A.I.R. 1923 P.C. 189; *Sri Jagannadha v. Sri Rajah Prasada*, 39 Mad. 554 (558, 559); *Sumsuddin v. Abdul*, 31 Bom. 165 (174); *Basanta Kumar v. Lala Ram Sankar*, A.I.R. 1932 Cal. 600 (611); *Mahadeo v. Mathura*, A.I.R. 1931 All 589; *Harnath v. Indar*, A.I.R. 1932 P.C. 403; *Kamaraju v. Venkatalakshmi pati*, A.I.R. 1925 Mad. 1043, 49 M.L.J. 296, 88 I.C. 982; *Prem Sukh v. Habib Ullah*, A.I.R. 1945 Cal. 355, 49 C.W.N. 379. But transfers of non-existent or after acquired property, provided that they are not of the nature mentioned in cl. (a) of this section, are perfectly valid. The transfer would be regarded as a contract to transfer after the vendor had acquired title and would fasten upon the property as soon as the vendor acquires it, *Ibid*. Where a person expected that certain karnam lands would be enfranchised in his name, and he agreed to transfer his interest in the property when that event would take place, held that this was no more than a transfer of an expectancy and as such offended against clause (a)

of this section. The agreement was void—*Auryaprabhakara v. Gum-mudu*, 48 M.L.J. 598, A.I.R. 1925 Mad. 385, 88 I.C. 557; and the fact that the vendor was in physical possession of the property and was merely subject to the disability to alienate, did not make any difference—*Ibid.* In this respect the Indian law differs from the law in England. Under the English law, a man can *contract* to assign property which is to come into existence in future, and when it has come into existence, equity, treating as done that which ought to be done fastens upon that property, and the contract to assign becomes a complete assignment—*Collyer v. Isaacs*, 19 Ch. D. 342; *Lyde v. Mynn*, 1 My. & K. 683; *Holroyd v. Marshall*, 36 L.J. Ch. 193, 10 H.L.C. 191; *Clements v. Mathews*, 11 Q.B.D. 808 (818); *Withered v. Withered*, (1928) 2 Sim. 183. "It has long been settled", observed Lord Macnaughten in *Tailby v. Official Receiver*, 13 App. Cas. 523 (543), "that future property, possibilities and expectancies are assignable in equity for value". The principle of these decisions was followed in certain earlier cases—*Rajah Sahib Perhlad v. Doorga*, 12 M.I.A. 286; *Bhabo Soondree v. Issur Chunder*, 11 B.L.R. 36; *Mohendra v. Kali*, 30 Cal. 265 (275). The last of these cases was decided without reference to the Transfer of Property Act, and the other two decisions were given before this statute was enacted. The tendency of modern decisions, however, is not to follow the principle of the English cases cited above. Before the Transfer of Property Act was extended to the Bombay Presidency, the Bombay High Court held that a contract to sell a reversionary interest was enforceable—*Gitabai v. Balaji*, 17 Bom. 232 (234). This ruling is no longer authoritative.

Under the Indian law, what in English law would be called a transfer of possibility or expectancy is expressly prohibited by cl. (a). Thus the mortgage of a future income to be derived from the work of scavengering where the house-owners were not bound to employ the scavenger for any particular period, is an expectancy or possibility within this clause, and the hypothecation of this income is therefore invalid—*Palapatti v. Nallagadda*, A.I.R. 1938 Mad. 881, 48 M.L.J. 258.

45. Transfer of expectancy by consent decree or compromise :—

The Court does not allow the transfer of a mere right to succession to be effected even by means of a consent decree—*Ramasami v. Ramasami*, 30 Mad. 255 (263). A compromise of a suit, according to the terms of which the mortgagee (to whom the Hindu widow had mortgaged her property) and the reversioner agreed to divide the property in equal shares after the widow's death amounts to a transfer of an expectancy by the reversioner and is therefore invalid under the provisions of this clause—*Bhagwan v. Munnu*, 15 O.C. 112, 13 I.C. 495. The relinquishment of a reversionary right cannot be the consideration for compromise. But a man can, for good consideration, admit that the property in dispute did not form part of the estate to which he was a reversioner—*Kamaraju v. Venkatalakshmi*, A.I.R. 1925 Mad. 1043 (1044), 49 M.L.J. 296, 88 I.C. 982. If the substance of the transaction is found to be a *bona fide* settlement between the parties, then, in spite of the fact that the same transaction might be represented in one of its aspects as a dealing with a *spes successionis*, it is none the less a real compromise of disputed rights—*per Srinivasa Iyengar, J., ibid* at p. 1045.

When an agreement decides an antecedent title to the estate in the hands of the widow, the compromise is valid even though indirectly it affects the rights of a reversioner—*Chanderjit v. Debi Das*, A.I.R. 1952 All. 522. Where the sons and grandsons of T undertook to maintain T on T's giving up his rights in the family property and T instituted a suit claiming a liquidated sum on account of past and future maintenance, the assignment of the claim before the decree was held to be void being assignment of a mere possibility and the assignee was not allowed to execute the decree passed on compromise—*Abdul Kadir v. Taraganar*, A.I.R. 1956 Mad. 681. It was agreed in a suit for partition that they would not claim any share which would otherwise have accrued to them on the death of either of the parties; Held that the compromise was not hit by any rule of Hindu law or by the provisions of cl. (a) of this section—*Rai Kumar v. Abani Kumar*, A.I.R. 1948 Pat. 362. If two co-widows having the right of survivorship in the properties inherited by them from their husband enter into a partition arrangement excluding the right of survivorship the arrangement is not hit by sec. 6 (a)—*Karpagathachi v. Nagarathinathachi*, A.I.R. 1965 S.C. 1752.

Estoppel:—But although a transfer of an expectancy (in the shape of a compromise) by a reversioner is void, he may, by becoming a party to the compromise and by taking the benefit of the compromise, be estopped from subsequently claiming as a reversioner—*Annada Mohan v. Gour Mohan*, 48 Cal. 536 (542); See also *Bhana v. Guman*, 40 All. 384 (386); *Kanhai Lal v. Brij Lal*, 40 All. 487 (496) (P.C.); *Bahadur v. Ram Bahadur*, 45 All. 277 (281); *Raghubir v. Narain*, 1930 A.L.J. 1541, A.I.R. 1930 All. 498 (500), 126 I.C. 24; *Ramgowda v. Bhausahab*, 52 Bom. 1 (P.C.), A.I.R. 1927 P.C. 227. Therefore, where a reversioner enters into a compromise of a doubtful claim to the property to which he has a chance of succession, the compromise is binding on him, and when the succession opens he cannot claim the property in contravention of the compromise—*Moti Shah v. Ghandarp*, 48 All. 637, A.I.R. 1926 All. 715, 96 I.C. 595. A sale by the reversioners of their right of succession during the lifetime of the widow is void. But if after the death of the widow, when their reversionary rights have become rights of ownership, they enter into a compromise with the purchasers by virtue of which the latter enter into possession of the property, and a decree is passed in terms of the compromise, the vendors cannot afterwards claim the property in contravention of the compromise—*Durga Prasad v. Narain*, 4 Luck. 181, 5 O.W.N. 1081, A.I.R. 1929 Oudh 63, 115 I.C. 294.

A reversioner who has expressly assented to an alienation made by the widow in possession cannot, on succeeding to the estate after the widow's death, repudiate his action and sue for possession of the property alienated by the widow—*Fateh Singh v. Rukmini*, 45 All. 339 (F.B.). *Rangaswami Gounden v. Nachrappa Gounden*, A.I.R. 1918, P.C. 196, 202; *Sahu Madhudas v. Mukand Ram*, A.I.R. 1955 S.C. 481. A gift made by a Hindu widow of her husband's property in favour of a person with the consent of the next reversioner is valid on the principle of estoppel as against the particular reversioner who consented to it—*Basappa v. Fakirappa*, 46 Bom. 292.

46. **Chance of Legacy:**—Although contracts to make testamentary

dispositions are valid, the person in whose favour such a contract exists cannot transfer his supposed right under the contract to a third person, and the latter cannot, on the strength of such a transfer, sue for a declaration of those rights—*Prag Dat v. Chote Singh*, 9 O.C. 55.

47. “Any other mere possibility of a like nature” :—The words “of a like nature” indicate that the *possibility* referred to herein must belong to the same category as the chance of an heir-apparent or the chance of a relation obtaining a legacy—*Pashupati Venkatapathi v. Venkata Subhadrayamma*, 47 I.C. 563 (Mad.). See also *Solomon v. Official Assignee*, *infra*.

Transfer of the chance of receiving a gratuitous payment at the discretion of an employer for services being or about to be rendered consists of a possibility which is purely a fortuitous possibility. *Solomon v. Official Assignee*, A.I.R. 1939 Rang. 8, 1938 R.L.R. 542, 180 I.C. 399 (*per* Robert, C.J., and Spargo, J.).

The right to receive the offerings made at a temple cannot be transferred, because the chance that future worshippers will give offerings to a temple is a mere ‘possibility’—*Puncha Thakur v. Bindeshri*, 43 Cal. 28, 19 C.W.N. 580, 28 I.C. 675; *Kaniram Ramchandra v. Hazari Dharam Singh*, 1930 Nag. L.J. (Notes) 96. But according to the Allahabad High Court the right to receive the offerings is not so uncertain, variable and limited as to pass out of the conception of law—*Balmukund v. Tula Ram*, 50 All. 394, 26 A.L.J. 185, A.I.R. 1928 All. 721, 113 I.C. 242. This has been followed in Oudh in *Ganpat v. Kashmiri Bank*, A.I.R. 1929 Oudh 444, 120 I.C. 822 and *Bhagwan v. Billeshar*, A.I.R. 1937 Oudh 15, 12 Luck. 358, 164 I.C. 1111.

Where persons sharing the income of a fair held in connection with a *mandir* do not perform any or other sacerdotal functions at the shrine, the right to receive shares of such income is property and is alienable—*Zaharia v. Parameshri*, A.I.R. 1942 Lah. 284, 44 P.L.R. 403.

There is no such thing as a right to scavenge. A mortgage or sale of such a right is not enforceable by a court—*Radhya v. Kamraya*, A.I.R. 1951 M.B. 120. Nor can a custom to claim a right to scavenge and to mortgage or sell such a right be recognized by a Court of law as such a custom is *prima facie* unreasonable, *ibid*.

A vendor’s right to receive the purchase-money, before the sale is completed, is merely a possible right or interest, which cannot be attached or sold—*Ahmaduddin v. Majlis*, 3 All. 12 (14). The future wages or salary of a servant before it is earned is a mere expectancy and not property so as to be capable of being attached or assigned—*Debi Prasad v. Lewis*, 6 A.L.J. 227. As to the attachment of the salary of public officers, see Code of Civil Procedure, sec. 60 (1) (i).

Where A by a deed of annuity agrees to pay during his life time a certain sum every month to the son of his step-mother after her death if he becomes the mutwali of a certain wakf estate and receives the income of the wakf, A’s obligation is not hit by sec. 6 (a)—*Sarfarez Ali v. Ahmad Kamil*, A.I.R. 1944 All. 104, I.L.R. 1944 All. 141.

The right of a Mahabrahman to officiate as priest in funeral ceremonies of Hindus is not a 'mere possibility' and is capable of transfer—*Sukh Lal v. Bishambar*, 39 All. 196, 37 I.C. 661. See also *Raghoo v. Kassey*, 10 Cal. 73. An agreement by quasi-permanent allottee to sell the land when permanent certificate is received under the Displaced persons (Compensation and Rehabilitation) Act, 1944 is not hit by sec. 6 (a)—*Sevaji v. Sardarni Gurdial Kaur*, I.L.R. (1967) Punj. 627.

48. Clause (b)—Right of re-entry :—A right of re-entry always presupposes an estate in the person asserting that right. Therefore, a lessor reserving a right of re-entry on breach of a covenant by his lessee cannot transfer that right by itself—*Smith v. Pankhurst*, 3 Atk. 139. But where the subject matter of the transfer was not the right of re-entry by itself but also the reversion as based on a clause of forfeiture in the lease for non-payment of rent, such transfer was held not to be invalid by reason of this clause—*Vaguran v. Rangayyengar*, 15 Mad. 125. What this clause prohibits is a transfer of a right of re-entry on a breach of a condition subsequent. Such a right of re-entry is different from a right of re-entry on the expiry of the term of the lease. If, however, the lessor transfers not merely a right of re-entry on breach of a condition, but the whole of his interest in the land, the transfer is perfectly valid.—*Vishveshwar v. Mahabaleshwar*, 43 Bom. 28 (33, 35,) 20 Bom. L.R. 767, 47 I.C. 330. The license to enter and take possession of goods the property in which has not passed to the assignee is not capable of being assigned—*In re Davis & Co.*, 22 Q.B.D. 193.

49. Clause (c)—Easement :—In section 4 of the Indian Easements Act (V of 1882), 'easement' has been defined as "a right which the owner or occupier of a certain land possesses as such for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in, or upon or in respect of, certain other land, not his own".

In the Limitation Act (sec. 26), the definition is much more comprehensive and includes what in English law is called a *profit a prendre*, i.e., a right to enjoy a profit out of the land of another.

An easement cannot be transferred apart from the dominant heritage. It is a right ancillary to the enjoyment of the land and cannot be disannexed from it—*Hill v. Tupper*, 32 L.J. Exch. 217. "There can be no easement properly so called, unless there be both a servient and a dominant tenement. An easement must be connected with a dominant tenement"—*Per Lord Cairns, L.J.*, in *Rangelay v. Midland Railway Co.*, I.L.R. 3 Ch. 310.

This clause lays down that there cannot be an easement in gross—*Sital Chandra v. Delanney*, 20 C.W.N. 1158 (1163); *Municipal Board v. Ladlu*, 20 All. 200. The right of certain villagers to hold village fairs in another's land is not alienable—*Ashraff v. Jagannath*, 6 All. 497; so also, a right to hold markets or horse-races in another's land—*Mounsey v. Ismay*, 34 L.J. Exch. 52; similarly, a right to bathe in another's tank (*Channanam v. Manu*, 1 M.L.J. 47) or to place taziah in another's land during the celebration of the Moharam festival (*Mamman v. Kaur Sen*, 16 All. 178) cannot be transferred.

But an easement can be *released* by the dominant owner in favour of the owner of the servient tenement. In such a case the easement is not transferred but extinguished—*Kristodhone v. Nandarani*, 35 Cal. 889, 12 C.W.N. 969.

50. Clause (d)—Interest in property restricted to personal enjoyment :—The prohibitions contained in cls. (d) and (dd) of this section relate to transfers *inter vivos* by act of parties. The prohibition contained therein cannot therefore apply to transfer by operation of law, *i.e.*, by sale in execution of a decree—*Zahiruddin v. Chokkey Lal*, A.I.R. 1952 All. 662.

This clause contemplates cases like service-tenures or the office of an *archaka* in a temple, which is restricted in its enjoyment and cannot be transferred by the office-holder—*Seshappa v. Chandayya*, 37 M.L.J. 402, 53 I.C. 665 (667). An interest restricted to personal enjoyment cannot be transferred, because if its transfer were allowed, it might defeat the object underlying the restriction, and it would be manifestly inconsistent with the presumed intention of its founder—*Juggurnath v. Kishen*, 7 W.R. 266; *Kalicharan v. Mohan*, 6 B.L.R. 727; *Rajah Varma v. Ravi Varma*, 1 Mad. 235 (P.C.). Thus, a grant for the grantee's parwarish for life-time is a grant of an interest restricted in its enjoyment to the grantee personally and is not a creation of a life-estate; the transfer of such a grant is invalid under clause (d) of this section—*Mad. Shahbar v. Har-nath*, A.I.R. 1927 Oudh 436. So also, religious offices, rights of maintenance, service-tenures, etc., cannot be transferred. See below.

The right of enjoyment of a grove is not "restricted in its enjoyment to the owner (original grove-holder) personally". Therefore, a successor of the original grove-holder can transfer the grove, unless there is a local custom or a condition to the contrary—*Sheo Mangal v. Jagan*, 123 I.C. 767, A.I.R. 1930 All. 377 (378).

Where the contract is based on personal considerations, *e.g.*, manufacture of salt by the person with whom the contract is made, the interest in the contract cannot be assigned—*Namasivaya v. Kadir*, 17 Mad. 168, *Toomey v. Rama*, 17 Cal. 115 (122).

Where a sale-deed and an agreement to reconvey are not between the same parties and are independent transactions, the right conferred by the agreement to reconvey being personal is not transferable—*Uthandi v. Raghavachari*, 29 Mad. 307. In a contract of sale of property containing an option to repurchase reserved to the vendor the option is assignable in the absence of a contract to the contrary—*Sinnakaruppa Gorender v. Aruppuswami Gorender*, A.I.R. 1965 Mad. 506.

Where *munafi* rights were not given to a person personally, but were given to him and his descendants in perpetuity, cl. (d) did not apply—*Hari Kishan v. Ratan Singh*, A.I.R. 1934 All. 973, 151 I.C. 562.

Where a settlor creates trust of his property, but reserves some interest as allowance to himself, it is an interest to which cl. (d) does not apply—*Rajamier v. Subramaniam*, A.I.R. 1928 Mad. 1201. See *Shammuga v. Chidambaram*, A.I.R. 1938 P.C. 123, 42 C.W.N. 565, 173 I.C.

772, wherein the Privy Council expressed the same view. Clause (dd) was not applicable in either of the two cases.

Where a property has been given to a Hindu widow in lieu of her maintenance the transfer of such property during her life is valid and is not affected by clauses (d) and (dd).—*Kamal Chunder v. Sushilabala*, 42 C.W.N. 1258, A.I.R. 1938 Cal. 405.

A deed of partition between the father, his wife and three sons of a Mitakshara family provided that after the father's death his four-anna share should remain in possession and occupation of his wife up to her life time with life interest and that she would have a right to appropriate the profits therefrom without a power of making a mortgage or other transfers : held that her interest under the deed was an interest in the property restricted in its enjoyment to the owner personally within clause (d) of this section and was therefore not transferable—*Luchmeshwar v. Mt. Moti Rani*, A.I.R. 1939 P.C. 157.

51. Religious office :—A priestly office with emoluments attached to it is inalienable.—*Mahamaya v. Haridas*, 42 Cal. 455. Any such alienation is void and may be declared void even at the instance of the alienor—*Nagendra v. Rabindra*, A.I.R. 1926 Cal. 490. Such an assignment being for the pecuniary advantage of the trustee cannot be validated by any proof of custom—*Raja Verma v. Ravi Verma*, 4 I.A. 76. A Mchunt of a mutt cannot transfer the right of management vested in him, though coupled with the obligation to manage in conformity with the trust annexed—*Prayad Das v. Kriparam*, 8 C.L.J. 499. It would be contrary to public policy to allow priestly offices to be transferred either by private sale or by sale in execution of a decree—*Mallika v. Ratanmani*, 1 C.W.N. 493. Thus, the right of a shebait of a Hindu idol to perform the services and receive the customary remuneration is not transferable—*Juggurnath v. Kishen*, 7 W.R. 266; *Drobo v. Srineebash*, 14 W.R. 409. The office of a Mutwalli or Sajjadanashin, is a personal trust, and the office may not be transferred nor the endowed property conveyed to any person whom the acting mutwalli may select—*Wahid Ali v. Ashroff*, 8 Cal. 732; *Sarkum v. Rahaman*, 24 Cal. 83; *Haji Ali Mahomed v. Anjuman-Islamia*, 12 Lah. 590, A.I.R. 1931 Lah. 379 (382); *Sahed v. Golam*, 20 C.W.N. 996. The right of a purohit to perform religious ceremonies at a partiucular place or temple cannot be the subject of transfer—*Rajaram v. Ganseh*, 23 Bom. 131; *Raja Varma v. Ravi Varma*, 1 Mad. 235; *Ganasambandha v. Velu*, 23 Mad. 271, 27 I.A. 69. The hereditary right of a village joshi to perform religious ceremonies at his jajman's house is not transferable—*Waman v. Balaji*, 14 Bom. 167. A right to receive voluntary offerings made at the worship by votaries resorting to a temple or shrine is not transferable—*Dinonath v. Pratap*, 27 Cal. 30; *Rameshuvar v. Ishan*, 10 W.R. 457; *Shailaja v. Peary*, 29 Cal. 470; *Puncha Thakur v. Bindeswari*, 43 Cal. 28, 19 C.W.N. 580; *Nityagopal v. Provasch*, 47 Cal. 990, 31 C.L.J. 37; *Paragi v. Guori*, 6 O.L.J. 157, 51 I.C. 86; *Kashi v. Kailash*, 26 Cal. 356. But a sale of the *Jajmani bahis* (i.e., books in which lists are kept of pilgrims who visited the place in past years) is not forbidden by this clause because the sale is only a sale of the books as such and does not confer on the purchaser

the right to act as the hereditary guide of the pilgrims—*Gopi Nath v. Jhandu*, 4 A.L.J. 712.

A shebaitship cannot be transferred unless the transaction amounts to a renunciation by the shebait of his *entire* rights resulting in the acceleration of the interests of persons next in the line of succession—*Bameshwar v. Anath Nath*, A.I.R. 1951 Cal. 490, 84 C.L.J. 237. Whether a *pala* is a property or not, it is not alienable except by custom. If the *pala* represents shebaiti right, then *palas* cannot be transferred except when such transfer amounts to renunciation, *ibid.*

As a general rule, *vrittis* are inalienable. They may be alienated in special cases and under special conditions, provided that such alienation can be supported by local usage or custom—*Manjunath v. Shankar*, 39 Bom. 26. *Utpat vritti* shares having been frequently transferred among the *utpats* themselves, they are saleable—*Digamber v. Hari*, A.I.R. 1927 Bom. 43, 29 Bom. L.R. 102, 100 I.C. 1008.

The holding of *birat jajmani* is not *per se* the holding of a religious office, for apart from the occasion when necessity arises to officiate as a priest, the Purohit does not hold any office—*Chandī v. Rampratap*, A.I.R. 1953 Raj. 144. In *Sarda Kumwar v. Gajanand*, A.I.R. 1942 All. 320, it has been held that the right of a *birat jajmani* is a right in property and that is heritable and in some cases transferable.

Emoluments attached to a priestly office, being inseparably connected with the office are not ordinarily transferable, but the offerings to a diety are alienable if the persons receiving them are not required to render services of a personal nature—*Balmukund v. Tula Ram*, 50 All. 394, A.I.R. 1928 All. 721, 113 I.C. 242; *Subh Ram v. Ram Kishan*, A.I.R. 1943 Lah. 265. See also *Ahmad v. Ilahi*, 34 All. 465.

In the absence of any custom to the contrary or connection between the shares of the offerings of a temple and the right to officiate as a priest thereof, the shares cannot be said to be emoluments attached to the office and are therefore transferable—*Nand v. Ganesh*, A.I.R. 1936 All. 131.

Although ordinarily religious offices cannot be the subject of sale, by the custom of a small particular institution such alienation might be valid—*Rangasami v. Ranga*, 16 Mad. 146. Thus, where it is found that *mirasi* offices in a temple had been the subject of frequent alienations and the temple authorities recognised their validity, the alienation of such offices can be upheld—*Ibid.* To hold the poles of the god's seat when taken in procession is a religious office alienable by custom of the institution—*Ibid.* The alienation of the priestly office to a person belonging to the founder's family and standing in the line of succession to him is sometimes allowed—*Sitarambhat v. Sitaram*, 6 B.H.C.R. 250; *Mancharam v. Pransankar*, 6 Bom. 298. The Madras High Court has held that a sale of a religious office to a person not in the line of heirs of the founder is illegal—*Kuppa v. Dorasami*, 6 Mad. 76. In a later case the Bombay High Court has considered all the rulings and come to the conclusion that where the members of a family are entitled to religious office (right to perform worship in a temple), one member of the family can

transfer or surrender his share of the office and emoluments only in favour of the remaining members of the family, but not in favour of an outsider or even in favour of the original grantor or his heirs—*Raghnath v. Purnanand*, 47 Bom. 529 (533), A.I.R. 1923 Bom 358.

A *pala* or turn of worship is not transferable except by custom—*Mohamaya v. Haridas*, 42 Cal. 455. Where by custom a right to perform puja by turns is conferred on Brahmins only, the transfer of such a right to a non-Brahmin is not valid—*Jagdeo v. Ram Saran*, A.I.R. 1927 Pat. 7. In a subsequent case where there was an alienation of a *pala* or turn of worships only, apart from the debutter land, and evidence was adduced of instances of alienation along with the debutter land, the Calcutta High Court held that no custom of alienating the *pala* apart from the debutter land was established—*Nitya Gopal v. Nani Lal*, 47 Cal. 990.

The office of a *maha brahman* who officiates at the funerals of Hindus, or of a *brit acharje*, is a right to perform personal service and as such is inalienable—*Durga v. Shambhu*, 41 All. 656. But a *Maha Brahman* is entitled to mortgage his right to offerings receivable by him in his professional capacity—*Sukh Lal v. Bishambhar*, 39 All. 196.

52. Right of pre-emption :—The Mahomedan law of pre-emption has long been judicially recognized as existing among Hindus in Bihar—*Jadu v. Janki*, 39 Cal. 915 (P.C.). The right of pre-emption is a purely personal right which cannot be transferred to any one except the owner of the property affected thereby—*Jasudin v. Sakharam*, 36 Bom. 139; *Rajjo v. Lalman*, 5 All. 180 (183). The pre-emptional property, and not the *decree* can be transferred—*Ram Sahai v. Gaya*, 7 All. 107 (111). But where a person has obtained a conditional decree for pre-emption, he can mortgage his rights under the decree to a stranger to raise funds to pay the purchase money—*Bela Bibi v. Akbar Ali*, 24 All. 119.

A right of pre-emption does not exist independently of its exercise so as to invalidate transactions which take place in defiance of it—*Madho Singh v. Skinner*, A.I.R. 1941 Lah. 433 (F.B.) at p. 436, 43 P.L.R. 581. Under Or. 20, r. 14, C. P. Code a claim to pre-emption, if decreed, becomes effective only when the money is paid into Court and the vendee is entitled to the rents and profits so long as the purchase money is not paid—*ibid*; see also *Deonandan v. Ramdhari*, 44 Cal. 675 P.C., 44 I.A. 80; *Md. Akram v. Md. Azim*, 4 Lah. 137, A.I.R. 1923 Lah. 451, 73 I.C. 318 and *Nadir Ali v. Wali Amir*, 5 Lah. 486, A.I.R. 1925 Lah. 202, 85 I.C. 182.

A resale by the vendee in favour of a person possessing equal rights with the pre-emptor, thus leading to a dismissal of the pre-emptor's suit, is valid—*Madho Singh v. Skinner*, *supra*; see also *Moolchand v. Ganga Jal*, A.I.R. 1930 Lah. 356. But where a vendee having an equal right of pre-emption associates with himself in a joint purchase a stranger, he loses his right of pre-emption and cannot be allowed to retain even his own share of the purchase; but if the vendee during the pendency of the suit removes the defect by purchasing the stranger's share, the pre-emptor cannot succeed irrespective of the fact that the subsequent acquisition has taken place after the period of limitation—*Ali Mohammad*

v. *Mohammad Din*, A.I.R. 1941 Lah. 444 (F.B.) at pp. 446, 447, 43 P.L.R. 566.

53. Clause (dd)—Right to receive maintenance :—A right to receive maintenance, which originally fell under clause (d) of this section (interest in property restricted to personal enjoyment) has now been specially provided for by the new clause (dd), and has been declared to be inalienable.

In some circumstances an allowance may be paid in lieu of maintenance and in others the person entitled to maintenance gives up that right in consideration of a promise to pay an allowance. This distinction should always be borne in mind—*Mahbub Ali v. Mahammad*, A.I.R. 1944 All. 212, I.L.R. 1944 All. 299. See also *Nageshwar v. Chhotey Lal*, A.I.R. 1944 All. 91, I.L.R. 1944 All. 216. Where the trustees under a will were not under any obligation to maintain R, no question of a right to future maintenance arose. The allowance was an annuity like any other and was transferable, *ibid.*

Since under cl. (dd) a right to future maintenance in whatsoever manner arising, secured or determined, cannot be transferred, it is immaterial whether the right was acquired under a deed for the first time or not—*Ashfaq Md. v. Nazir Banu*, A.I.R. 1942 Oudh 410. A right to future maintenance, in order to be non-attachable under sec. 60 (1) (n), C. P. Code and non-transferable under the present clause should be personal as distinguished from heritable, *ibid.* A heritable *khorphosh* grant to appropriate the income of certain villages by way of maintenance was given by a proprietor of an impartible raj to the ancestor of the judgment-debtor : *held* that in the absence of proof of any special custom in the family, it was a case of an assignment of property in lieu of maintenance, and therefore cl. (dd) did not apply—*Ram Prasad v. Motiram*, A.I.R. 1947 Pat. 404, 25 Pat. 705.

A right to future maintenance cannot be transferred—*Bala Prasad v. Ajodhya Prasad*, A.I.R. 1952 Pat. 78. The right of maintenance which a Hindu widow has out of lands which belonged to her husband and has devolved on her son, is a purely personal right and cannot be transferred—*Bhyrub v. Nabo Chunder*, 5 W.R. 111. The husband's duty of maintaining his wife is one which he cannot owe to another. Her right as against him is one that she cannot transfer to another—*Narbadabai v. Mahadeo*, 5 Bom. 99. A right to receive future maintenance can neither be attached in execution of a decree nor transferred under clause (d) or (h)—*Palikandy v. Krishnan Nair*, 40 Mad. 302 (307). Where a widow who had succeeded as heir to the property of her husband by a registered deed surrendered her life-interest in the property to the nearest reversioner, who in return agreed to maintain her, *held* that the right to maintenance thus conferred on the widow was purely 'personal' to her within clause (d) and was not transferable—*Subraya v. Krishna*, A.I.R. 1924 Mad. 22. Similarly where a Mahomedan transferred the whole of his property to his daughter for a certain sum, the daughter entering into an agreement undertaking to pay a certain sum annually to the father, as long as he lived, it was *held* that the right to receive it was not assignable—*Bibi Haliman v. Bibi Umadatunnissa*,

A.I.R. 1939 Pat. 506 (509), 181 I.C. 37. The right given under a deed of wakf to a beneficiary to receive a certain amount periodically during his life time for maintenance is covered by sec. 6 (dd) and sec. 60 (1) (n) C.P.C.—*Zahiruddin v. Chokkey Lal*, A.I.R. 1952 All. 662. In England also it has been held that alimony granted to a separated wife is not alienable by her—*Watkins v. Watkins*, [1896] Prob. 222. But where in discharge of the obligation a maintenance-grant is made to the widow, there can be no prohibition against the transfer of the grant; and if in the grant there is any stipulation restraining alienation, such stipulation is void under sec. 10—*Singai v. Baji Rao*, 14 C.P.L.R. 114. *Ram Chandra v. Gopianth*, 29 I.C. 251 (Cal.). Property granted in lieu of a right to maintenance may be transferred, for the period of the limited interest, in the absence of any restriction of alienation in the deed of grant—*Balkrishna v. Paj Singh*, A.I.R. 1930 All. 593 (594); *Dhup Nath v. Ram Charitra*, A.I.R. 1932 All. *Kamal Chunder v. Shushilabala*, A.I.R. 1938 Cal. 405.

It was held prior to the insertion of this clause, that an annuity by way of maintenance charged upon the estate was alienable whether by voluntary or involuntary transfer—*Murlidhar v. Mulchand*, 52 I.C. 953 (Nag.); *Rajat Kamini v. Satyanirajan*, 23 C.W.N. 824. So also, where the claim of maintenance based on an agreement merged in a decree, the right under the decree was held to be assignable—*Asad Ali v. Haider Ali*, 38 Cal. 13; *Raja of Kalahasti v. Venkatappa*, A.I.R. 1928 Mad. 713; *Seshappa v. Chandayya*, 37 M.L.J. 402; *Annapurni v. Swaminatha*, 34 Mad. 7 (9), 6 I.C. 439. But these cases are no longer good law in view of clause (dd) which expressly prohibits the alienation of a right to maintenance, in *whatsoever manner arising, secured or determined*.

There is however a distinction between a maintenance allowance and an annuity. Whether an allowance is the one or the other depends upon the facts of each case—*Aniruddh v. Official Receiver*, A.I.R. 1942 Cal. 241, 74 C.L.J. 528; see also *Subraya v. Krishna*, 46 Mad. 659 (F.B.), 46 M.L.J. 533, A.I.R. 1924 Mad. 22; *Altap Begam v. Brij Narain*, A.I.R. 1929 All. 281, 1929 A.L.J. 367, 51 All. 612. Where the testator had vast properties and he practically disinherited his son giving him only so much as was necessary for his maintenance, held, that it was a maintenance grant and the moneys not accrued due could not be transferred—*Aniruddh v. Official Receiver*, supra at p. 243.

A right to future maintenance as contemplated by the Legislature in cl. (dd) means a personal right for maintenance or personal enjoyment of the grantee, and does not include a heritable interest in land—*Sharif v. Hunter*, A.I.R. 1937 Oudh 420 (421-22), 167 I.C. 52. The right of a Hindu widow to claim maintenance out of her husband's estate when it has not crystallized into a definite sum, is an inchoate right which cannot be transferred. The claim is personal and consequently if she dies pending her suit for maintenance against the estate of her husband in the hands of a coparcener, the claim does not survive to her legal personal representative—*Muthalammal v. Veeraraghavalu*, A.I.R. 1953 Mad. 202, (1952) 2 M.L.J. 344. But whereby a preliminary decree in a suit for partition provision is made for the maintenance of three defendants, one of whom is the mother of the other two, mainten-

ance arrears due to the mother can be claimed by the two sons after the death of the mother because they are claiming not any future right to maintenance but arrears of maintenance that had already accrued due—*Dhan Pala v. Krishna Chettiar*, A.I.R. 1955 Mad. 165.

Where a settlor creates a trust of his property, but reserves some interest in the property as allowance to himself, such allowance does not fall under clause (d) or (dd) and is alienable—*Rajamier v. Subramanian*, A.I.R. 1928 Mad. 1201.

Babuana land or property granted by the Maharaja of Durbhanga to junior members of the Raj family to be enjoyed by them in lieu of money maintenance is alienable by custom, subject to the proprietary right of the grantor and to his ultimate claim as reversioner, on extinction of the grantee's descendants in the male line—*Rameshwar v. Jibendar*, 32 Cal. 683; *Ramachandra v. Mudeshwar*, 33 Cal. 1158 (1161); *Durgadut v. Rameshwar*, 36 Cal. 943 (P.C.).

Arrears of maintenance :—Arrears of maintenance which have accrued due can be assigned—*Seshappa v. Chandayya*, 37 M.L.J. 402; *Asad Ali v. Haidar Ali*, 38 Cal. 13; *Bibi Haliman v. Bibi Umadatunnissa*, A.I.R. 1939 Pat. 506 (508); *Province of Orissa v. Venkata Rangamma*, A.I.R. 1950 Or. 220.

Right of residence :—The right of residence is intimately connected with the right of maintenance and follows the same rule. It is neither capable of voluntary transfer, nor can it be attached and sold in execution of a money decree—*Nanak Chand v. Kishen Chand*, 1 P.L.R. 209.

Creditor's right to have a receiver appointed :—In *Lal Rajindra v. Sundar Bibi*, A.I.R. 1925 P.C. 176, their Lordships of the Judicial Committee has held that the right of maintenance granted by one brother to another by a compromise decree is not saleable in execution of a decree obtained by a creditor, who can, however, apply for the appointment of a receiver with authority to realise the rents and profits and pay out a sufficient sum out of the same for the maintenance of the judgment-debtor and apply the balance, if any, to the liquidation of the decretal dues.

Where a plaintiff suing as a pauper obtains a charge decree for maintenance, a receiver may be appointed at the instance of the Government to recover the court-fee leaving adequate provision for the plaintiff—*Province of Orissa v. Venkata Rangamma*, supra.

54. Service tenures :—A ghatwali tenure is inalienable because its income must remain unimpaired to enable each succeeding ghatwal to discharge efficiently his duty of guarding the land against the invasion of hillmen and others—*Narain v. Badi Roy*, 29 Cal. 227 (229). A ghatwali tenure is inalienable in the absence of proof of local custom—*Narayan v. Satya Niranjan*, 51 I.A. 37, A.I.R. (1924) P.C. 183; *Purna v. Soudamini*, 28 C.L.J. 283; *Nilmoni v. Bakranath*, 9 Cal. 187 (P.C.). On this principle, the attachment of the future rents and profits that may become due to a ghatwal, in execution of a decree against him, is prohibited—*Udoy Kumari v. Hari Ram*, 28 Cal. 483 (485). A ghatwali tenure,

however, loses its character of inalienability when the services have been commuted by money payment, or the tenure on military service has been abolished—*Bansidhar Sharaff v. Thakur Asutosh Deo*, A.I.R. 1925 Pat. 346 (services commuted by money payment); *Appayasami Naicker v. Midnapore Zamindari Co.*, 48 I.A. 100, A.I.R. 1922 P.C. 154 (Military service abolished).

Inam lands granted to a person on condition that he will perform *swastivachakam* service in a temple and that he and his family should enjoy the inam so long as they perform the service are not transferable, because if the inamdar is allowed to transfer the inam he would be without any means to support himself and to perform the services of the temple—*Anjaneyulu v. Sri Venugopala*, 45 Mad. 620, A.I.R. 1922 Mad. 197, 70 I.C. 466, 42 M.L.J. 477. A chowkidar in Bengal holding chakran lands can induct a tenant who may acquire a right of occupancy in the lands, which will not be affected even if the lands are resumed by the Government—*Ram Kumar v. Ram Nawaj* 31 Cal. 1021, 8 C.W.N. 860.

56. Clause (e)—Mere right to sue :—Cf. clause (e) of section 60 (1), C. P. Code, under which a mere right to sue for damages is not attachable.

A right to sue is not transferable. Consequently, the sale of a right to sue for immoveable property does not confer on the vendee any title to immoveable property, and the vendee cannot sue for possession—*Nazir Hassan v. Mutinuzzaman*, 11 O.L.J. 672, A.I.R. 1925 Oudh 299 (300). "How can there be", as observed by the Privy Council, "any such transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession and to which he may never establish a title"—*Perhlad Sein v. Rajendra*, 12 M.I.A. 292 (307). But the transfer of a *property* which is the subject-matter of a litigation is not a transfer of a mere right to sue, although the transfer necessarily carries with it the right to sue—*Khudiram v. Shomnath*, A.I.R. 1933 Cal. 454. When a manager of a joint family property alienates the property for himself and his minor brother, the alienee is entitled to sue, as it is not a transfer of a mere right to sue—*Hanmantappa v. Dandappa*, A.I.R. 1934 Bom. 234; *Pethu v. Kandswami*, A.I.R. 1950 Mad. 560.

When a minor's property is sold by his natural guardian without legal necessity and the purchaser goes into possession and is still in possession, all the interest which the minor possesses in the property is a mere right to sue to have the sale set aside and a transfer of such a right is prohibited under this clause—*Man Mohan v. Bidhu Bhusan*, A.I.R. 1939 Cal. 460. But in a recent case the Madras High Court has held that in such a case the ex-minor transfers not a mere right to sue but his interest in the property, though a suit may be necessary to avoid the transfer by the guardian and recover possession of the property from the alienee—*Palaniappa v. Naliappa*, A.I.R. 1951 Mad. 817. It may however be pointed out that in the Calcutta case the minor's property was sold by his natural guardian, whereas in the Madras case the minor's property was sold by his de facto guardian. The view of the Madras High Court has been accepted by the Andhra High Court in *K.*

Nagabhushana Rao v. K. Gowramma, (1968) 2 An. W.R. 57 and also by the Patna High Court in *Sadhu Saran v. Sheo Prasad*, A.I.R. 1959 Pat. 278. Where an ex-minor, instead of challenging within 3 years of his attaining majority alienation of property made during his minority by his guardian, transfers the property to a third person after expiry of the said period of 3 years, the transfer is of nothing more than a mere right to sue and therefore without effect—*Natha v. Thakur*, A.I.R. 1939 Oudh 122, 1939 O.W.N. 241, 180 I.C. 329.

An action for damages in tort is not transferable and an owner cannot bring an action for damages in tort for trespass committed on the premises, before he becomes the owner thereof—*Sri Sri Iswar Gopal Jew v. Globe Theatres, Ltd.*, A.I.R. 1947 Cal. 200. But the purchaser of immoveable property in the possession of a trespasser can sue for mesne profits that accrued due before his purchase—see the cases noted in the last paragraph. A mere right to sue for damages for injury caused by a wrongful act, such as a wrongful attachment of moveable property in execution of a decree, is not transferable—*Pragi Lall v. Fateh Chand*, 5 All. 207; *Parma Sah v. United Provinces*, A.I.R. 1939 Oudh 196.

A right to recover *mesne profits* is a mere right to sue and is not transferable—*Durga v. Kailash*, 2 C.W.N. 43; *Seetamma v. Venkataramanayya*, 38 Mad. 308; *Jai Narayan v. Kishun Dutta*, A.I.R. 1924 Pat. 551; *Dayadaru v. Arigapudi*, A.I.R. 1927 Mad. 817; *Shyam Chand v. Land Mortgage Bank*, 9 Cal. 695; *Parma Sah v. United Provinces*, supra; *Thoma v. Govindakurup*, A.I.R. 1951 Tr.-Coch. 180; *Bhag Singh v. Dan Singh*, 69 Pun. L.R. 759.

But where the *property itself* is sold together with the mesne profits, the transfer is valid. An assignment of a mere right to sue does not convey any property, e.g., if a person out of possession of immoveable property makes an assignment to the effect that the assignee would have a right to sue, without conveying any interest in the property, the assignee would not be entitled to maintain any suit for the recovery of the property. But it would be otherwise if the *property itself* is transferred—*Monmatha v. Matilal*, A.I.R. 1929 Cal. 719; *Ganga Din v. Piyare*, A.I.R. 1929 All. 63; *Shankarappa v. Khatumbi*, A.I.R. 1932 Bom. 478; *Susat v. Ramaswami*, A.I.R. 1933 Mad. 710; *Thoma v. Govindakurup*, supra; *Muralidhar v. Rupendra*, A.I.R. 1953 Cal. 321. Where the properties of A Company are transferred to C Co. during the pendency of a suit by A Company for damages or a breach of contract, C Company can proceed with the suit on substitution—*New Central Jute Mills Co. Ltd. v. Rivers Steam Navigation Co. Ltd.*, A.I.R. 1959 Cal. 352. "Where the right of action was not a bare right but was incident or subsidiary to a right in property, an assignment of the right of action was permissible, and did not savour of champerty or maintenance"—*per* Scrutton, L.J., in *Ellis v. Torrington*, [1920] 1 K.B. 399 (411). The distinction, however, was not noticed in *Seetamma v. Venkataramanayya*, 38 Mad. 308, which was a suit for recovery of *property as well as* mesne profits. A transfer of the right to recover profits which arose out of the land along with the transfer of the land itself is not hit by sec. 6 (e)—*Gangaraju v. Gopala*

Krishnamurthi, A.I.R. 1957 And. Pra. 190 (F.B.); *Albion Jute Mills v. Rivers Steam Navigation Co.*, (1957) 100 C.L.J. 70.

Similarly, where the plaintiff purchased a tank and along with the vendor's right to sue the defendant, owner of the subjacent colliery, for the subsidence of the tank held that what was purchased was not a mere right to sue but a property with an incidental remedy to recover damages for subsidence—*Jagannath v. Kalidas*, 8 Pat. 776, 10 P.L.T. 191, A.I.R. 1929 Pat. 245 (247), 120 L.C. 626; *Radha Govinda v. Khas Dhar-maband Colliery*, A.I.R. 1963 Pat. 160.

Where certain property was entrusted to an agent for collection of the rents and profits, and the agent fails to pay balance due after rendering accounts, the claim of the principal is in essence a claim for property. Where such a claim is assigned, it is an assignment of property in the hands of the agent and not an assignment of a mere right to sue—*Sheikh Muhammad v. Bathummal*, A.I.R. 1948 Mad. 458.

The right to recover an *ascertained* and *definite* debt is not a mere right to sue and is transferable. It is an actionable claim. The principle is, that if a *certain* sum of money is due from any person, that sum is recoverable on assignment; the right to recover the money is not a mere right to sue and the transfer of such a right does not offend against section 6 (e) of the T. P. Act. But if that sum is to be ascertained only on taking accounts it might be that the right to take the accounts is not assignable—*Ramaseshiah v. Ramiah*, A.I.R. 1926 Mad. 417, following *Subhadramma v. Venkatapati*, A.I.R. 1924 P.C. 162. As regards actionable claims see *Manmatha v. Hedait Ali*, A.I.R. 1932 P.C. 32; *Baijnath v. Parmeshwari*, A.I.R. 1934 Oudh 240; *Nagappa v. Badridas*, A.I.R. 1930 Bom. 409; *Muthu v. Achu*, A.I.R. 1934 Mad. 461. But the assignee of a debt, so far as the claim to interest due before the date of assignment is concerned, purchases a mere right to sue which is not transferable under this clause—*Baijnath v. Parmeshwari*, supra. Cl. (e) must be read in conjunction with sec. 130 and sec. 3. The definition of 'actionable claim' has been extended to include such equitable choses in action as debts or beneficial interests in moveable property, whether existent, accruing, conditional or contingent. A 'debt' is an obligation to pay a liquidated or certain sum of money—*Tikam Singh v. Bhola Nath*, A.I.R. 1937 All. 470 (471-72). Where a sale is set aside, a contract to repay the purchase-money is an implied term of the contract of sale. The right of the vendee to claim an enforcement of this contract is an actionable claim and is therefore clearly assignable. *Chinnapareddi v. Venkataramanappa*, A.I.R. 1924 Mad. 209. An assignment by the assured to the insurer of his rights and remedies not being a transfer of a mere right to sue enables the insurer to sue in his own name—*Vasudeva Mudaliar v. Caledonian Insurance Co.*, A.I.R. 1965 Mad. 159. See also *Union of India v. Alliance Assurance Co. Ltd.*, 66 C.W.N. 419.

There cannot be an assignment of a suit which has been filed for the purpose of recovering damages either in contract or in tort. It is lawful however to a plaintiff in a pending suit to assign the benefit which he may obtain under the decree to be passed in the suit—*Rajamanickam v. Abdul Halim*, A.I.R. 1941 Mad. 389; see also *Purna Chandra v. Barna Kumari*, A.I.R. 1939 Cal. 715. But this does not give the assignee of

the fruits of the action the right to interfere in the proceedings in the action—*Rajamanickam v. Abdul Halim*, supra.

The words "right to sue" not only refer to rights to damages arising out of *torts*, but also include rights arising out of *contracts*. Thus, a right to sue the *gomasta* (agent) for accounts (which is a right *ex contractu*) falls under this clause and is unassignable—*Kshetra Mohan v. Biswa Nath*, A.I.R. 1924 Cal. 1047; *Kalusa v. Madhorao*, A.I.R. 1926 Nag. 357. (Contra—*Churamoni v. Rajendra*, 42 I.C. 390). The right of a person to recover damages (whether liquidated or unliquidated) for the breach of a contract is a right to sue within the meaning of this section and is not capable of being transferred—*Janglimal v. Pioneer Flour Mills*, 106 P.R. 1914, 27 I.C. 115; *Abu Muhammad v. S. C. Chunder*, 36 Cal. 345; *Jewan Ram v. Ratan Chand*, A.I.R. 1921 Cal. 795; *Hira Chand v. Nem Chand*, A.I.R. 1923 Bom. 403; *Yadavendra v. Srinivasa*, A.I.R. 1925 Mad. 62; *Gopala v. Ramaswami*, 21 M.L.J. 153, 22 M.L.J. 207; *Chiman Mal v. Ganesh*, A.I.R. 1951 Raj. 187. *Moti Lal v. Radhey Lal*, A.I.R. 1933 All. 642, (646, 647); *Shahrukh v. Sheo Prasad*, 41 I.C. 435; *Nakhela v. Kokaya* A.I.R. 1923 Nag. 67 (68); *Gerimal v. Raghunath*, A.I.R. 1921 Sind 59; *Mt. Powri v. Shiva*, A.I.R. 1935 Nag. 2. But see *Bans Gopal v. P. K. Banerje*, A.I.R. 1949 All. 433. It has been held in this case that where the Official Receiver has become entitled to the benefits of a contract between the insolvent and another person, the right to sue for damages for breach of the contract in his hands will not be a mere right to sue for damages. An executory contract for the future sale of immoveable property is, however, not a mere right to sue, although a right to sue is involved in it on breach of its conditions. But where at the time of execution of the assignment deed by the vendee, the assignor is aware that the contract was incapable of execution, what he assigns is not an executory contract, but a claim in respect of compensation for breach thereof and hence a mere right to sue—*Punjaram v. Hariso*, A.I.R. 1934 Nag. 268. The benefit of a contract, that is, the beneficial right or interest of a party under the contract and the right to sue to recover the benefits created thereby are, however, assignable provided that, (a) the benefit is not coupled with any liability or obligation that the assignor is bound to discharge, and (b) that the contract has not been induced by personal qualifications or considerations as regards the parties to it—*Nathu v. Hansraj*, 9 Bom. L.R. 114; *Jaffer v. Budge-Budge Jute Mills Co.*, 33 Cal. 702. See also *Bhabhootmal v. Moolchand*, A.I.R. 1943 Nag. 266. The right of the mortgagor to sue the mortgagee for the balance of the consideration which has not been paid by the mortgagee is a right to obtain damages for breach of the agreement to lend money, and is a right to sue within the meaning of this clause, such a right cannot be assigned and the transferee of the right cannot sue the mortgagee for the money—*Yadavendra v. Srinivasa*, A.I.R. 1925 Mad. 62. But where A, after mortgaging his property to B, subsequently sells it to C, who retains part of the purchase money for payment of B's mortgage but does not pay it, A has a charge on the property until the amount is paid, and his right to recover the unpaid purchase money from C is not a mere right to sue, but is assignable at law—*Nathu Mali v. Bansaji*, A.I.R. 1931 Nag. 89 (90). But in a later case of the same High Court where the mortgagee accepted the liability to pay off the mortgagor's creditors as part of the consideration for the mortgage but

failed to do so, it was held that the mortgagee committed a breach of his agreement with the mortgagor which gave rise to a right to claim damages and so the mortgagor was not entitled to recover the sum as a debt and it could not be treated as an actionable claim—*Mohanlal v. Motilal*, A.I.R. 1935 Nag. 135. A right to sue for the remainder of the maintenance allowance that may fall due in future cannot be transferred—*Altaf Begum v. Brij Narain*, A.I.R. 1929 All. 281 (285). But it has recently been held by the Patna High Court that a right of maintenance in a definite sum of money cannot be a mere right to sue. It may not be attachable under cl. (n) to sec. 60 (1), C. P. C., but that is not sufficient to bring it within cl. (e), for it will, in case of breach, support a suit for a debt and not for damages—*Mt. Alimunnissa v. Abdul Aziz*, A.I.R. 1936 Pat. 527, 165 I.C. 298. A right to recover damages from the purchaser for breach of contract to purchase goods is not an actionable claim but a right to sue, and cannot be transferred—*Hira Chand v. Nem Chand*, A.I.R. 1923 Bom. 403. But the right to recover earnest money paid under a broken contract is not a mere right to sue. It is a claim for an ascertained amount and can be transferred as an actionable claim—*Chiman Mal v. Ganesh*, A.I.R. 1952 Raj. 187. A claim to recover damages from an agent for negligence in collecting rents (whether the claim is viewed as one for compensation for breach of contract or as one founded on tort) is a mere right to sue and cannot be transferred—*Varahata-swami v. Rama Chandra*, 38 Mad. 138. A claim to damages for use and occupation from a tenant continuing on the land after the expiration of the lease without the landlord's consent, is a mere right to sue for damages and is not transferable—*Govindaswami v. Ramaswami*, 30 M.L.J. 492, (reversing on appeal *Govindaswami v. Ramaswami*, 31 I.C. 604). Where a person sues not for recovery of the actual crops, but for compensation for wrongful appropriation of the crops by the defendant in violation of an agreement, the suit is professedly one for damages resulting from breach of contract. Such a right of action is purely personal and incapable of assignment or attachment—*Liladhar v. Nago*, A.I.R. 1933 Nag. 6 (9). A contract of service, being a personal contract, is not assignable before breach, as the transfer would be of a mere right to sue—*Karam Khan v. Dangushti*, 47 I.C. 902 (Nag).

Sales by an Official Assignee of lands in possession of alienees from an insolvent as being part of the insolvent's estate are in substance, if not in form, nothing more than sales of the right to litigate, and assuming that they do not come within the prohibition in the Transfer of Property Act against the transfer of a mere right to sue, they are open to the same objection and are strongly to be deprecated—*Chockalingam v. Seethai Ache*, A.I.R. 1927 P.C. 252.

If what was attached had not accrued due at the date of the attachment, then what is later sold in virtue of the attachment is a mere right to sue—*Jagannath v. Jamnaballabh*, A.I.R. 1939 Nag. 97.

A right to recover money fraudulently omitted to be accounted for in a partition is not a mere right to sue but is an interest in property and therefore an actionable claim. Neither a mere uncertainty as to the amount to be recovered, nor the fact that it may be neces-

sary to look into the accounts settled makes the right a mere right to sue—*Ramiah v. Rukmani*, 24 M.L.J. 313, 18 I.C. 138. A right to recover past profits of a partnership on taking accounts is not a mere right to sue but is an actionable claim, and is transferable—*Shrinath v. Kanhaiyalal*, A.I.R. 1924 Nag. 145. A right to reconveyance of land is property and not a mere right to sue, and can be attached and sold in execution—*Narasingerji v. Panaganti*, A.I.R. 1921 Mad. 498. A right to contribution is not a mere right to sue for damages and is assignable—*Ramaswami v. Deivasigamani*, A.I.R. 1922 Mad. 397. Where the vendee in a contract of sale of land transfers his rights under the contract, the transfer is not a mere right to sue, although a right to sue is involved in it on breach of its conditions. The transfer is therefore not invalid under this clause—*Akhtar Beg v. Haq Newaz*, A.I.R. 1924 Lah. 709 (711); *Venkateswara v. Raman*, 3 L.W. 435 (439), 33 I.C. 696; *Venkateswara v. Raman*, 3 L.W. 435, 33 I.C. 696. Where the mortgagor left with the mortgagee a portion of the consideration money, with the understanding that the same should be paid to him whenever he so required, and subsequently the mortgagor assigned his rights regarding the same held that what was transferred was a mere right to sue which is non-transferable under this clause—*Indar v. Raghubir*, A.I.R. 1930 Oudh 88. A transfer of the share of the profits of a village which have at the time actually accrued due, is an assignment of a debt and not of a right to sue, and is therefore not bad in law, although the transfer of a right to sue is a necessary incident of the transaction—*Bharat Singh v. Bindu*, 6 O.L.J. 398, 47 I.C. 634; *Girdhari v. Ahmad Mirza Beg*, 23 O.C. 384, 60 I.C. 690 (691). The transfer of a share in a partnership is not a transfer of a mere right to sue and is valid—*Vishindas v. Thawerdas*, A.I.R. 1925 Sind 18. Where a lessee under the mortgage in violation of his agreement to pay the Government dues or to pay damages in case of default makes default in paying Government dues and the mortgagee in execution of his previous mortgage decree purchases the mortgaged property and clears the Government dues in arrears, he can recover the amount so paid from the lessee—*Manmatha v. Sheikh Hedait*, A.I.R. 1932 P.C. 32. If the consignee of goods carried by a Railway, after getting compensation from the insurer on account of short delivery, assigns his rights against the Railway to the insurer the assignment is not hit by sec. 6 (e)—*Union of India v. Alliance Assurance Co., Ltd.*, A.I.R. 1964 Cal. 31.

A present right under a settlement to enjoy the income of the property divided among heirs can be transferred by the beneficiary—*Ma'ait v. Mahomed Ebrahim*, A.I.R. 1927 Rang. 165.

Where the right to sue has merged in a decree, the right under the decree is assignable. Thus, where a claim for *mesne profits* has merged in a judgment before assignment, the right under the judgment can be transferred, although the original cause of action was not transferable—*Prasanna v. Ashutosh*, 18 C.W.N. 450, 20 I.C. 685; *Venkatarama v. Ramaswami*, 44 Mad. 539 (543); *Hari Prasad v. Kodo Marya*, 1 P.L.J. 427, 37 I.C. 998.

A right to take accounts and to recover such sums as may be found due is not assignable, being a mere right to sue within the mean-

ing of cl. (e)—*Hakam v. Naranjin*, A.I.R. 1937 Lah. 934. In commission agency before an agent can claim an indemnity he has a duty to account. The right of the principal to ask for accounts cannot be assigned—*Ghisulal v. Gumbhirmull*, A.I.R. 1938 Cal. 377. But where the income from the Jagir has been received by the certificate holder, the other sharers can validly assign their right to take accounts of their share in the income of the Jagir—*Ajijoddin v. Jainwant*, A.I.R. 1953 Nag. 355. A partner's right to sue for an account of a dissolved partnership has, however, been held to be moveable property and such a right is not a mere right to sue and can be assigned as an actionable claim—*Thakurdas v. Vishindas*, A.I.R. 1925 Sind 72, 79 I.C. 384.

Where pending an appeal by the plaintiff in a suit for dissolution of partnership and accounts the appellant transferred by will her share in the rice mill with all its assets and liabilities and the right to continue the appeal and enjoy all the profits arising therefrom what is transferred is not a mere right to sue but a tangible interest in the partnership—*Srinivasa v. Abraham*, A.I.R. 1950 Mad. 824. When a bank sues its employees on acts of misfeasance and it is thereafter taken over by another bank under a scheme settled by the Central Government the second bank can continue the suit—*The Merchants Bank Ltd. v. Dharmasambarthani Ammal*, A.I.R. 1966 Mad. 26.

An assignee from the plaintiff can apply for a *personal decree* against the defendant under O. 34, r. 6, C. P. Code. Such assignment is not invalid by reason of the present section—*Shanmugam v. Radha Krishan*, A.I.R. 1951 Mad. 628. A preliminary decree for accounts is not a mere right to sue and it can be sold by private negotiation though it may not be sold in execution—*Jammula Venkayya v. Kasi-reddi Narasimha Murthi*, (1969) 1 An. W.R. 74.

57. Clause (f) :—Public office :—If the office be not a *public* one in the strict sense it would be transferable, even though the discharge of its duties should be indirectly beneficial to the public—*In re Mirams*, (1891) 1 Q.B.D. 594.

The following public offices have been held to be non-transferable :—

(a) Office of *archaka* in a temple—*Venkatrayar v. Srinivasa*, 7 M.H.C.R. 32.

(b) Office of *paricharaka* in a temple—*Narasimma v. Anantha*, 4 Mad. 391.

(c) *Karaima* right in a temple—*Keyaka v. Yaddatil*, 3 M.H.C.R. 380.

(d) *Miras* office in a temple—*Ramaswami v. Ranga*, 16 Mad. 146.

(e) *Dharmakartaship* in a temple—*Subbarayudu v. Kotayya*, 15 Mad. 389.

(f) Office of *Mutawalli*, *Sajjadanashin*, *Mahant*, or *Shebait*—*Wahid v. Ashruff*, 8 Cal. 732; *Sarkum v. Rahaman*, 24 Cal. 83; *Girijanand v. Sailajanand*, 23 Cal. 645; *Gobind Kumar v. Debendra*, 12 C.W.N. 98; *Munshi Shahed Baksh v. Golam Nabi*, 22 C.W.N. 996. See also Note 51.

- (g) Office of *Ghatwal*—*Narain v. Badi Roy*, 29 Cal. 227.
- (h) Office of *Karnam*—*Kumarasami Pillai v. Orr*, 20 Mad. 145.
- (i) Office of *Chowkidar*—*Ram Kumar v. Ram Newaj*, 31 Cal. 1021.

When one member of a family in accordance with custom transfers his turn of worship the transaction is valid for the following reasons : (1) the office of worship is not a public office as it is capable of being divided whereas public office is indivisible; (2) the transaction is valid under Hindu law; (3) the transaction is really not a transfer because the office is still retained by the family—*Hanmappa v. Hanmantganda*, A.I.R. 1948 Bom. 233. An office of worship in a temple, which is heritable and partible, is not a public office—*Narayanam Seshacharyulu v. Narayanam Venkatacharyulu*, 1956 Andhra W.R. 1050.

58. Salary of public officer :—The salary of a public officer is not transferable under this Act, although under clause (i) of sec. 60 (1) of the C. P. Code it is attachable under certain restrictions.

Where the law assigns fees to an officer, it is for the purpose of upholding the dignity and performing properly the duties of that office, and the policy of the law will not allow the officer to bargain away those fees to the appointer or to any one else—*Corporation of Liverpool v. Wright*, 28 L.J.N.S. Ch. 868.

For definition of "Public Officer" see C.P. Code, Sec. 2 (17).

Salary :—The word 'salary' means the recompense or consideration stipulated to be paid to a person periodically for services.

The percentage allowance which a khot receives for collecting the assessments is not his salary—*Ravji v. Sayajirao*, 13 Bom. 673.

Travelling allowances paid to public officers in excess of their fixed stipends are not salaries. Cf. clauses (h) and (i) of sec. 60 (1), C. P. Code.

A consent decree was passed with a term that the plaintiff might recover the amount from the salary of the defendant at Rs. 2 per month by attachment. The defendant was a railway servant : *Held*, the contract was opposed to public policy and void under this section—*M. & S. Ry. v. Rupchand*, A.I.R. 1950 Bom. 155. Where a younger brother, a university student, out of natural love and affection promises to pay his elder brother a specified sum based on his monthly earning on his getting an employment, the promise is not hit by sec. 6 (f)—*B. Ananthayya v. B. Subba Rao*, A.I.R. 1960 Mad. 188.

59. Clause (g) :—Pensions :—Under cl. (g) stipends allowed to military and civil pensioners of Government and political pensions cannot be transferred; they are also exempt from attachment under sec. 60 (1) (g) of the Code of Civil Procedure. This section does not prohibit the assignment of a pension not granted on political considerations, on account of past services or present infirmities or as a compassionate allowance. A grant of land revenue as such cannot be comprised in the term "pension". Such a grant may be a hereditary grant and partakes of the nature and character of *jagir*. Its liability to resumption would be dependent upon the terms under which it was created and upon the will of the Sovereign power—*Bhopal v. Shalm*, A.I.R. 1929 All. 781 (786-87),

(1929) A.L.J. 724. Where a *munafi* grant of landed property had been made by the Mogul Government to the plaintiff's family, but subsequently the land was resumed and cash allowance was substituted thereof and is recognised by the British Government, the cash allowance is a substitution for land which can be alienated by the grantee. The allowance is not a pension within sec. 11 of the Pensions Act, 23 of 1871—*Habibul Rahaman v. Abdul Hai*, A.I.R. 1926 All. 521; *Duni Chand v. Gurmukh*, A.I.R. 1930 Lah. 816.

Clause (g) follows section 12 of the Pensions Act (Act XXIII of 1871) under which "all assignments, agreements, orders, sales and securities of every kind made by the person entitled to any pension, pay or allowance in respect of any money not payable at or before the making thereof, on account of any such pension, pay or allowance, or for giving or assigning any future interest therein, are null and void".

The word "pension" has nowhere been defined in the Pensions Act. But the Bombay High Court has laid down that "pension" means a periodical allowance or stipend granted not in respect of a right, privilege, perquisite or office, but on account of past services or particular merits, or as compensation to dethroned princes, their families and dependants—*Secretary of State v. Khemchand*, 4 Bom. 432 (136); *Bhoopal v. Shiam*, *supra*.

A pension is a periodical payment of money by Government to the pensioner—*Lachmi Narain v. Makund*, 26 All. 617; *Wasif Ali Mirza v. Kernani Industrial Bank*, 35 C.W.N. 791 (794) (P.C.). The rents of the properties granted by the Government to the Nawab of Murshidabad are not included in the term "pension," because the Nawab draws the rents not as a pensioner, but as the owner (though a limited owner) of the properties—*Wasif Ali Mirza*, *supra*. A land granted once for all in lieu of pension is not a pension, and a transfer of such land is not prohibited—*Balwant v. Secretary of State*, 29 Bom. 480; *Ganpat Rao v. Ananda Rao*, 28 All. 104, 32 All. 148 (P.C.); *Anna Bibi v. Najm-un-nissa*, 31 All. 382; *Kumar Tirumalai v. Bangaru*, 21 Mad. 310; *Subbarayya Mudali v. Velayuda*, 30 Mad. 153. But see *Atma Ram v. Kehar*, A.I.R. 1930 Lah. 904 (905), where it is said that a pension may take the form of an assignment of land revenue.

A Zemindari burdened with the payment of land revenue, granted as a reward for past service rendered to Government, is not a pension, and is therefore transferable—*Lachmi Narain v. Makund Singh*, 26 All. 617. An annual grant by Government as compensation for loss sustained by the grantee on account of improper redemption of rent-free land is not a pension—*Jiban Krihsna v. Sripati*, 8 C.W.N. 665. Where the Government after considerably raising the assessment assigns as an act of grace certain shares out of the increased revenue to the junior members of the family, the shares so assigned do not constitute pension—*Balkrishna v. Govind*, 1902 A.W.N. 161. The grant of a reward or bonus by Government is not a pension—*Khasim v. Carliet*, 5 Mad. 272. A *toda giras hak* which is an allowance made to *garasias* to preserve the peace of the country and to render police service if required is not a pension—*Secretary of State v. Khemchand*, 4 Bom. 432.

Political Pensions :—An allowance granted to a political prisoner detained under the provisions of the State Prisoner's Regulation III of 1818 is a political pension, and cannot be transferred. The allowance granted to the ex-Maharaja of Panna who is interned under the above Regulation is a political pension even though the Government of India makes some arrangement with the Panna Durbar under which the latter pays the money into the Government Treasury to be paid to the ex-Maharaja—*Satraji Dongorchand v. Madho Singh*, 50 Mad. 711, 52 M.L.J. 622, A.I.R. 1927 Mad. 64, 103 I.C. 339. A pension guaranteed payable by the Government of India by a treaty with another sovereign power is in the strictest sense a political pension. Thus an allowance so payable to one of the heirs of the King of Oudh who has inherited it is a political pension—*Bishambar v. Imdad Ali*, 18 Cal. 216 (P.C.). The stipends allowed by the Government to the members of the Mysore family cannot be attached—*Hazee Mahammad v. Shazada Mahammad*, 7 W.R. 169. The character of a political pension remains unchanged so long as it remains unpaid in the hands of the Government irrespective of whether the beneficiary is alive or dead—*Valia v. Anujani*, 26 Mad. 69. Pensions payable by a foreign State when received by a pensioner in India appear to be outside the scope of this clause—*Bishambhar Nath v. Imdad Ali*, 18 Cal. 216, 17 I.A. 181.

60. Clause (h) :—“Opposed to the nature of the interest” :—The transfer of a service inam by the inamdar is opposed to the nature of his interest in the property. If he sells the property, he can no longer perform the services—*Anjaneyulu v. Venugopala*, 45 Mad. 620 (624), A.I.R. 1922 Mad. 197, 70 I.C. 466. So also, *ghatwali* tenures are non-transferable. See Note 54, *ante*. The archakatvam service lands are not alienable but the standing crops on such lands are transferable and liable to be attached and sold in execution—*C. V. Kutumba Rao v. Govardhanam*, A.I.R. 1957 Andh. Pra. 349. As to the validity of the lease of service inam lands the Andhra Pradesh High Court observed as follows : “... a lease by itself will not attract s. 6 (h) ... If under the lease a provision is made for payment of rent ... that is a valid transaction ... If, on the other hand, all the rent ... is to go in reduction of a premium received at that time of the granting of the lease. ... that would contravene ... s 6 (h)”,—*Suryanarayana v. Venkata Suryanarayana*, A.I.R. 1958 Andh. Pra. 286.

61. Unlawful object or consideration :—Section 24 of the Indian Contract Act enacts :—

“The consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

In each of these cases the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.”

This clause would be inapplicable where the object or the consideration for the transfer is not unlawful, but the transfer

is ineffective on some other ground—*Dip Narain v. Nageshar*, 52 All. 338 (F.B.), 1930 A.L.J. 45, 122 I.C. 872, A.I.R. 1930 All. 1 (2). Although the words 'object' and 'consideration' have been coupled together, they are distinguishable. The term 'object' means purpose or design. Thus, if the object of an assignment was to defeat the provisions of the Insolvency Act in such a manner as to prevent the property of the insolvent vesting in the Official Assignee and thereby becoming available for distribution under the provisions of that Act, such an object is unlawful and the transfer is inoperative under this section, although the transfer was supported by consideration—*Jaffar v. Budge Budge Jute Mills*, 33 Cal. 702 (709, 710); and on appeal 34 Cal. 289; *Chinniram v. Shibendra*, 16 C.L.J. 162, 14 I.C. 519.

A contract may be invalidated either by the illegality of the object or the consideration itself, or by the incapacity of the promisor to enter into such a contract. In cases of inherent illegality, it is sometimes impossible to say whether the legal or the illegal portion of the consideration affected the mind of the promisor most. But in cases of contract only partly beyond the competence of the promisor, there is no good ground why the promisee who has paid good consideration should not be allowed to enforce that part of the promise which the promisor was competent to make—*Dip Narain v. Nageswar*, A.I.R. 1930 All. 1 (3) (F.B.).

62. Transfers forbidden by law :—There is a clear distinction between an agreement which may be forbidden by law and one which is merely declared to be void. In the former case the Legislature penalises it or prohibits it. If a void agreement has been carried out and consideration has passed the promisor may not in equity be allowed to go back upon it without restoring the benefit which he has received. But if the promisee comes to Court to enforce it, he would receive no help from a Court of law—*Dip Narain v. Nageswar*, *supra*, at p. 3. A contract which is *ultra vires* is not necessarily illegal. Thus, a bank was allowed to sue to enforce a mortgage, although its memorandum of association prohibited the bank to lend money on mortgage—*Ahmed Saif v. Bank of Mysore*, A.I.R. 1930 Mad. 512, 53 Mad. 771, 126 I.C. 614.

Here the 'law' refers to some substantive law, and not to an adjective law such as the C. P. Code—*Hukum Chand v. Taharunnessa*, 16 Cal. 504. An alienation of the minor's property by the certificated guardian without the sanction of the Court is voidable—Sec. 30, Guardians and Wards Act. A license granted under the excise law is a personal privilege, and the rights and privileges conferred by the license cannot be transferred by one private individual to another—*Behari Lall v. Jagadish*, 31 Cal. 798 (805). Where a person, who held the lease of a farm to retail opium at certain shops and whose lease contained a clause prohibiting subletting without the Collector's sanction, entered into an agreement to sublet some of the shops, held that the agreement was void—*Raghunath v. Nathu*, 19 Bom. 626. Where the transfer of an occupancy right is forbidden by law, its transfer by the tenant is void—*Durga v. Jhinguri*, 7 All. 511 (514); *Jhinguri v. Durga*, 7 All. 578 (880) (F.B.). Where the object of a lease was to secure a higher

rent than that allowed by the Calcutta Rent Act, the lease was void as it intended to defeat the provisions of that Act—*Saleh Abraham v. Manekji*, 50 Cal. 491, A.I.R. 1924 Cal. 57, 75 I.C. 521.

If any portion of the consideration for a transfer is forbidden by law, the whole transfer should be set aside—*Shenbagavadiammal v. Mupidathi Ammal*, A.I.R. 1942 Mad. 720, (1942) 2 M.L.J. 364.

This clause applies to cases where the transfer is forbidden by statute, and not to cases where the restriction on alienation is imposed by an *agreement* of parties or *decree* of Court—*Wazir Md. v. Har Prasad*, 15 O.C. 67, 13 I.C. 613 (615).

Fraudulent transfers :—See sec. 53 of this Act.

63. Transfers with immoral object :—Where the landlord knowingly let out his house to a prostitute to be used by her as a brothel, *held* that he could not recover rent—*Gourinath v. Madhumani*, 18 W.R. 445, 9 B.L.R. App. 37; *Choga Lal v. Pujari*, 31 All. 58. If, however, the landlord was ignorant of the fact that the prostitute took the house for prostitution (and not for mere habitation), he could recover rent—*Sultan v. Nanu*, 22 P.R. 1877; *Pirithi Mal v. Bhagan*, 2 P.R. 1898. Where a person mortgaged his property in order to raise money for the purpose of getting his daughters taught singing, *held* that the mortgage was not void, in as much as amongst the community of the Naickens to which the mortgagor belonged, singing was not a necessary prelude to prostitution—*Khubchand v. Beram*, 13 Bom. 150. An assignment of a mortgage by a person to a woman, ostensibly for money consideration but really for the purpose of future illicit cohabitation with her is void and can be set aside at the instance of the assignor—*Methukannu v. Shunmugavelu*, 28 Mad. 413. Where the donor made a gift of his property to a husband and wife on condition that he should have physical enjoyment of the latter, *held* that the consideration for the gift being future illicit connection, the gift was void under sec. 23 Contract Act—*Ghumna v. Ramchandra*, 47 All. 619, A.I.R. 1925 All. 437, 88 I.C. 411; see also *Istak v. Ranchod*, A.I.R. 1947 Bom. 198, 48 Bom. L.R. 775. A bequest by a Hindu testator made conditional on the continuance of immoral relations between himself and the legatee is void—*Tayaramma v. Sitaramasami*, 23 Mad. 613. But where a gift of a property was made by a person to his kept mistress on condition of her continuing to live with him, which was followed by possession of the property by her for a number of years, and afterwards a creditor of the donor sued for a declaration that the gift was invalid, *held* that even assuming that the consideration was immoral and illegal, the gift could not be set aside because of the long possession of the donee—*Lachmi v. Wilayti Begam*, 2 All. 433. But see *Sabava v. Yamanappa*, 35 Bom. L.R. 345, A.I.R. 1933 Bom. 209 (211), which holds that an immoral consideration does not become innocuous by passage of time. Similarly, where a deed of settlement was made with the object and in consideration of the donee cohabiting with the settlor, and the immoral purpose of the donor was achieved by the donee in fact remaining in his keeping as contemplated in the settlement-deed, *held* that the settlor could not afterwards avoid the deed and recover the property transferred for an immoral purpose *which had*

already been achieved. It is a well-established rule of equity that when a transaction is entered into for unlawful and immoral purpose, and that purpose has been achieved, the Court will not interfere at the instance of a *particeps criminis* to relieve him from the legal effect of the transaction. Section 6 of the Transfer of Property Act does not modify this rule of equity but only lays down that the Court will not enforce a transfer which would have the effect of carrying out its unlawful object—*Deivanayaga v. Muthu Reddi*, 44 Mad. 329 (330, 332); *Sabava v. Yamanappa*, A.I.R. 1933 Bom. 209 (212); *Ayerst v. Jenkins*, (1873) 16 Eq. 275. In the last cited case Lord Selbourne observed as follows (at p. 283):—"The voluntary gift of part of his own property by one *particeps criminis* to another is in itself neither fraudulent nor prohibited by law . . . If, public policy is opposed (as it is) to vice and immorality, it is no less true that the law in sanctioning the defence of a *particeps criminis* does so on the grounds of public policy, namely, that those who violate the law must not apply to the law for protection It is a maxim of law, not opposed to any equity, that *in pari delicto meliorem conditis possidentis*". But see *Pranballav v. Tulsibala*, 63 C.W.N. 258 where the executors who obtained the probate of a will left by a testatrix were allowed to recover possession of a house let out by the testatrix for running a brothel as they wanted to establish a hospital in that house as per direction contained in the will. But *past cohabitation* is not an immoral consideration, and a promise to pay a woman an allowance or some property for such consideration has been held to be valid—*Dhiraj v. Bikramjit*, 3 All. 787; *Mankuar v. Jasodha*, 1 All. 478 (480); *Mt. Balo v. Mt. Parbati*, I.L.R. 1940 All. 371, A.I.R. 1940 All. 385, 190 I.C. 578; see also *Lakshmi Narayana v. Subhadri Ammal*, 13 M.L.J. 7 and *Godfrey v. Mt. Parbati*, 17 Pat. 508, 19 P.L.T. 893, A. I. R. 1938 Pat. 502; *Istak v. Ranchod*, A.I.R. 1947 Bom. 198, 48 Bom. L.R. 775. In some cases, however, a transfer in consideration of *past cohabitation* has been held to be invalid—*Kisandas v. Dhondhu*, 44 Bom. 542; *Husseinali v. Dinbai*, 25 Bom. L.R. 252, A.I.R. 1924 Bom. 135, 86 I.C. 240 (dissenting from 3 All. 787); *Sabava v. Yamanappa*, supra. Gift to a concubine motivated by a desire to compensate her for past services is not hit by sec. 6 (h)—*Duxampadi v. Kunuko*, A.I.R. 1968 S.C. 253.

The fact that in the community to which the parties belong concubinage is allowed and is not regarded as immoral does not make a settlement made in consideration of concubinage any the less immoral—*Sabava v. Yamanappa*, supra. Where the owner of a house lets out the property to the defendant for the immoral purpose of running a brothel, the executors of the will of the owner can sue to eject the defendant on the basis that the transfer is void—*Pranballav Saha v. Sm. Tulsibala Dassi*, A.I.R. 1958 Cal. 713.

64. Transfers opposed to public policy:—As to what is "public policy" the decision of the House of Lords in *Janson v. Driefontien Consolidated Mines*, (1902) A.C. 484 is instructive. There Lord Halsbury, L.C. observed as follows:—"But I deny that the Court can invent a new head of public policy; so a contract for marriage brokerage, the creation of a perpetuity, a contract in restraint of trade, a gaming or wagering contract or, what is relevant here, the assisting of the

King's enemies, are all undoubtedly unlawful things; and you may say that it is because they are contrary to public policy they are unlawful; but it is because these things have been either enacted or assumed to be by the common law unlawful, and not because a Judge or Court have a right to declare that such and such things are in his or their view contrary to public policy"—at pp. 491-92. Lord Davey in the same case went so far as to say: "Public policy is always an unsafe and treacherous ground for legal decision"—at p. 484.

Marriage brokage contracts:—A contract according to the terms of which the father or guardian is to be paid money in consideration of giving his daughter or ward in marriage is against public policy and unenforceable in a Court of law—*Dholidas v. Fulchand*, 22 Bom. 42 and 22 Bom. 658; *Dulari v. Vallabhdas*, 13 Bom. 126; *Venkata v. Lakshmi*, 32 Bom. 185. An agreement to allow maintenance to the parents of a girl who had to enter into an unsuitable marriage is void as opposed to public policy—*Baldeo v. Jamna*, 23 All. 496. In some cases however, it has been held that if the person who is remunerated in money or by way of maintenance stands in near relationship to the girl, the agreement is not void. Thus a promise made by a person to give his sister or daughter in marriage to the plaintiff in consideration of the latter paying a sum of money or any property to the promisor (brother or father of the girl) was held to be lawful, where it was not shown that the guardian was giving the girl to a husband otherwise ineligible—*Jogeshwar v. Panch Kauri*, 13 W.R. 154; *Ranee Lallu Monee v. Nabin Mohan*, 25 W.R. 32; *Bakshi Das v. Nadu Das*, 1 C.L.J. 261.

Other contracts and transfers:—To compound a charge of a non-compoundable offence is both opposed to public policy and forbidden by law, and so unlawful; and therefore an agreement, in which such compounding is either a consideration or an object, is void under secs. 23 and 24 of the Contract Act. Thus, where the consideration for submission by the defendant to arbitration of his alleged liability and for execution of a mortgage bond by him for the debt settled by the award was a promise on behalf of the plaintiff bank to drop such a criminal proceeding against the defendant, both the award and the mortgage are invalid—*per* Derbyshire, C.J., in *Sudhindra v. Ganesh*, A.I.R. 1938 Cal. 840. See also *Gopal v. Lakshmikanta*, 37 C.W.N. 749.

If it is an implied term of the reference to the arbitration of a civil dispute that the criminal complaint already filed would not be further proceeded with then the consideration of the reference is unlawful and the award is invalid, no matter whether any prosecution in law had been started or not—*Kamini Kumar v. Birendra Nath*, A.I.R. 1930 P.C. 100.

Whether a pre-existing debt will support a security given, when a criminal prosecution is withdrawn is more a question of fact than of law. Where the entire consideration for the security is the pre-existing debt the transaction is good even though the criminal case is withdrawn thereafter; but if the dropping of the prosecution constitutes even a part of the consideration apart from the pre-existing debt, the security cannot be enforced—*Sudhindra v. Ganesh*, A.I.R. 1938 Cal. 840.

There is, however, a distinction between getting a security for a debt from a debtor and getting it from a third person who is under no obligation to the creditor. In such a case the security is not enforceable—*per* Mukherjea, J. in *Sudhindra v. Ganesh*, *supra* at p. 162. This distinction was pointed out by Cotton, L.J. in *Flower v. Sadler*, 10 Q. B.D. 572. An agreement for an illegal consideration, both the parties to which know of the illegality of the object, cannot be said to be an agreement which is *discovered* to be void within the meaning of sec. 65 of the Contract Act, so as to attract the operation of that section—*Durgesh Nandini v. Bhowanipur Banking Corporation*, (1939) 43 C.W.N. 260. Accordingly, when for securing the withdrawal of a criminal prosecution against a third person, a third party takes a make-believe loan from the complainant and the major part of the consideration is applied by the latter for the satisfaction of a debt owing to him by the accused, the complainant cannot recover from such third party even such small part of the loan as he may have actually received himself—*Ibid*.

On appeal the last cited decision has been affirmed by the Privy Council and it has been held that in order to make out the defence that the contract sued on is void on account of its consideration being the stifling of a prosecution, the defendant must establish a contract whereby the proposed or actual prosecutor agreed, as part of the consideration received or to be received by him, either not to bring or discontinue criminal proceedings for some alleged offence—*Bhowanipur Banking Corporation v. Durgesh Nandini*, 46 C.W.N. 1 (P.C.).

A mortgage executed to stifle criminal prosecution against some of the executants cannot be enforced against the executants—*Karam Singh v. Khairati*, A.I.R. 1937 Lah. 686, 168 I.C. 991. Where a criminal prosecution was pending against the defendant, and his pleader entered into a bail-bond for his appearance, and to indemnify the pleader against any loss he might suffer under the bail-bond a nominal sale deed and rent note were passed by the defendant to the plaintiff : *held* that the consideration for the sale deed was opposed to public policy, so it was void—*Laxmanlal v. Kanak Kirti*, 32 Bom. 449. A contract which is against public policy and intended to evade the course of law cannot be enforced in a Court of Justice ; money paid under such contract, *e.g.*, for an illegal purpose, such as bribing a Darogah, cannot be recovered—*Protima v. Dookhia*, 18 W.R. 450. A transfer of land to a Patwari in contravention of rules is void as opposed to public policy—*Abdul v. Ghulam Mahammad*, A.I.R. 1927 Lah. 18, 7 Lah. 463, 98 I.C. 673. But a Full Bench of the Allahabad High Court has held that the taking of an assignment of a mortgage by a *patwari* is not a transaction opposed to public policy—*Bhagwan v. Murari*, 39 All. 51 (54) (F.B.).

65. Maintenance and Champerty :—*Maintenance* means the stirring up of improper litigation with a bad motive for purposes contrary to public policy and justice. *Champerty* is a species of maintenance and of the same character, but with the additional feature of a condition or bargain providing for participation in the subject matter of the litigation—*Pitchakutty v. Kamala*, 1 M.H.C.R. 153. "It must be some-

thing against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary. It was necessary, therefore, to look to the substance of the transaction and not merely the languages of the instruments"—*Fisher v. Kamala*, 8 M.I.A. 170 (187).

In India agreements to finance litigation, in consideration of having a share of the property if recovered, are not *per se* opposed to public policy. It may be so if the object of the agreement is an improper one, such as abetting or encouraging unrighteous suits or gambling in litigation or their enforcement against a party may be contrary to the principles of equity and good conscience as unconscionable or extortionate bargain—*Ramanamma v. Viranna*, A.I.R. 1931 P.C. 100, 35 C.W.N. 633, 61 M.L.J. 94., 131 I.C. 401; *Vatsavaya v. Poosapati*, A.I.R. 1924 P.C. 162; 47 M.L.J. 93, 29 C.W.N. 57, 80 I.C. 807; *Moss v. Ma Nyein*, A.I.R. 1933 Rang. 418. The English law of Champerty is not in force in India—*Raghunath v. Nilkanth*, 20 Cal. 343 (846-47) (P.C.); *Bhagwat v. Debi Dayal*, 35 Cal. 420 (P.C.).

In agreements of this kind the questions to be considered are, whether the agreement is so extortionate and unconscionable as to be inequitable against the borrower, and whether the agreement has been made, not with the *bona fide* object of assisting a claim believed to be just and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits so as to be contrary to public policy—*Ram Coomar v. Chunder Canto*, 2 Cal. 233 (P.C.); *Raja Mokham Singh v. Raja Rup Singh*, 15 All. 352 (P.C.); *Achal Ram v. Kazim Hosain*, 27 All. 271 (P.C.); *Bhagwat Dayal v. Debi Dayal*, 35 Cal. 420 (P.C.); *Gokuldas v. Lakshmidas*, 3 Bom. 402. Where a person is himself unable to prosecute a suit, a contract made in good faith to supply him with funds to carry on the suit, on the security of the property in dispute, will be enforced—*Ram Coomar v. Chunder*, 2 Cal. 233 (P.C.). The law does not prevent persons from transferring the subject matter of a litigation in order to obtain the means of prosecuting it—*Khudiram v. Shomnath*, 37 C.W.N. 706 (708), A.I.R. 1933 Cal. 454.

So, an assignment, merely with a view of litigation, to a person who, but for the litigation would have no interest whatever in the subject-matter of the assignment, is champertous—*Gokuldas v. Lakshmidas*, 3 Bom. 402. An agreement between pleader and client for the supply of funds for the litigation of the latter, in consideration of the former getting a share of the property in suit on its success, is void—*In re Ali Muhammad Mukhtear*, 111 P.R. 1894.

A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not however to be regarded as *per se* opposed to public policy. But agreements of such kind ought to be carefully watched, and when extortionate, unconscionable or made for improper objects, ought to be held invalid—*Alopi v. Court of Wards*, A.I.R. 1938 Lah. 23. Thus, where by an agreement between A and B, B agreed to finance the litigation of A in

respect of certain property in return for part worth about a lac of rupees knowing full well that the litigation would cost about Rs. 9,000, A was a man of weak intellect and was in the habit of drinking, it was held that the agreement was unconscionable and invalid—*Ibid* at p. 29.

An assignment of property said to be worth 3 lacs by persons claiming to be the next reversioners on the death of a female owner, for a consideration of Rs. 52,000 of which sum Rs. 600 was paid at the time of execution of the deed, and the balance payable in proportion to the success of a suit by the assignee and the assignors to recover the property was held not to be a transaction contrary to public policy and void on that ground—*Bhagwat v. Debi Dayal*, 35 Cal. 420 (P.C.).

Where a suitor has a just claim to property in dispute and being unable to understand English language and to spend the time necessary for explaining his case to the Advocate and himself to go to the Court, enters into an agreement with another person to act for or represent him wherever necessary and promises to pay him on success of the case for services rendered by the latter, such agreement, though champertous according to English law is not champertous or void as against public policy in India. Mere inadequacy of consideration is not sufficient to set aside such a contract. But where the inadequacy is so glaring and the circumstances surrounding the contract are so suspicious as to lead the Court to the view, not that one of the parties has made a bad bargain merely, but that one of the parties must have imposed upon and taken advantage of by a person who had better means of knowledge, the contract may be set aside—*Kalimutha v. Maung Tha*, A.I.R. 1936 Rang. 491, 14 Rang. 392, 166 I.C. 273.

66. Persons disqualified to be transferees:—See section 136 of this Act, under which Judges, legal practitioners, mukhtears, and other officers connected with Courts of Justice are disqualified from purchasing any actionable claims.

Minors are not included in the term 'persons disqualified'. There is no provision in the T. P. Act under which a minor is incapable of being a transferee of property. Section 7 which speaks of persons competent to contract applies only to a *transferor*, and does not prevent a minor from being a *transferee* of property. The Privy Council decision in *Mohori Bibi v. Dharmadas* (30 Cal. 539) declaring contracts by minors to be void does not apply to a transfer in favour of a minor—*Muni Koer v. Madan Gopal*, 38 All. 62; *Narain Das v. Dhanja*, 38 All. 154; *Ulfat v. Gouri Shankar*, 33 All. 657. A sale-deed in favour of a minor is not void—*Subba v. Guruvu*, A.I.R. 1930 Mad. 425, 120 I.C. 77. It can be enforced specially when the consideration has been paid in full to the vendor—*Thakar Das v. Mt. Putli*, A.I.R. 1924 Lah. 611, 5 Lah. 317; 82 I.C. 96; *Gangai v. Govinda*, A.I.R. 1924 Mad. 544, 84 I.C. 626. So also, a mortgage executed in favour of a minor who has paid the consideration, is valid and enforceable—*Raghava Chariar v. Srinivasa*, 40 Mad. 308 (315) (F.B.) (overruling *Navakotti Narayana v. Loyalinga*, 33 Mad. 312); *Zafar Ashan v. Zubaida*, 1929 A.L.J. 1114, 121 I.C. 398, A.I.R. 1929 All. 604 (605); *Madhab v. Baikuntha*, 4 Pat. L.J. 682; *Satyadeca v. Tribeni*, A.I.R. 1936 Pat. 153, 161 I.C. 579. But where the transfer to a minor involves

certain covenants which are to be performed by the minor, *e.g.*, in case of a lease to a minor, in which the minor agrees to pay rent and to perform any particular covenants which form an essential part of the transaction, the transfer (lease) is void, as it falls within the mischief of the rule laid down in *Mohori Bibi's case* (30 Cal. 539)—*Pramila v. Jogesher*, 3 Pat. L.J. 518 (521, 522), 46 I.C. 670; *Sew Sankar Lal v. Bejoy Krishna*, 57 C.W.N. 65.

Where a clause in a grant prohibits a transfer to a person who does not hold a certain certificate, the person who does not hold the certificate should not be regarded as a person legally disqualified to be a transferee, and there is no basis for holding that the transfer to such a person is void *ab initio* and cannot be validated by a subsequent removal of the disqualification—*Maung Ye v. M. A. S. Firm*, 6 Rang. 423, A.I.R. 1928 Rang. 136, 111 I.C. 105.

A Buddhist monk may hold property such as paddy land, and he may be a transferee of such property. He is not legally disqualified to be a transferee, and the transfer to him is valid—*U. Pyinnya v. Maung Law*, 7 Rang. 677 (F.B.), A.I.R. 1929 Rang. 354 (360).

67. Clause (i) :—This clause which is identical with the second para of section 108 (j) has been inserted by the Transfer of Property Amendment Act of 1885, in order to remove any doubt which might arise in view of sec. 117, as to its applicability to leases for agricultural purposes.

By reason of cl. (i) the interest of an occupancy tenant cannot be transferred—*Shanti Prasad v. Bachhi Devi*, A.I.R. 1948 Oudh 349, (1948) O.W.N. 122. An occupancy tenant holding an untransferable right of occupancy cannot transfer his right out and out by sale; but he can hypothecate such right—*Gopal Panday v. Parshotam*, 5 All. 121 (explained in 13 All. 28). But see *Makund v. Mt. Sumita*, A.I.R. 1931 All. 461, 132 I.C. 422, where it has been held that a contract for possessory mortgage of an occupancy holding is void under sec. 23 of the Contract Act being against the tenancy law and the right to recover money being contingent upon non-delivery of possession, a covenant illegal in itself and not capable of enforcement, the plaintiff has been held not to be entitled to recover the money. The land under what is known in Gprakhpur chiefly as a *mandadari* tenure is nothing more than an occupancy holding and is not, therefore, transferable; such land cannot be sold in execution of a decree upon a mortgage thereof—*Kedar v. Naipal*, 34 All. 155; *Banamali v. Bisheshar*, 29 All. 129. Mortgage of an exproprietary tenancy land being in contravention of sub-section (3) of section 7A, Oudh Rent Act, 1886, is void—*Md. Muzaffar v. Madad Ali*, A.I.R. 1931 Oudh 309, 132 I.C. 543. Under the law as it stood before the T. P. Act, tenancies whether of homestead lands or of agricultural lands were not transferable in the absence of a custom or contract to the contrary—*Sarada v. Nabin*, A.I.R. 1927 Cal. 39, 54 Cal. 333, 31 C.W.N. 231; *Manmatha v. Anath*, 23 C.W.N. 201. In Bengal, the transfer of an occupancy holding has now been expressly permitted by sec. 26B of the Bengal Tenancy Act (as amended in 1928). For a case of relinquishment by a tenant of his agricultural

holding in Oudh, see *Amar Nath v. Har Prasad*, 7 Luck 425, A.I.R. 1932 Oudh 79, 136 I.C. 333.

If a non-transferable occupancy-holding is mortgaged along with certain other properties which are transferable, the whole transaction is not bad, if without defeating the provisions of this Act part of the mortgage can be enforced—*Dip Narain v. Nageshar*, 52 All. 338 (F.B.), A.I.R. 1930 All. 1 (3), 122 I.C. 872.

The interests which are declared inalienable by this clause are particular interests which have been created by *statutes* enacted to regulate the relations between landlord and tenant. An interest conferred by a *decree* is not covered by this clause. There is an essential distinction between restrictions on transfers imposed by the Legislature, and restrictions imposed by contract or decree. Where the Legislature deem it expedient to fetter the privilege of free alienation, the prohibition founded upon considerations of public interest must be treated as absolute. But no such force can be attributed to a restriction which has its origin in an agreement of the parties or a decree of Court. The contract or decree does not purport to affect the rights and interests of any one but the parties themselves; it merely regulates the relations of the parties *inter se*. Consequently, where there is a decree of Court settling the rights of two parties, which contains a provision that one of them (tenant) shall not alienate the property which he has got from the other, the presumption is that the condition against alienation is inserted for the benefit of the other party (superior proprietor). The latter may waive the benefit of the condition and if he elects to do so by giving his consent to a transfer, the transfer is a valid transaction—*Wazir Muhammad v. Har Prasad*, 15 O.C. 67, 13 I.C. 613 (614, 615).

7. Every person competent to contract and entitled to transfer. Persons competent to transferable property, or authorised to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force.

68. Persons competent to contract:—Under section 11 of the Indian Contract Act, "every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind and is not disqualified from contracting by any law to which he is subject."

Minors:—It has now been settled by the Privy Council that a minor is incapable of contract, and that his contract is not only voidable but void—*Mohori Bibi v. Dharmodas*, 30 Cal. 539 (P.C.). A minor is therefore incompetent to make a transfer of his property by sale, mortgage or lease.

A lease by a minor is void. That it was executed only by the lessee in favour of the lessor (by means of a *kabuliyat*) and not by the lessor (by means of a *patta*) does not cure its invalidity. The fundamental conception of a lease involves the transfer by the lessor. A

lease is essentially a bilateral contract—*Govinda v. Chowakkaran*, 59 M.L.J. 941, 129 I.C. 449, A.I.R. 1931 Mad. 147 (149). See the amendment made in sec. 107.

Where the actual lease executed by a minor was only for 5 years, and the stipulation with regard to the continuance of the lease in future, should the tenant require it, had not passed from the domain of contract, the stipulation could not be ratified by the minor on his coming of age, as the agreement with regard to the future lease was void—*Indian Cotton Co. v. Raghunath*, A.I.R. 1931 Bom. 178 (182), 33 Bom. L.R. 111, 130 I.C. 598.

Where a deed is executed by a person who alleges himself to be a major but the fact of the minority is established, such a deed executed by minors being a nullity, is incapable of founding a plea of estoppel—*Sadiq Ali v. Jai Kishori*, A.I.R. 1928 P.C. 152 (156), 32 C.W.N. 874, 26 A.L.J. 685, 109 I.C. 387. When a contract has been induced by a false representation made by an infant as to his age, he is liable neither in the contract nor in tort. No estoppel can be pleaded against a statute—*Ajudhia Prasad v. Chandan Lal*, A.I.R. 1937 All. 610, I.L.R. 1937 All. 860, 170 I.C. 934 (F.B.). In the last cited case money was borrowed on mortgage by two minors at a time when they were more than 18 years but less than 21 years of age concealing the fact that a guardian had been appointed by the Court under the Guardians and Wards Act. It was held that the mortgagee could not get a decree on the mortgage. See also *Gadigeppa v. Balangowda*, A.I.R. 1931 Bom. 561, 55 Bom. 741, 33 Bom. L.R. 1313, 135 I.C. 161 (F.B.), and *Khan Gul v. Ladha Singh*, A.I.R. 1928 Lah. 609 (F.B.), 9 Lah. 701, 111 I.C. 705.

If the manager of a minor's estate enters into an agreement for the purchase of certain immovable property, the minor is not bound by the contract, nor can he sue for the specific performance of the contract—*Mir Sarwarjan v. Fakhruddin*, 39 Cal. 232 (P.C.). A contract by a minor's guardian to sell his immoveable property cannot be enforced against the minor—*Raghunathan v. Ravuthakanni*, A.I.R. 1938 Mad. 765, 48 M.L.W. 112; *Venkatachalan v. Sethuram*, A.I.R. 1939 Mad. 322. But see *K. Subrahmanyam v. Kurra Subba Rao*, 52 C.W.N. 706 (P.C.), where the Privy Council quoted with approval the following extract from Pollock and Mulla's Indian Contract Act and Specific Relief Act, 7th edition, p. 70: "It is, however, different with regard to contracts entered into on behalf of a minor by his guardian . . . In such a case . . . the contract can be specifically enforced by or against the minor, if the contract is one which it is within the competence of the guardian to enter into on his behalf so as to bind him by it, and, further, it is for the benefit of the minor . . ." What has been actually decided in that case is that where a guardian enters into a contract for the sale of immoveable property for repaying the debts of the minor's father, and the purchaser enters into possession on payment of the consideration, and the guardian files a suit for recovery of possession taking advantage of the non-execution of the deed of sale, the purchaser is entitled to get the protection under sec. 53A T.P. Act.

Onus :—Where a mortgagor alleges that he was a minor on the

date the mortgage was executed, the burden is on him to prove that he was a minor on that date—*Dhanapala v. Goverchand*, A.I.R. 1938 Mad. 959 (1960), (1938) M.W.N. 938.

There is nothing in this Act to prevent a minor from *being a transferee* (purchaser) of property and from suing to recover possession of that property. See Note 295 under sec. 54, and Note 66 under sec. 6. The acceptance of a minor's bid at an auction sale held under the provisions of the Bombay Land Revenue Code, 1879 vitiates the sale—*Shiva Mart v. Arun Nanakchand Khatri*, A.I.R. 1969 Bom. 93.

Lunatics :—A lease of property granted by the lessor at a time when he was mentally unfit and incapable of understanding the effect of the transaction is void—*Amina Bibi v. Saiyed Yusuf*, 44 All. 748 (752), 20 A.L.J. 731, A.I.R. 1922 All. 449.

A disposition of property by a lunatic during a lucid interval is considered as done by a person perfectly capable of contracting, managing and disposing of his affairs at that period—*Hall v. Warren*, 9 Ves. 605 (per Eldon L. C.).

Disqualified proprietors :—A proprietor whose property is under the management of the Court of Wards cannot validly transfer his property. Thus, a mortgage entered into by a Government ward in contravention of the provisions of sec. 23 of the Central Provinces Government Wards Act, is absolutely void—*Jiwan Lal v. Gokul Das*, 17 C.P.L.R. 13. A mortgage by a person whose estate is under the management of an officer under the Jhansi Encumbered Estates Act is not valid, and the mortgagee cannot invoke the assistance of sec. 43 to compel the disqualified mortgagor to make good his transfer after the removal of his disqualification—*Radhabai v. Kamod Singh*, 30 All. 38. Where on the date of the mortgage or sale the property of the mortgagor is under the charge of the Collector under Sch. III, Civil Procedure Code, the judgment-debtor or his representative is incompetent to mortgage or charge the property without the permission of the Collector—*Sarju v. Ramsaran*, A.I.R. 1931 All. 541, (1931) A.L.J. 400, 132 I.C. 568. *Gouri Shankar v. Chennumiya*, 46 Cal. 183 (P.C.); *Ganesh Prasad v. Baiyalal*, A.I.R. 1938 Nag. 253, 175 I.C. 384.

69. Pardanashin ladies :—Transactions with pardanashin women are almost placed on the same footing as transactions with minors or other persons of limited capacity.

It is, therefore, always incumbent on the person who is dealing with a pardah lady to show that its terms are fair and equitable, and that the lady had good independent advice in the matter and acted therein altogether at arm's length from the other contracting party—*Kanailal v. Kamini*, 1 B.L.R. (O.C.) 31 (n). But where a lady attended to her own business herself, communicated in matters of business with men other than members of her own family, was able to go to Court to give evidence in litigation, and was able to attend at the Registration office in person to acknowledge her deeds for the purpose of registration, held she could not be spoken of as a pardanashin lady, and documents executed by her need not be looked upon with the same amount of scrutiny and suspicion as documents executed by females are generally looked upon—*Ismail Messajee v. Hafiz*, 33 Cal. 773 (783) (P.C.).

To charge a pardanashin woman upon an instrument alleged to have been executed by her, it must be shown by satisfactory evidence that the document was explained to and understood by her—*Sudisht Lal v. Sheoharat* 7 Cal. 245 (P.C.); *Shambati v. Joga*, 29 Cal. 749 (P.C.); *Sum-suddin v. Abdul*, 31 Bom. 165 (180); *Amirbai v. Abdul*, 3 Bom. L.R. 658; *Achan v. Thakur Das*, 17 All. 125; *Shamsundar v. Achhan Kumar*, 21 All. 71 (P.C.). Where a person sets up the validity of a lease granted by a pardanashin lady, the onus is upon him to prove that she understood the nature and effect of her act—*Jugal Kishore v. Charoo Chandra*, A.I.R. 1939 P.C. 159. But to validate a transaction with a pardanashin lady, it is not necessary to prove that she understood every detail of the matter. It is sufficient that she should understand its general effect, and that people disinterested and competent to give advice should, with a fair understanding of the whole matter, advise her to enter into it—*Sumitibala v. Dhara Sundari*, 47 Cal. 175 (P.C.). For though there may not be a clear understanding of each detail of a matter which may be greatly involved in technicalities, there may still be an intelligent comprehension of the bargain on the part of the lady. In such a case the bargain is good and good as a whole. But if a feature of the transaction affecting in a high degree the expediency of her entering into it is not understood by the lady, the bargain cannot be divided into parts or otherwise reformed by the Courts so as to uphold certain portion of it while rejecting others—*Hem Chandra v. Suradhani*, I.L.R. (1940) 2 Cal. 436 (P.C.), 45 C.W.N. 253, A.I.R. 1940 P.C. 134; see also *Farid-un-Nissa v. Mukhtar Ahmad*, 47 All. 703 (P.C.), 52 I.A. 342, A.I.R. 1925 P.C. 204. "The real point is that the disposition made must be substantially understood and must really be the mental act as its execution is the physical act, of the person who makes it"—*Farid-un-Nissa v. Mukhtar Ahmad*, (supra), 47 All. 703 (P.C.) at p. 711.

An old pardanashin lady having considerable capacity for business executed a mortgage deed which was read over to her, though it was not explained. She understood its effect except that she did not understand that she was making herself personally liable: *held*, the mortgage deed did not bind her at all—*Hem Chandra v. Suradhani*, supra. Where a pardanashin lady to pay her husband's debts executed a mortgage deed under a mistaken view of the nature of her interest under a partition deed between her husband and his sons and the Court was not satisfied that the assumption by her of liability of her husband's debts was made with knowledge of the true position, she was not liable for any sums which she did not herself receive from the mortgagee, though no fraud was practised upon her and she knew that she was mortgaging her interest for her husband's debts—*Luchmeshwar v. Moti Rani*, A.I.R. 1939 P.C. 157 (159).

Where the execution of a mortgage deed by a pardanashin lady is found not to be her mental conscious act, there being no room for a semi-conscious act, the whole deed is affected and must be set aside—*Bank of Khulna v. Jyoti Prakash*, 67 I.A. 377, 45 C.W.N. 259, A.I.R. 1940 P.C. 147. It is only when a party founding on the deed has established the grantor's intelligent understanding of the deed that the question of undue influence arises—*ibid*.

The question whether the lady is pardanashin or that she adopted the deed with full knowledge and comprehension involves a question of fact. It should be put in issue and investigated at the trial. It cannot be raised for the first time in Privy Council appeal—*ibid.* Where the assertion that the lady is pardanashin is challenged, evidence may be produced to show that even if she was outside the class, the circumstances were such that the person dealing with her was bound to take special precautions and to prove that he had done so—*Bank of Khulna v. Jyoti Prakash*, *supra*; *Hodges v. Delhi & London Bank*, 27 I.A. 168, 23 All. 137 (P.C.).

71. Person authorised to dispose of transferable property not his own :—These persons include the manager of a joint Hindu family, guardian (see secs. 27 and 29, Guardians and Wards Act), executor, administrator (sec. 307, Indian Succession Act, 1925) and trustee (secs. 11 and 12, Indian Trusts Act).

A man has no right to deal with property which is not his own, and unless he can show some right to deal with it either as agent or guardian of the owner or as trustee or the like, any transfer which he purports to make cannot bind the lawful owner. Section 7 of the T. P. Act embodies this principle—*Chitu v. Charan Singh*, A.I.R. 1923 All. 563 (564), 77 I.C. 705. A person who has no right at all to present possession cannot make any valid transfer—*Padma Kumari v. Nanda Padhan*, A.I.R. 1941 Pat. 219.

If a person (e.g., the manager or Karnavan of a tarwad) is authorised to dispose of the tarwad property absolutely and without condition, any false recital as to under what particular state of facts he obtained his power to convey, does not affect the title of the transferee, provided the transferor has got the power to give an absolute title and professes to convey such absolute title—*Subramania v. Krishna*, 39 M.L.J. 590, 60 I.C. 77 (80).

The power of a Mohunt to alienate *debutter* property being like the power of a manager for an infant heir limited to cases of unavoidable necessity, a permanent lease at a fixed rate, though adequate at the time, is a "breach of duty in the Mohunt" and on the most favourable construction can only enure for the life of grantor and is not binding on his successor—*Abhiram v. Shyama Charan*, 36 Cal. 1003 (1113) (P.C.).

8. Unless a different intention is expressed or necessarily implied, a transfer of property passes forth-
 Operation of transfer. with to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof.

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth ;

and, where the property is machinery attached to the earth the moveable parts thereof ;

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith ;

and, where the property is a debt or other actionable claim, the securities therefor, (except where they are also for other debts or claims not transferred to the transferee) but not arrears of interest accrued before the transfer ;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

This section corresponds to sections 63 and 6 of the English Conveyancing Act, 1881 (44 & 45 Vict., c. 41). The object of this section is to cut down the length of deeds and to simplify them by doing away with the description of the minute details and incidents of the property intended to be conveyed. These incidents will be implied to be automatically conveyed by this section.

72. Scope :—This section is not intended to lay down any rule as to what words are necessary to effect a transfer of any particular kind of property. What property is actually conveyed by a particular deed depends upon its own terms—*Jyoti Prasad v. Seldon*, A.I.R. 1940 Pat. 516 (536), 19 Pat. 433, 192 I.C. 17. Where what is transferred by the endorsement is only the property in the promissory note and not either a debt or an actionable claim, this section does not apply—*Vira Raghavalu v. Rajalingam*, (1939) 2 M.L.J. 531, 1939 M.W.N. 774, A.I.R. 1939 Mad. 846. This section is inapplicable to transfers by execution sales—*Sribharaju v. Seetharamaraju*, 39 Mad. 283 (286); *Penumeta v. Veegesena*, 28 I.C. 232. But see *Hariharan v. Pachuveetial*, A.I.R. 1935 Mad. 482, 145 I.C. 174. See sec. 2 (d). But in an Allahabad case, the principle of this section, though not the section itself, has been applied to a Court-sale. Thus, if the property is at the date of the auction-sale subject to a charge, the purchaser gets only what the "transferor is capable of passing", that is, he takes the property subject to the charge, and cannot disregard it; he is not clothed with a higher interest in the property than what the transferor was capable of passing—*Nathan Lal v. Durga Das*, 52 All. 985, 1930 A.L.J. 1267, 130 I.C. 489, A.I.R. 1931 All. 62 (64).

It is incompetent to an undivided member of a Hindu family to alienate, by way of gift, his undivided share or any portion thereof, and such alienation is void *in toto*. The rule of Hindu law is not affected by s. 8—*Venkatappayya v. Raghavayya*, A.I.R. 1951 Mad. 318, (1950) 2 M.L.J. 466.

This section does not apply to rights under a decree in respect of immoveable property obtained by the transferor—*Lakshmi v. Yacob*, A.I.R. 1952 Tr.-Coch. 254.

73. "Unless a different intention is expressed or implied" :—Where a property is transferred, unless there is ambiguity in the document

effecting the transfer, an intention to reserve a certain right cannot be necessarily implied under this section except from the terms of the document itself. If the document, however, is ambiguous, a Court can consider the object of the grantor and other circumstances attending its execution and the acts of the parties since the date of its execution—*Suresh v. Surendra*, 37 I.C. 870 (871) (Cal.). There is a distinction between a grant or a reservation of coal, and that of a mine. The meaning of “coal” must be gathered from the document under construction—*Radha Gobinda v. Nilkantha*, A.I.R. 1951 Pat. 556, 30 Pat. 406.

Construction of document :—The construction of a document depends upon the words used therein and a document cannot be construed in the light of authorities interpreting the terms of documents in other cases. Those decisions may serve as a useful guide if they contain general rules of construction—*Poomalai Ammal v. Subbammal*, A.I.R. 1953 Mad. 566, (1952) 2 M.L.J. 884; *Fozmal v. Shridhar*, A.I.R. 1946 Bom. 499, 48 Bom. L.R. 327; *Bapiraju, A. v. Dist. Registrar*, A.I.R. 1968 Andh. Pra. 142 (F.B.); *Trivenibai v. Smt. Lilabai*, A.I.R. 1959 S.C. 620. Terms in the operative part are not controlled by those in the recitals—*Banki Das Mod Raj v. State of Rajasthan*, 1968 Raj L.J. 171. If the landlord signs the *Kabuliyat* along with the tenant it is a lease within the meaning of sec. 107 T. P. Act—*Madan Lal v. Noor Mohamed*, 1968 Raj. L.W. 334. The intention of the settlor has to be ascertained by a reading of the document as a whole and if there is ambiguity the Court can look to the circumstances under which the document came into existence and also, if necessary, to the subsequent conduct of the parties. A defeasance clause could not be operative so as to curtail the absolute estate given to the settlee in the earlier portion of the document, *ibid*. Words used in connection with legal transactions in India should not be given the special and technical meaning which they possess in England—*Shiba Prasad v. Lekhranj Shewakaram & Co.*, A.I.R. 1945 P.C. 162, 23 Pat. 871 relying on *Shashi Bhusan v. Jyoti Prasad*, 44 I.A. 46, 44 Cal. 585; *Kalidas v. Kanhaiyalal*, 11 Cal. 121 (131) P.C.; *Ramkishorelal v. Kumla Narayan*, A.I.R. 1963 S.C. 890.

To ascertain the rights of the grantee, the language of the instrument and the intention of the parties, as well as the estate held by the grantor, have to be taken into consideration—*Megh Lal v. Raj Kumar*, 34 Cal. 358; *Commissioner of Wealth Tax v. Gayatri Devi*, A.I.R. 1968, Raj. 129. Where a transaction is contained in more than one document between the same parties, the documents must be read together—*Narayani Amma v. Bhaskaran Pillai*, A.I.R. 1969 Ker. 214. The word “*malik*” as applied to the grantee in a deed of grant imports full proprietary rights, unless there is something in the text to indicate a contrary intention. Where the word “*malik*” is not used but it is said that the grantee (a female) and the sons born of her womb and the sons born of their loins in succession and the daughters born of the grantee’s womb shall enjoy the property in succession with right of transfer by sale and gift, then also an absolute estate is conferred as if the grantee was constituted *malik* of the property—*Sarajubala v. Jyotirmoyee*, 59 Cal. 142 (P.C.), 35 C.W.N. 903 (906), A.I.R. 1931 P.C. 179, 134 I.C. 648. Where a gift “making over certain taluks to the donee” was preceded by the

words "in order that you may perform those religious ceremonies, celebrate the festivals satisfactorily, and may provide for your own support, by having the property under your authority and control", held that the words of the gift were limited by its purpose, and the donor's intention as gathered from the whole instrument was that the donee should take the property for life only—*Kalidas v. Kanhayalal*, 11 Cal. 121 (131) (P.C.). The words "*istimrari mokurari*" in a pattah granting land do not *per se* convey an estate of inheritance; but it is also true that such an estate may be created without the addition of such expressions as "*ba farz-andan*" (with children) or "*vaslan bad vaslan*" (generation after generation). Without them, the other terms of the instrument, the circumstances under which it has been made, or the conduct of the parties, may show the intention with sufficient certainty to enable the Courts to pronounce the grant to be perpetual—*Tulshi Pershad v. Ram Narain*, 12 Cal. 117; *Gaya v. Ramjivan*, 8 All. 569. The grant of a *mokurari ijara* at a fixed rent in a mauza may be only for the life of the grantee; and in the absence of words importing perpetuity, the question to be considered is whether the intention of the parties is shown by the other terms of the instrument, the circumstances under which it was made or the subsequent conduct of the parties, with sufficient certainty to enable the Court to pronounce that the grant was perpetual—*Bilasmani v. Raja Sheopershad*, 8 Cal. 664 (P.C.). A condition in a lease that the tenant will not be ejected so long as he pays the rent due from him and remains obedient, is at best good only for the lifetime of the tenant and creates no heritable estate—*Madho Singh v. Deputy Commissioner*, 8 O.C. 61. In the absence of anything to the contrary, the simple grant of an annuity conveys only a life interest to the grantee. The mere circumstance that an annuity is continued after the life of the first grantee or that it is being charged on village revenues does not lead to an inference that it is of absolute duration, and does not indicate an intention to create an annuity as co-equal with the duration of the property itself—*Gopal Krishna v. Ramnath*, 5 Bom. L.R. 729. In the absence of direct evidence of its terms or territorial custom to the contrary, a *khorphosh* grant cannot be presumed to be of greater duration than for the life-time of the grantee. Such a grant cannot be presumed to be more than a grant of the rents and profits, and does not carry with it a right to open mines and remove minerals which are properties of the soil—*Tituram v. Cohen*, 33 Cal. 203 (P.C.). Trees standing on the land pass to the purchaser on a sale of the land; the mere fact that the trees had been prior to the sale of the land mortgaged to another person and no mention of the mortgage is made in the sale-deed, does not lead to the inference of a "different intention" to the effect that the vendor's interest in the trees should not pass to the purchaser of the land—*Pandurang v. Bhimrao*, 22 Bom. 610 (612).

If the purchaser of a property refuses to produce the deed of conveyance, it is impossible to ascertain whether a 'different intention is expressed or necessarily implied' and the Court will not be entitled to hold that any easement passed by virtue of this section to the purchaser as a legal incident of the property—*Wutzler v. Sharpe*, 15 All. 270 (289).

Provisos and exceptions :—The technical rules of interpretation of proviso and exceptions with reference to their scope and legal effect adopted in construing statutes should not ordinarily be imported in interpreting deeds and documents executed by lay men. In ordinary deeds a proviso may sometimes be in the nature of an explanation of the main clause or provision, and the Court must look not merely at the form of the language but its substance, the governing idea or purpose of the deed, the context and the surrounding circumstances to gather the real meaning or intention of the executant—*Angurbala v. Debabrata*, A.I.R. 1951 S.C. 293, 1951 S.C.J. 394 per Chandrasekhara Aiyar, J. A proviso is normally an excepting or a qualifying clause and the effect of it is to except out of the preceding clause upon which it is engrafted, something which but for the proviso would be within it, *ibid* per Mukherjea, J.

Power of Court to strike out words :—See *M/s. Parekh Bros. v. Kartik*, A.I.R. 1968 Cal. 532.

74. Transfer passes transferor's entire interest :—When a certain property is conveyed, it must be taken strongly against the grantor and in favour of the grantee, and all the interest which the grantor possessed in the property sold should be deemed to have passed. Hence, where in a sale deed certain specific lands are described as being conveyed without specifying the extent of the interest possessed by the vendor, it must be taken that all the interest which the vendor possessed including the vested interest would pass under the deed—*Budhiaraju v. Vullipallem*, A.I.R. 1939 Mad. 802 (803), (1939) 2 M.L.J. 600, 1939 M.W.N. 810. Unless there is an express or implied qualification to the contrary, the donor must be deemed to have conveyed all that he was possessed of in the property granted. Consequently, if the words employed are clear and unambiguous, no matter who the donee is, whether a male or a female, the language of the gift must be given effect to. Broadly speaking it may be said that if the language of the instrument is capable of conferring an estate of inheritance, considerations regarding the sex of the donee should be discarded. Where the language is ambiguous then recourse can be had to the personal law of the donee and the rule of inheritance applicable to him or her in finding out what the intention of the donor was (*i.e.*, whether he intended to confer an absolute estate or a mere life-estate on the female donee)—*Rama Chandra v. Ram Chandra*, 42 Mad. 283 (290, 291). This section, which provides that a transfer of property passes the transferor's entire interest to the transferee, must be read subject to the provisions of sec. 2 (old) which laid down that nothing in this chapter should be deemed to affect any rule of Hindu law. It is a rule of Hindu law as understood in Mithila that a gift by a Hindu to his wife does not carry with it the right to alienate. This rule of Mithila law is unaffected by sec. 6 of the T. P. Act—*Hitendra v. Rameswar*, 4 Pat. 510, A.I.R. 1925 Pat. 625, 87 I.C. 849. And the omission of the word "Hindu" from sec. 2 has not changed the Hindu Law in this respect.

In the case of a gift to a Hindu female by a Hindu this section is not of much practical utility as the words "or necessarily implied" do attract the operation of the general notion of a Hindu that a Hindu

woman ordinarily gets an estate for life and not an absolute estate—*Mt. Sheoraji v. Ram Sawari*, A.I.R. 1935 All. 43, (1934) A.L.J. 1013, 152 I.C. 387. But see *Rampyari Kuer v. Dulhin Bachuraj Kuer*, A.I.R. 1965 Pat. 217, where it has been held that a wife may get an absolute estate if so intended by the husband.

When an owner of a grove sells it by declaring that he was selling it with every right that he possessed therein, it follows that his right to the land is also conveyed to the vendee, unless it is expressly reserved by him—*Mahmood v. Bhikari* A.I.R. 1953 All. 705.

A transfer of his rights by a person having proprietary and under-proprietary rights in land without reservation includes the under-proprietary rights also—*Besheshwar v. Achaihar*, A.I.R. 1941 Oudh 507, 1941 O.W.N. 820, 195 I.C. 242 relying on *Gour Chandra v. Makunda Deb*, 9 C.W.N. 710 and *Bhojohari v. Bhagabati*, 17 I.C. 494. Where an entire zemindari *patti*, constituting a distinct unit like the village itself in which it is situate, is sold by auction without any exception or reservation, the abadi numbers, whose area is included in the area of the zemindari *patti* and which are a part and parcel of the latter, also pass to the purchaser—*Sheoraj v. Ganga Prasad*, A.I.R. 1941 Oudh 395, 1941 O.W.N. 618, 193 I.C. 675. See also *Abu Husan v. Ramzan Ali*, 4 All. 381; *Abhainandan v. Pashpat*, 47 All. 470, 23 A.L.J. 283, A.I.R. 1925 All. 449; *Asgar Reza v. Md. Mehdi Hossien*, 30 I.A. 71, 30 Cal. 556, 7 C.W.N. 482; *Balram v. Ganga*, A.I.R. 1926 Oudh 358, 93 I.C. 287; *Krishna Kumari v. Rajendra Bahadur*, 2 Luck. 43, A.I.R. 1927 Oudh 240, 104 I.C. 155. On a transfer of a village, all the interest possessed by the proprietor in that village passes to the transferee, e.g., houses and graves situate in that village—*Krishna Kumari v. Rajendra*, 2 Luck. 43, 13 O.L.J. 846, 104 I.C. 155, A.I.R. 1927 Oudh 240; *Bhagabutti v. Bholanath*, 1 Cal. 104 (P.C.). The sale of the rights and interests of a zemindar in a village passes also the buildings appurtenant to the zemindari rights—*Abu Hasan v. Ramzan*, 4 All. 381 (382); *Banke Lal v. Jagat Narain*, 22 All. 168 (172, 173). But this is subject to the qualification laid down by their Lordships of the Judicial Committee in the following words: "It was, however, determined by this Board in *Bejoy Singh v. Surendra Narayan*, [A.I.R. 1928 P.C. 234, 56 Cal. 1, 111 I.C. 345] that unless the terms of a putni lease showed an intention to grant a right of user other than that to which the zemindary lands were subject at the date of the grant, no other right passed to the grantee, and that such general words as "including all interests therein" were not sufficient to pass a right to excavate brick or earth Their Lordships think that the effect of the decision is to put putni tenures generally in this respect on the same footing as other permanent heritable and transferable tenures created by a zemindar and that the sub-soil rights will only pass under a *putni*, as in the case of other tenures referred to when granted in express terms: See *Gobinda Narayan Singh v. Sham Lal* [A.I.R. 1931 P.C. 89, 131 I.C. 753]"—*Bhupendra v. Rajeshwar*, A.I.R. 1931 P.C. 162, 59 Cal. 80, 58 I.A. 228, 35 C.W.N. 870, 132 I.C. 610; *Jagat v. Pratap*, A.I.R. 1931 P.C. 302, 10 Pat. 877, 134 I.C. 1073; *Sashi Bhusan v. Jyoti Prasad*, 44 Cal. 585, 44 I.A. 46 (53).

Where the grantor has used unqualified words of conveyance, he

cannot subsequently claim to have reserved any rights in the property—*Tarachand v. Lakshman*, 1 Bom. 91 (94). The rule as to the construction of the language of a grant is that indefinite words are calculated to convey all the interests of the grantor—*Kalidas v. Kanhayalal*, 11 Cal. 121 (131) (P.C.). If a person is the executor of the estate of his father, and has as one of his several sons a beneficial interest in the estate left by his father, and then he executes a sale-deed along with his other brothers, the deed will convey all the right and title which all the brothers possessed in the property, and this will undoubtedly include the right and title which the first-named person possessed as executor, although he did not expressly state in the deed that he was conveying the property in his capacity as executor. The meaning of a deed is to be decided by the language used, interpreted in a natural sense; and there being nothing in the deed to show that only his beneficial interest was to be sold, his interest as executor would also pass—*Bijraj Nopani v. Pura Sundary*, 42 Cal. 56 (64-66) (P.C.); *Gangabai v. Sonabai*, 40 Bom. 69. Where the share of a Hindu father as well as his power of disposal over his son's share vests in the Official Assignee, the son's share is also conveyed on alienation by the assignee although there is no express mention to that effect in the sale deed—*P. N. Kailasanatha Mudaliar v. P. Biswanatha Mudaliar*, (1967) 1 M.L.J. 383.

The general words used in a mortgage deed were in the absence of reservation of a *sarbarakari* interest sufficient to pass the entire interest of the mortgagor—*Gour v. Makunda*, 9 C.W.N. 710. The presumption under this section is that all the interest of the transferor would pass to the transferee—*Mt. Ram Kumar v. Mt. Chhitra*, A.I.R. 1937 Nag. 367, 172 I.C. 289. Where a mortgagee in possession grants an ordinary rayati lease, the lessee by virtue of this section acquires a right to cultivate the lands as a tenant for the period during which the mortgagee continues in possession, i.e., till the mortgage is redeemed—*Pramatha v. Sashi Bhusan*, A.I.R. 1937 Cal. 763, I.L.R. (1937) 2 Cal. 181. Where the question was whether a residential house standing on land included in the 13 gandas zemindari passed to the auction purchaser thereof in execution of the mortgage decree, it was held that no words of exclusion or reservation being found in the mortgage deed or sale certificate the words therein were ample to pass all the interest of the mortgagor in the 13 gandas zemindari including the land upon which the house was situate—*Deokinandan v. Aghorenath*, A.I.R. 1945 Pat. 400, 24 Pat. 268. Transfer of land includes, unless a different intention is expressed or implied, trees standing on it—*Divisional Forest Officer v. Daut*, A.I.R. 1968 S.C. 612.

A Mahomedan executed a sale-deed of the whole of his property in favour of his mother R and then died. The conveyance was ultimately declared to be void, but before such declaration the mother dedicated a portion of the property to a *wakf*. The question arose whether the dedication was valid to the extent of the one-third share which she inherited from her son. The High Court held that the *wakf* did attach to the one-third share. When R transferred the property to *wakf*, she passed not only such title as she had acquired or believed to have acquired from her son by virtue of the sale-deed, but also such

title as she had, as a matter of fact, acquired by inheritance on the death of her son. And if R's title to the whole property, by purchase from her son, failed her other title, *viz.*, title by inheritance to the one-third share passed to the *wakf*—*Fazal Ahmad v. Har Prasad*, 1929 A.L.J. 620 (F.B.), A.I.R. 1929 All. 465 (475, 476), 116 I.C. 1. But the Privy Council has reversed this decision, remarking that since the sale-deed was invalid, the *wakf* fell with it and was not valid even to the extent of R's share inherited from her son, and that sec. 8 did not apply to the case—*Har Prasad v. Fazal Ahmad*, 55, All. 83 (P.C.), 1933 A.L.J. 331, 37 C.W.N. 490 (494), A.I.R. 1933 P.C. 83, 142 I.C. 217.

75. Legal incidents thereof:—Incident has been defined in Wharton's Law Lexicon as a "thing necessarily depending upon, appertaining to or following another that is more worthy, as rent is incident to a reversion". Webster defines it as "something appertaining to or passing with or depending on another called the principal".

Examples:—An assignment of the subject-matter of a suit carries with it the right to continue the suit and consequently the right to be brought on the record as plaintiff—*Commercial Bank v. Sabju*, 24 Mad. 252. A liability to pay customary dues known as *haq-i-chahorum* is of the nature of an incident attaching to land, and may be enforced against the vendee unless it is limited by a right to claim it from the vendor—*Dhandia v. Abdur Rahman*, 23 All. 209. The right of pre-emption attached to ownership is a legal incident of the property and passes along with it—*Bhajan v. Mushtaq Ahmed*, 5 All. 324 (330) (F.B.). The title deeds of an estate, counterparts, leases and other documents of the like kind such as *kabuliyats* are regarded as necessary to the estate and pass with it, whether the transfer is made by a conveyance, decree or certificate of sale—*Sri Bhavani v. Devrao*, 11 Bom. 485; *Harrington v. Price*, 3 B. & Ad. 170. A right of property carries with it the right to execute decrees obtained in respect of such property. Thus, the purchaser of a village is entitled to execute decrees for ejectment obtained by the vendor against the tenants of the village for non-payment of rent, except when the decrees are personal as in the case of decrees for pre-emption or when they relate to past profits—*Onkardas v. Shahbaz Khan*, 1 N.L.R. 48. Where during the pendency of a suit for the recovery of a debt the plaintiff transfers to a third party, the debt in suit and a decree is thereafter passed in favour of the plaintiff, the transferee becomes entitled to the decree as legal incident of the debt transferred and the transferee can execute the decree without assignment—*Jugal Kishore v. Raw Cotton Co.*, A.I.R. 1955 S.C. 376. Where the right of unpaid purchase-money is transferred, the lien for the unpaid purchase-money also goes with it to the transferee—*Sambasiva v. Venkatarama*, 51 M.L.J. 95, A.I.R. 1926 Mad. 903, 95 I.C. 447. A covenant for renewal is a covenant running with the land, and therefore where a grantee of land for a term of years transfers his interest, the right to renewal goes with the transfer unless there is an express or implied intention in the document of transfer to the contrary—*Jogendra v. Mtasha*, 12 Bur. L.T. 133, 9 L.B.R. 268, 51 I.C. 360.

But an injunction does not run with the land. Hence if a property regarding which an injunction is granted is sold under a decree,

the vendee thereof cannot be made amenable to the injunction—*Dahyabhai v. Bapulal*, 3 Bom. L.R. 564; *Attorney-General v. Birmingham Drainage Board*, 17 Ch. D. 685.

The goodwill of a trade or business passes with the premises—*Hall v. Barrows*, 4 DeG. J. and S. 150; *Re David and Matthews*, [1899] 1 Ch. 378. Similarly, trademarks and trade names denoting the goods of a particular manufacturer would pass with the sale of the business to which they relate—*Singer Manufacturing Co. v. Long*, 18 Ch. D. 395, 8 App. Cas. 15; *Siegart v. Findlater*, 7 Ch. D. 801. The right to eject on the ground of unlawful subletting under the West Bengal Premises Tenancy Act 1956 is transferred along with the transfer of premises—*Munni Devi v. Pushpalata*, 71 C.W.N. 282.

76. Easements annexed thereto :—The characteristic of an easement is that it is a right which the owner of a dominant tenement as such has over the property of another. Where the owner of a portion of a holding, who is himself the owner of a common passage in the holding and as such entitled to use it, transfers the portion of the holding, such easement, if any, as may arise by the transfer in favour of the transferred property over the property remaining in the hands of the transferor, is not contemplated by this section—*Hamida Khatoon v. Panchayat*, A.I.R. 1947 Pat. 122, 12 B.R. 622. When a common passage was left for the use of the co-sharers in a partition between members of one family, the right to a share in the passage or even to the use of the passage, was not a legal incident of the shares allotted to the co-sharers, with the result that any stranger who might acquire the share of one of the co-sharers would not automatically become entitled to the common passage, *ibid*.

Easements 'annexed' may mean those considered as appurtenant thereto, as held in England—*Ibid* (at p. 288). But the term does not mean an easement which first came into existence as a consequence of a transfer of a house or land; it means those easements which at and prior to the transfer were existing easements—*Wutzler v. Sharpe*, 15 All. 270 at p. 290.

Under section 19 of the Indian Easements Act (V of 1882) an easement passes to the transferee with the dominant heritage. Thus, A has a certain land to which a right of way is annexed. A lets the land to B for 20 years. The right of way vests in B and his legal representatives so long as the lease continues. (Illustration to sec. 19, Indian Easements Act). See also *Rajpur Colliery Co. v. Pursottam Cohil*, A.I.R. 1959 Pat. 463.

Even where the grantor reserves a portion of the property to himself, the easements of necessity which had been enjoyed by the part granted over the part reserved go with the former, and the transferor is also entitled to exercise the rights of easements of necessity over the transferred land. Question of this character frequently arises in cases of partition of the premises. See *Kadombini v. Kali Kumar*, 26 Cal. 516; *Charu v. Dokawri*, 8 Cal. 956; *Bolye v. Lalmoni*, 14 Cal. 797; *Purshotam v. Durgoji*, 14 Bom. 452 (454); *Attar Singh v. Jawahir*, 60 P.R. 1888; *Sultani v. Ram Saran*, 49 P.R. 1900. It is only the ease-

ments of necessity or continuous easements that pass by implication of law—*Polden v. Bastard*, L.R. 1 Q.B. 156 (161). And if the easements are not easements of necessity, the transferor cannot exercise them against the transferee unless they are expressly reserved to the transferor in the deed of conveyance—*Chunilal v. Manishankar*, 18 Bom. 616; *Attar v. Jawahir*, *supra*; *Wheeldom v. Burrows*, 12 Ch. D. 81.

An easement is extinguished when either the dominant or the servient heritage is completely destroyed (Indian Easements Act, sec. 45), or when the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages (*Ibid*, sec. 46).

77. Rents and profits :—This section speaks of rents and profits accruing *after* the transfer. The right to recover rents and profits which have accrued to the property *prior* to the date of assignment does not pass with the property unless the right is expressly conveyed—*Ganesh v. Shannarain*, 6 Cal. 213; *Bhogilal v. Jethalal*, 30 Bom. L.R. 1588, A.I.R. 1929 Bom. 51, 114 I.C. 262; *Muthu v. Neevanathi*, 12 L.W. 44, 58 I.C. 383; *Poongavanam v. Subramanya*, A.I.R. 1951 Mad. 601, (1951) 1 M.L.J. 601. Such arrears of rent are a debt or actionable claim and if they are to be transferred, they must be assigned separately, *ibid*. As to profits that accrued *due prior* to sale, it cannot be said that they are subsidiary to the enjoyment of the property. It cannot be said that to make a sale operative and effective, the right to collect past profits must be conveyed to the vendee—*Chandrasekaralingam v. Nagabhushanam*, 53 M.L.J. 342, A.I.R. 1927 Mad. 817, 104 I.C. 409. The purchaser of a village is not entitled to execute decrees which relate to rents and profits which had accrued *prior* to the transfer—*Onkardas v. Shabaj*, 1 N.L.R. 48.

Where a mortgage deed provided that the property mentioned therein was mortgaged with "all the appurtenances to the said premises belonging to and all the estate, right, title and interest, property, claim and demand whatsoever of the mortgagors into and upon the said premises unto the mortgagees subject to the proviso for redemption hereinafter contained": *held* that the mortgagee was entitled as a secured creditor to the rents and profits of the land and that by reason of this section the rents and profits arising out of the mortgaged land in the hands of the receiver appointed pending the mortgage suit would form part of the mortgage—*Ma Joo v. Collector*, A.I.R. 1934 Rang. 321, 12 Rang. 437; see also *Ashgar v. Mehdi Hussain*, 30 Cal. 556, 30 I.A. 71.

78. "Things attached to the earth" :—For the meaning of the term 'attached to the earth' see Notes under section 3.

Trees, crops :—The title to trees and shrubs passes with the transfer of proprietary rights in the land—*Fitrat Hussain v. Liaquat Ali*, I.L.R. 1939 All. 518 (F.B.), 1939 A.L.J. 281, A.I.R. 1939 All. 291 (294) (F.B.). See also *Yakub Ali v. Tajammul Hussain*, A.I.R. 1932 All. 653, 143 I.C. 247. Trees and shrubs being rooted to the earth are deemed to be 'attached' thereto, and so long as they are attached they form part of the soil to which they are attached, hence the sale of a house and compound would comprise the trees and growing crops thereon unless they are expressly

expected—*Faquir Sonar v. Khuderam*, 2 N.W.P. 251; *Land Mortgage Bank v. Vishnu*, 2 Bom. 670 (673); *Pandurang v. Bhimrav*, 22 Bom. 610 (611); *Ramlinga v. Samiappa*, 13 Mad. 15 (16); *Iqbal Husen v. Nand Kishore*, 24 All. 294 (297). A lease of land carries with it to the tenant a right to the trees standing on the demised land so as to entitle him to their usufruct—*Shaik Mohammad Ali v. Bolakee*, 24 W.R. 330. A tenant at fixed rates has a transferable right in his holding which includes a transferable right in the trees growing thereon—*Harbans Lal v. Maharaja of Benares*, 23 All. 126. In the absence of any special provision in a lease granted before the T. P. Act came into force, the property in the trees planted by the lessee after a *kaimi lease* had been granted did not vest in the landlord—*Mofiz v. Rashik*, 37 Cal. 815. But in the case of a lease for a limited period of waste land, for the purpose of cultivation, the lessee could only cut trees growing on the land for the purpose of clearance and cultivation or for repairs, but he had no right to fell or carry away for sale unassessed forest timber growing on the demised land—*Rustomji v. Collector of Tana*, 11 M.I.A. 295.

The right to the growing crops passes by the sale unless there is some provision to the contrary, and in the case of a Court sale the right to possession of the crops accrues from the date of the delivery of possession of the land—*Suptd. & Remembrancer of Legal Affairs v. Bhagirath*, A.I.R. 1938 Cal. 610, 38 C.W.N. 854, 59 C.L.J. 482. Where in execution of a pre-emption decree possession is delivered to the pre-emptor from the purchaser and the crops are still standing on the land, they pass with the land, *Chela Ram v. Gopi Chand*, A.I.R. 1942 Pesh 88.

Bamboo trees standing on the land are "attached to the earth" and pass to the transferee upon a transfer of the land—*Jagmohan v. Emp.*, 13 P.L.T. 519, A.I.R. 1932 Pat. 344 (345).

Groves :—In the case of a sole proprietor he cannot have inferior rights as grove-holder as well as full proprietary rights as a zemindar in the land in which he has planted a grove. His rights in the groves merge completely in his zemindary rights. The trees pass to the purchaser with the auction-sale of the zemindary—*Bhoop Singh v. Sri Ram*, I.L.R. 1940 All. 599, 1940 A.L.J. 443, A.I.R. 1940 All. 427. See also *Khan Chand v. Mt. Chandan*, 24 I.C. 81 and *Hasan Ali v. Azharul Hasan*, 47 All. 45. If the zemindar elects to sell a part of his zemindary holding retaining his entire share in the grove land that entire share continues to appertain to his remaining share in the village. Hence, if the remaining share of the zemindary is sold at an auction-sale, his entire share in the grove land passes to the auction-purchaser; *Raj Narain v. Imam Reza*, I.L.R. 1940 All. 667, 1940 A.L.J. 587, A.I.R. 1940 All. 457.

Buildings :—The maxim of English law that *quicquid plantatur solo, solo cedit* has at the most a limited application in India where there exists a rule as a part of the customary law that the ownership of a superstructure may exist in one person and the ownership of the soil in another—*Mritunjai v. Hinga*, A.I.R. 1933 Oudh 468 145 I.C. 627; *Narayan v. Jatindra*, A.I.R. 1927 P.C. 135, 54 Cal. 669, 54 I.A. 218. So, in order to make a house erected upon the land as well as the land itself subject to the Government's power of sale for arrears of revenue, special words indicat-

ing the intention of the Legislature to make the building subject to sale would be necessary—*Narayan v. Jatindra*, supra, at pp. 137-38; *Ismail Kani v. Nazarali*, 27 Mad. 211 (214); *In re Thakoor Ch. Paramanick*, B.L.R. Supp. Vol. 595 (F.B.). In the last cited case their Lordships observed: "We think it clear that according to the usages and customs of the country, buildings and other such improvements made on land do not, by the mere accident of their attachment to the soil, become the property of the owner of the soil; and we think it should be laid down as a general rule that if he who makes the improvement is not a mere trespasser, but is in possession under any *bona fide* title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building, if it is allowed to remain for the benefit of the owner of the soil, the option of taking the building or allowing the removal of the material remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess—"per Sir Barnes Peacock delivering the judgment of the Full Bench at p. 598.

On the sale of a building only the land on which it stands does not pass—*Katkar Jute Mills v. Calcutta Match Works*, A.I.R. 1958 Pat. 133. A life tenant executed two mortgages. The mortgage deed provided that any future building that might be erected on the mortgaged land by the mortgagor would remain security for the mortgage money. On the death of the life tenant, Held: that the mortgage could be enforced against the structure, because the remainderman on the death of the life tenant got the land but not the structure—*Venkatasubbiah v. Thirupurasundari*, A.I.R. 1965 Mad. 185.

According to the Mahomedan law also the owner of land on whose property another person has built without his consent is not entitled to the building as having become attached to the land, but is only entitled to have the building removed and the land restored to the original state—*Secretary of State for Foreign Affairs v. Charlesworth, Pulling & Co.*, 26 Bom. 1 (P.C.).

But where the deeds of mortgage and sale certificate in respect of a zemindary contained no words of exception and reservation and were otherwise apt for the purpose, they conveyed all the interest in the zemindary which was possessed by the former owner including his interest in the houses on that land and in the profit rents derived from them in the absence of words showing an intention to retain them—*Syed Ashgar v. Syed Mahomed*, 30 Cal. 556 (P.C.), 30 I.A. 71 (75). If a zemindar sells his zemindary share in a village it may be presumed that he sells the property with all his interests therein if there are no words in the deed showing an intention to retain or exclude the house therein—*Balaram v. Ganga*, A.I.R. 1926 Oudh 358 (359), 93 I.C. 287. Where immoveable property is mortgaged a theatre erected by the mortgagor or other fixtures pass to the mortgagee—*MacLeod v. Kissan*, 30 Bom. 250; *Hari Pada v. Anath*, 22 C.W.N. 758 (759), 44 I.C. 211; *George v. South Indian Bank Ltd.*, A.I.R. 1959 Ker. 294. The "rights and interests" of a zemindar in a certain village were sold in execution of a decree. At the time of the sale a certain building was his property *qua* zemindar, held that in the

absence of a proof that such building was excluded from sale, the sale passed the building to the auction purchaser—*Abu Hasan v. Ramzan Ali*, 4 All. 381.

A Full Bench of the Allahabad High Court has however held in a recent case (Allsop, J. dissenting) that the residential house of a zemindary is a separate unit and in no sense a part and parcel of the proprietary right owned by him in the mahal. Hence on transfer of the proprietary interest of zemindar in the mahal in execution of a mortgage decree against him, his residential house in the abadi site, unless it is included in the mortgage itself, cannot pass to the transferee under this section which has no application to compulsory sales in execution of a decree or to transfers of undivided shares in land—*Umrao Singh v. Kacheru Singh*, A.I.R. 1939 All. 415 (428) (F.B.), I.L.R. 1939 All. 607, 1939 A.L.J. 308. The residential house of a zamindar is not necessarily appurtenant to the Zamindary and it must be deemed to have remained the property of the Zamindar on the transfer of the Zamindary unless it is proved that the house was intended to be transferred along with the rest of the zamindary—*Deota Din v. Gur Prasad*, A.I.R. 1955 All. 292 (F.B.).

Agricultural fixtures :—The purchaser of lands irrigated by a tank becomes entitled to the use of the water of the tank for the purpose of irrigating the lands—*Venkata v. Secretary of State*, 12 M.L.J. 432. The grant of a village with all “wells, tanks and waters” within its boundaries does not necessarily pass to the grantee an artificial channel which was in existence before the grant of the village and which ran through that and two other villages and in enjoyment of which those villagers were equally interested—*Ambalavana v. Secretary of State*, 28 Mad. 539.

Although an agricultural tenant may possibly be justified in digging up shells for cultivating the land properly and in a husbandman-like manner, the property in the shells is not in him, but in the landlord; and in the absence of a local custom, the tenant has no right to convert the shells so dug up to his own use—*Chaladom v. Kakkath Kunhambu*, 25 Mad. 669 (671); *Tucker v. Linger*, L.R. 8 A.C. 508; *Elwes v. Briggs Gas Co.*, 33 Ch. D. 562. The grant of a village with ‘water’ does not include flowing water in the river passing through the village—*S. N. Ranade v. Union of India*, A.I.R. 1964 S.C. 24.

Minerals :—The rights of the grantee of a land to the minerals underground must depend upon the terms of the deeds by which they are conveyed or reserved—*Rowbotham v. Wilson*, 8 H.L.C. 348 (at p. 360). The Zemindar is presumed to be the owner of the mineral rights appertaining to a tenure, in the absence of evidence that he parted with them. Therefore, on the grant of a mokarari lease by the Zemindar, the mineral rights do not by implication pass to the tenant—*Hari Narayan v. Sriram*, 37 Cal. 723 (P.C.) (reversing *Sriram v. Hari Narayan*, 33 Cal. 54, and practically overruling *Meghlal v. Rajkumar*, 34 Cal. 358; *Tituram v. Cohen*, 33 Cal. 203 (P.C.); *Giridhari v. Megh Lal*, 45 Cal. 87 (P.C.); *Sashi Bhusan v. Jyoti Prasad*, 44 I.A. 46. This principle applies as well to rent-free grants as to grants of tenures at fixed rents—*Raghunath v. Durga Prasad*, 47 Cal. 95 (P.C.). “A long series of recent deci-

sions by the Board has established that if a claimant to sub-soil rights holds under the Zamnidar or by a grant emanating from him, even though his powers may be permanent, heritable and transferable, he must still prove the express inclusion of the sub-soil rights; *Gobinda Narayan Singh v. Sham Lal Singh*, A.I.R. 1931 P.C. 89, 58 I.A. 125, 131 I.C. 753 and see cases cited there"—*H. V. Low & Co. v. Jyoti Prasad*, A.I.R. 1931 P.C. 299 (301), 35 C.W.N. 1246, 58 I.A. 392, 135 I.C. 632. But the permanent tenure holder may acquire right to the minerals by adverse possession—*Onkarmal Agarwalla v. Bireswar Hazra*, 61 C.W.N. 970. Minerals necessarily pass with the rights to the surface unless there is express or implied reservation in grant—*Raja Anand Brahma Shah v. State of Uttar Pradesh*, A.I.R. 1967 S.C. 1081.

Sub-soil rights :—Sub-soil rights in a tenure are not granted, unless an express grant is made. Of course the tenant has a right to make bricks for his own domestic or agricultural purposes. But unless the tenant has acquired by grant or by adverse possession a right of ownership in the sub-soil, the digging of earth for bricks to be taken away from the area of the tenure and disposed of to strangers is an appropriation of the corpus of the grant which in India a tenure-holder is not entitled to make—*Purnendu v. Narendra*, A.I.R. 1943 Pat. 31, 23 P.L.T. 662.

Factory includes machinery :—On a mortgage of a factory (which is immoveable property) the fixed machinery would also be comprised within the factory—see *Amratlal v. Keshavlal*, 28 Bom. L.R. 939, A.I.R. 1926 Bom. 495 (496), 98 I.C. 696. But see *Muni Lal v. Kishore Chand*, 28 P.L.R. 325, 103 I.C. 742, A.I.R. 1927 Lah. 373 (374).

79. House and its easements :—The transfer of a house passes with it the easements annexed thereto. Thus, where a person has a right to use a drain or passage as incidental to his property, such right may be enjoyed at all times by any person who may be placed in his shoes in regard to the property. So, a tenant may also enjoy that right—*Amjudee Begum v. Syed Ahmad*, 6 W.R. 314. The purchaser of a house acquires the right to the use of the way over a definite path communicating with the house, which the vendor of the house had been enjoying—*Nabeen Chander v. Bhooban Chander*, 15 W.R. 526.

The phrase "easements annexed thereto" in this section refers to those easements which at and prior to the transfer were existing easements, for instance, a right of way over a field belonging to a different owner by which alone a house could be approached. It does not refer to an easement which first came into existence as a consequence of transfer—*Ahmad v. Dhonfa*, A.I.R. 1937 Nag. 179 (180), 171 I.C. 496.

80. Doors, windows, etc. :—Doors and window shutters of a pucca building form part of the immoveable property and have no separate existence—*Peru Bepari v. Bonuo*, 11 Cal. 164 (166); *Queen-Empress v. Shaikh Ibrahim*, 13 Mad. 518.

The enumeration of the words "locks, keys, bars, etc." corresponds to fitting or permanent fixtures to the house. The words "other things provided, etc." do not include a right of access by a staircase when the ownership of the staircase itself is not claimed and the right of way is not an easement of necessity—*Ahmad v. Dhondba*, supra.

House does not include machinery :—In cases where business is carried on in the premises, and the sale is only of the premises and not of the business as a going concern nor of the premises together with the fixtures of machinery, *prima facie* all that the purchaser is entitled to are the buildings. It can hardly be the intention of the parties when they sell the building alone without reference to the machinery or the business, that the purchaser should get the valuable machinery in the building by calling them fixtures and by claiming to get them under that head. *The technical English law of fixtures is not applicable to India.* The provisions as to fixtures are contained in sec. 8 of the T. P. Act, under which the transfer of a house carries with it "all other things provided for permanent use". A machinery brought into a house for carrying on a business is not a thing provided for the permanent use of the house and is not necessary for the beneficial enjoyment of the same. Therefore, on a sale of the house the machinery does not pass to the purchaser—*Narayana v. Balaguruswami*, 45 M.L.J. 385, 79 I.C. 838, A.I.R. 1924 Mad. 187 (188); *Veerappa v. Ma Tin*, 4 Bur. L.J. 52, 88 I.C. 1011, A.I.R. 1925 Rang. 250.

81. Debt—Securities :—The words used in the penultimate clause of this section are "debt or other actionable claim"; consequently, a debt secured by mortgage of immoveable property does not come under this clause, as it is not actionable claim. But a difficulty arises with regard to the application of this clause to a promissory-note secured by deposit of title-deeds. In a Madras case it has been held that where a promissory-note secured by a deposit of title-deeds was endorsed over to the plaintiff for collection, and title-deeds were also delivered over to him, and the plaintiff brought a suit to enforce the equitable mortgage, *held* that along with the transfer of the promissory-note-debt by the endorsement the equitable mortgage passed thereunder to the transferee by operation of this section, and the plaintiff was entitled to enforce the equitable mortgage, and not to sue upon the promissory-note alone—*Cunniah v. Gopala Chettiar*, 1919 M.W.N. 613, 52 I.C. 879. In this case, the endorsement was for collection and hence the endorsement of the pro-note was sufficient to pass the security. But if the endorsement is for value, it amounts to a sale, and a sale of a mortgage-debt (even though it is a promissory-note-debt secured by an equitable mortgage by deposit of title-deeds) can be made only by a registered instrument. Consequently, if the promissory-note is simply transferred by endorsement, without the transferor taking care to transfer the mortgage right by a registered instrument, the debt and the security will get dissociated, and the security will cease. The transferee will get only the right to the debt but not to security. Section 8 cannot apply to such a case, because that section applies only to a debt or other actionable claim, and not to a mortgage-debt—*Ehumalai v. Balakrishna*, 44 Mad. 965 (969) (distinguishing *Cunniah v. Gopala*, *supra*). In another Madras case, however, Wallis, C.J., went to the length of saying that even if a promissory-note secured by deposit of title-deeds was transferred by mere endorsement, this section operated to pass the right to the security along with the right to the debt—*Perumal v. Perumal*, 44 Mad. 196. But this case has been dissented from in 44 Mad. 965, *supra*. See Note 356 under sec. 59, *post*.

If the debt is merged in a *decree*, the transfer of the decree does not carry with it the securities of the debt, and the purchaser is not entitled to maintain a suit on the securities. Thus, the purchaser of a simple money-decree passed on a simple mortgage-bond does not acquire a lien on the property mortgaged—*Ganpat v. Sarupi*, 1 All. 446 (447). But it has been held by the Patna High Court that where a decretal debt is transferred by a registered instrument, the securities therefor are also transferred to the transferee—*Bhagirath v. Jamuna*, A.I.R. 1950 Pat. 211.

The stipulation for payment of interest upon arrears of rent is an ordinary incident of a tenancy in this country, unless there is something unusual in the stipulation, and as a rule, it attaches to the tenancy so that a purchaser of the tenancy will also be bound by the stipulation—*Raj Narain v. Panna*, 30 Cal. 213.

9. A transfer of property may be made without writing in every case in which a writing is not expressly required by law.

Oral transfer.

Scope :—This section does not in terms apply to charges, for a

charge is not a "transfer of property"—*Bapurao v. Narayan*, A.I.R. 1950 Nag. 117, I.L.R. 1949 Nag. 802.

83. Transfer cannot be made otherwise than under this Act:—

After this Act comes into force, a transfer of immoveable property within this Act cannot be effected in any manner not prescribed by this Act. Thus, where the Act requires a transfer to be effected only by means of a registered instrument, it cannot be effected in any other manner, e.g., by filing a petition to the Collector admitting the transfer, or by the admission recorded in a registered mortgage not being itself the deed of transfer, or by mere mutation of names or change of possession in favour of the transferee—*Immudipattam v. Periya Dorasami*, 24 Mad. 377 (P.C.); *Bishen Lal v. Ghaziuddin*, 23 All. 175. Title to land cannot pass by mere admission where the statute requires a deed. Therefore, the mere execution of a *baziwada* (release or relinquishment) by a benamidar which contains an undertaking not to interfere with the plaintiff's possession cannot itself give or transfer title to the property from the benamidar to the plaintiff (real owner)—*Keshri Mull v. Sukan Ram*, 12 Pat. 616, A.I.R. 1933 Pat. 264 (266).

Unlike the Statute of Frauds, the T. P. Act adopts it as a general principle in this section that a transfer may be made without writing in every case in which a writing is not expressly required by law—*Arumugham v. Subramaniam*, A.I.R. 1937 Mad. 882 (892), I.L.R. 1937 Mad. 638, 171 I.C. 444 (F.B.).

Punjab :—No doubt oral transfers of any value are valid outside the municipal and cantonment limits in the Punjab, but when the transaction is intended to be a transfer by writing, it cannot be treated as an oral sale—*Mt. Shankri v. Melkha Singh*, A.I.R. 1941 Lah. 407 (F.B.) at p. 410. Delivery of possession is not in itself conclusive evidence of an oral transfer—*Ibid*.

84. Where writing not necessary:—A *relinquishment* or surrender by a Government ryot to the Government of the properties included in his *patta* is neither a mortgage nor a sale, nor a gift, nor a lease, as defined in this Act and is not by law required to be in writing or in any of the modes prescribed by this Act—*Fowler v. Secretary of State*, 13 L.W. 230, 61 I.C. 852. Similarly relinquishment or surrender by a limited owner under the Hindu law may be effected by any voluntary act which may operate as her civil death—*Mt. Akhaj v. Arjun Koeri*, A.I.R. 1952 Pat. 67. Mother may relinquish her interest in the joint family property without a written instrument—*Ramdas Chimna v. Pralhad Deoras*, A.I.R. 1965 Bom. 74.

A surrender of a lease is not a transfer and need not be in writing—*Brojonath v. Mameshwar*, 28 C.L.J. 220, 46 I.C. 100; *Elias Meyer v. Monoranjan*, 22 C.W.N. 441, 44 I.C. 297; *Fowler v. Secretary of State*, supra.

A transfer made in compromise of a claim is neither a sale nor a gift nor an exchange and no writing is necessary under the T. P. Act to validate the same, though such transfer may relate to immoveable property—*Thiruvengada Chariar v. Ranganatha*, 13 M.L.J. 500.

A partition of joint family property is not an exchange and is not by law required to be in writing—*Satya Kumar v. Satya Kripal*, 10 C.L.J. 503, 3 I.C. 247; *Ma Sein Nyun v. Maung U.*, 25 I.C. 498; *Peddu Reddiar v. Kothanda Reddi*, A.I.R. 1966 Mad. 419.

The creation of an easement is not a *transfer* thereof, and therefore it can be created by oral agreement, without requiring any writing—*Sital Chandra v. Delanney*, 20 C.W.N. 1158 (1164), 34 I.C. 450.

A grant of immoveable property by way of *guzara*; not being a grant of the corpus, but only of the right to enjoy the usufruct, need not necessarily be in writing—*Gajraj v. Indarpal*, 21 O.C. 360, 49 I.C. 406.

A transfer of land by a husband to be enjoyed by his wife during his life-time in discharge of future maintenance is not a gift or sale and may be made without writing—*Madam Pillai v. Badrakali*, 45 Mad. 612 (F.B.). If an owner orally agrees to settle some properties in consideration of marriage and thereafter delivers possession to the settlee, the transaction is a valid transfer under sec. 9—*Serandaya Pillai v. Sankaralingam Pillai*, (1959) 2 M.L.J. 502.

Where a purchase is made by a joint decree-holder in his own name, other joint decree-holders are beneficially interested in the purchase, and their right which is short of ownership can be relinquished without a written instrument—*Lal Singh v. Mt. Chotey*, A.I.R. 1933 All. 854 (1934) A.L.J. 107.

There is no express provision of law that a charge can be created only by a document. Consequently a valid charge can be created orally. But if a charge is created by a document, it must be registered where the charge is for a sum in excess of Rs. 100—*Kuppuswamy v. Rasappa*, A.I.R. 1936 Mad. 865, 44 M.L.W. 438.

To enable parties to come to an agreement to treat a sale as a mortgage by a subsequent agreement, no writing is necessary—*Narsingdas v. Radhakisan*, A.I.R. 1952 Bom. 425.

85. Where writing is necessary :—Writing is necessary in the case of the following transactions :—

(a) Sale of immoveable property of the value of Rs. 100 or upwards—sec. 54, *infra*.

(b) Sale of a reversion or other intangible thing—*Ibid*.

(c) Simple mortgage irrespective of the amount secured—Sec. 59, *infra*.

(d) All other mortgages securing Rs. 100 or upwards—*Ibid*.

(e) Leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent—Sec. 107, *post*. But see Sec. 107 proviso; Sec. 117, *post*; and Sec. 17 (d) proviso, of Act XVI of 1908 (Registration Act) for exemptions.

(f) Exchange (subject to the same rules as sale)—Sec. 118, *post*.

(g) Gift of immoveable property—Sec. 123, *post*.

(h) Transfer of an actionable claim—Sec. 130, *post*.

(i) Notice of transfer of actionable claim—Sec. 131, *post*.

10. Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him: Provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

86. Principle of section :—The rule in this section that a condition of absolute restraint of alienation is void, is founded on the principle of public policy allowing free circulation and disposition of property—*Rosher v. Rosher*, 26 Ch. D. 801; *Renaud v. Gullet*, L.R. 2 P.C. 4; *Faiyaz Husain v. Nilkanth*, 4 O.C. 163. "From the earliest times," observed Lord Justice Fry, "the Courts have always leant against any device to render an estate inalienable. It is the policy of the law always to make estates alienable, and it is immaterial by what device it is attempted to prevent an owner from exercising the power of ownership"—*In re Parry & Daggs*, 31 Ch. D. 130 (134) (C.A.). It is a general rule of jurisprudence that where an estate in fee is given, a condition in restraint of alienation is a condition repugnant to the nature of the grant and as such inoperative. There can be no doubt, on general principles, that when property is transferred absolutely, it must be transferred with all its legal incidents, and that it is not competent to the grantor to sever from the property those incidents which the law inseparably annexes to it, and thereby to abrogate the law by private agreement. The introduction of a condition against alienation in a grant absolute in its terms has been declared to be equivalent to introducing an exception of the very thing which is of the essence of the grant—*Anantha v. Nagamuthu*, 4 Mad. 200 (202). It is the principle of English law that where an estate is created for life for a man and afterwards to the heirs of his body, then that will give him an absolute estate, and there is nothing in the T. P. Act which recognises that there can be any remainder left over after the creation of such estate—*Raj Deo v. Brahm Deo*, A.I.R. 1937 All 235, 168 I.C. 142. A provision in a deed of absolute dedication that the sebit for the time being shall have no power to alienate is void—*Ramchandraj Maharaaj v. Lalji Singh*, A.I.R. 1959 Pat. 305.

87. Application of section :—The provisions of sections 10 and 12 are perfectly general and refer to all transfers—transfer by gift, sale or otherwise. The conditions imposed upon a donee of a gift must, before it can be valid, be consistent with the general principles in regard to conditions in transfers contained in Chapter II of the Act and in particular in sec. 10 thereof—*Brij Devi v. Shiva Nanda*, I.L.R. 1939 All. 298, 1939 A.L.J. 77, A.I.R. 1939 All. 221. The principle of this section is of universal application and has therefore been applied both to Hindus and Muhammadans—*Krishna v. Shanmuga*, 6 M.H.C.R. 248; *Raja Chunder v. Koor Gobinmanath*, 11 B.L.R. 86 (P.C.):

Tagore v. Tagore, 9 B.L.R. 377 (P.C.); *Pudmananda v. Hayes*, 28 Cal. 720; *Bhairon v. Parmeshri*, 7 All. 516; *Mahram v. Ajudhi*, 8 All. 452 (459); *Laliyan v. Muhammad Shafi*, 34 All. 478 (480); *Broughton v. Mercer*, 14 B.L.R. 442; *Anantha v. Nagamuthu*, 4 Mad. 220; *Gomti v. Anari*, A.I.R. 1929 All. 492, 118 I.C. 152; *Muthu Kumara v. Udaya*, 33 Mad. 867. In an Oudh case it has been remarked that this section does not apply to cases under the Muhammadan Law—*Hanuman v. Abbas*, 4 Luck. 452, A.I.R. 1929 Oudh 193 (201), 120 I.C. 387.

The principles of this section have been applied to the Punjab although the Act does not apply to that province—*Bhawgan Dei v. Secretary of State*, (1902) P.L.R. page 518; *Nand Singh v. Partab*, 76 I.C. 16, A.I.R. 1924 Lah. 674.

The provisions of the T. P. Act do not apply to a case governed by the Muhomedan law; but in a gift under that law the provision that the donee shall have no right of transfer is void, and the donee takes an absolute estate—*Babu Lal v. Ghansham*, A.I.R. 1922 All. 205, 44 All. 633, 70 I.C. 84. Where a Mahomedan makes a gift and stipulates for a condition that is *fasid* or invalid, the gift is valid and the condition is void—*Siddiq v. Wiliyat*, A.I.R. 1952 All. 1.

A condition imposing a partial restraint only is not void—*Ratanlal v. Ramanujdas*, A.I.R. 1944 Nag. 187, I.L.R. 1945 Nag. 174; *Venkatachallam v. Kabala Murthy*, A.I.R., 1955 Mad. 350.

Compromise, family settlement etc. :—A restriction in the power of alienation is void, even though the restriction is contained in a compromise—*Partab v. Nand Singh*, A.I.R. 1924 Lah. 729, 85 I.C. 323. Thus, where one of the terms of a compromise embodied in a decree was that the party to whom a house was conveyed under it was not at liberty to transfer it without the consent and permission of the other party to the compromise and decree, *held* that such a condition was void as being a restraint on alienation and the house could be transferred in disregard of that condition—*Khaiiali Ram v. Raghunath*, 3 A.L.J. 621. Although this section applies only to cases where the restraint on alienation is annexed to a *transfer* of property and as such does not apply where the restraint is contained in a compromise by way of family settlement, still a restraint on alienation embodied in a compromise is invalid on general principles of law—*Nageshar v. Mata Prasad*, 25 O.C. 189, A.I.R. 1922 Oudh 236 (244), 69 I.C. 730, approved in *Mata Prasad v. Nageshar*, 47 All. 883 (P.C.) A.I.R. 1925 P.C. 272, 91 I.C. 370; *Venkatachallam v. Kabala Murthy*, A.I.R. 1955 Mad. 350. Similarly a condition absolutely restraining alienation, contained in a deed of partition, is void—*Jagannathpuri v. Godabai*, A.I.R. 1968 Bom. 25. In an Oudh case it has been held that since a family settlement is *not a transfer*, it is unnecessary as to whether the restriction imposed in the deed of settlement is an absolute or partial restraint on alienation. In a family settlement, every attempt must be made to give effect to the wishes of the parties to the agreement—*Hanuman v. Abbas*, 4 Luck. 452, A.I.R. 1929 Oudh 193 (201), 120 I.C. 387. But see, *Venkatachallam v. Kabala Murthy*, A.I.R. 1955 Mad. 350 where

it has been held that the principle underlying sec. 10 applies to a family settlement.

Where a compromise decree contained a term against alienation of certain property and gave the other party right to its possession on such alienation, the decree was not a nullity in spite of the fact that the term was opposed to this section. It was merely contrary to law and bound the parties thereto, unless it was set aside by taking proper proceedings—*Govind v. Murlidhar*, A.I.R. 1953 Bom. 412. A suit was compromised. The deed of compromise recited that A would remain in possession of certain land, that A would not be entitled to mortgage or sell and that on the death of A without sons the land would revert to B. Held in a suit by the successor-in-interest of B against the alienee from A's alienee: (1) that the deed gave an absolute estate to A: (2) that the transaction embodied in the deed was a transfer and (3) that the restriction on alienation was hit by sec. 10. Where an agreement contains a condition restraining alienation and the agreement is embodied in a deed of partition the agreement is not hit by sec. 10—*Bai Mangu v. Bai Vijli*, A.I.R. 1967 Guj. 81. If a widow under a family settlement between her and husband's brother obtains a life interest in her husband's share without any power of alienation, an alienee from the widow acquires no interest—*Bulkan Sah v. Guneval Devi Nathani*, A.I.R. 1964 Pat. 214.

A compromise between A and B had two main clauses. No. 1 provided that B was to hold the property for his life with no right to transfer it except for necessity (*Zarurat*) and unless his other property proved insufficient. No. 2 provided that if B died without leaving any heirs (*aulad*) of his body or legal widow, then A would become owner and the other heirs of B would have no right to succeed: held that the restraint was void and unenforceable under this section—*Raja Deo v. Brahmdao*, A.I.R. 1937 All. 235 (236), 168 I.C. 142.

Where upon an objection by the collaterals of the donor to a gift of property in favour of a *pichhlag* son an agreement was made between the parties that the donee or his descendants would not have the right of sale or mortgage over the property: it was held that the agreement amounted to a compromise and not a transfer, so the restriction on alienation was not hit by this section, and the agreement was not contrary to the principles of equity or any provision of law—*Gurdit v. Babu*, A.I.R. 1953 Punj. 282.

Restraint imposed by law:—Restraints on alienation imposed by statute are binding upon all persons. There is an essential distinction between restraints on transfers imposed by the Legislature, and restrictions imposed by contract or decree. The general policy of the law, no doubt, is to promote the free alienation and circulation of property and to discourage the introduction of restrictions calculated to interfere with the fulfilment of these objects. But cases may and do arise in which for the protection of particular interests it is deemed expedient by the Legislature to depart from this general principle and to fetter the privilege of free alienations. In such cases, the prohibition against transfer being founded upon considerations of public interest must be

treated as absolute—*Wazir Muhammad v. Har Prasad*, 15 O.C. 67, 13 I.C. 613 (615). For instances of such restrictions see clause (i) of sec. 6.

88. Property :—Life-interest :—The life-interest of a widow in property given to her for maintenance is just as much property as an absolute interest therein, and any condition annexed to a grant of such an estate absolutely restraining the widow from disposing of that interest, is void under this section—*Ram Chandra v. Gopinath*, 29 I.C. 251. But see *Brijlal v. Smt. Soma*, cur. L.J. 556 (Punj).

89. Partial restraint :—This section is confined only to those cases of transfer which are made subject to a limitation *absolutely* restraining the transferee from alienating his interest in the property. Thus, if A transfers his property to B, and imposes a condition that B will never alienate it, the condition is void—*Amiruddaula v. Nateri*, 6 M.H.C.R. 356. But although sec. 10 renders void all conditions which *absolutely* restrain the transferee from disposing of the property, it is wholly silent as to the validity of *qualified* restraints on alienations. See Mukhopadhyaya's *Law of Perpetuities*, p. 296. A restraint on alienation qualified as to time may be valid—*Chamaru v. Sona*, 14 C.L.J. 303, 16 C.W.N. 99 (102), 11 I.C. 301. But see *Renaud v. Gillet*, L.R. 2 (P.C.), where it was held that a restraint on alienation for 20 years was invalid on the general principles of jurisprudence. A condition restraining the donee from alienating the property to any person outside the family is not invalid—*Muhammad Raza v. Abbas Bandi*, A.I.R. 1932 P.C. 158. But see *Gayasi Ram v. Shahabuddin*, A.I.R. 1935 All. 493, where it has been held that such condition in a sale-deed is contrary to this section and is void. See also *Mudara v. Murthu*, A.I.R. 1935 Mad. 33 : *Venkatarammanna v. Brammanna*, 4 Mad. H.C.R. 345. Where a *patnidar* granted a *darpatni* lease, wherein it was provided that the *darpatnidar* should have full rights to grant leases or create incumbrances subject to the restriction that if the *darpatni* was sold for arrears of rent, the subordinate titles created by the *darpatnidar* should come to an end, *held* that there was no *absolute* restraint on alienation by the *darpatnidar*. Such a condition is not invalid—*Madhusudan v. Midnapore Zemindary Co. Ltd.*, 45 Cal. 940 (945), 27 C.L.J. 511. Where in a deed of gift the donee promised that he was not to make a transfer (by way of sale, gift or mortgage) of the gifted property without the knowledge, consent and permission of the donor, and that if he did so, he would return the property to the donor, *held* that there was no absolute restraint on the power of alienation—*Ma Yin v. Ma Chit*, A.I.R. 1929 Rang. 226 (228).

90. Restraint on alienation—Examples :—A restraint on alienation which is absolute in its terms, and extended *over a period of indefinite duration*, is none the less an absolute restraint on alienation within the meaning of this section and is legally invalid. Thus, where a reversioner agreed not to alienate the property during the lifetime of the widow, *held* that the restraint was invalid—*Nageshwar v. Mata Prasad*, A.I.R. 1922 Oudh 236 (244). A condition that the donee will not have power to alienate the property during the life-time of the donor's grandson is invalid—*Lali Jan v. Muhammad Shafi*, 34 All. 478 (480).

Restrictions on the power to alienate land with full proprietary rights is void, though it is the result of a compromise—*Partap v. Nand*, A.I.R. 1924 Lah. 729.

Where by a deed of lease executed by a father in favour of his daughter, she was constituted 'malik' in possession by right of *mīrash* talukdhari of several taluks but subject to the condition that neither the grantee nor her heirs should transfer the taluks by gifts except to the extent of 5 pakhis, and that only for a religious purpose, *held* that the words contained in the lease deed conferred an absolute estate on the daughter, and the attempt to restrict the powers of an absolute owner was repugnant to the absolute estate and therefore void—*Sarajubala v. Jyotirmoyee*, A.I.R. 1931 P.C. 179. Where property was transferred to a Hindu, and the deed recited that he should enjoy it from generation to generation but that he should have no power of transferring it in any shape, and that it should not be sold in auction for any debt payable by him, and that any transfer or sale made in violation of such condition should be invalid and should entitle the transferor to claim possession of the property, *held* that the restraints on alienation could not be given effect to—*Bhairon v. Parmesri*, 7 All. 516; *Ashutosh v. Doorga*, 5 Cal. 438 (444) (P.C.). A Mahomedan father during his son's minority gave certain property to him, and, on the delivery of possession, got from him a document stipulating that the latter (son) would not alienate the property: *Held*, that by the Muhammadan Law as well as by the general principles of law, such a restriction on alienation, especially after the gift had become complete, is absolutely void—*Amiruddaula v. Nateri*, 6 M.H.C.R. 356. Where the parties to a family partition deed entered into an agreement to the effect that the share of each issue-less members should not be alienated but be distributed among the remaining members, *held* that such an agreement was void—*Venkataramanna v. Brahmanna*, 7 M.H.C.R. 345.

A provision in a partition deed prohibiting alienation, except with the consent of other co-sharers, is repugnant to this section and is therefore invalid—*Mudara v. Muthu*, A.I.R. 1935 Mad. 33. A partition deed between the father and the sons provided that certain residential houses should be held by them as tenants-in-common and restrained the sons during as well as after the father's life time from alienating their shares to a stranger to the family, but gave a right to sell within the family at a maximum price which was far below the real value of the share of each son. There was no obligation to buy at that price. *Held*, the restriction on alienation amounted to an absolute restriction and therefore was void under this section—*Trichinopoly Vartaga Sangam, Ltd. v. Shanmugasundaram*, A.I.R. 1939 Mad. 769 (S.B.).

A deed of gift stating that the donor had put the donee in proprietary possession of the property recited that the donee or his successor had no right to transfer the property and that the donor and his successor would have a right to revoke the gift in case of transfer by the donee: *held*, that the condition restraining alienation was void and inoperative—*Brij Devi v. Shiva Nanda*, I.L.R. 1939 All. 298, 1939 A.L.J. 77, A.I.R. 1939 All. 221.

Condition to sell the property at a fixed price:—Where a testator

devised an estate to his son providing that if the son or his heirs or devisees should desire to sell the estate during the lifetime of the testator's wife, she should have the option to purchase it at a fixed price (which was one-fifth of the real market value of the estate), it was held that the condition to sell at a fixed price much below its real value was equivalent to an absolute restraint on sale, and as such void—*Rosher v. Rosher*, 26 Ch. D. 801. See also *Dolsing v. Khubchand*, cited below.

A condition restraining alienation of the property except to a particular person or persons is void—*Teja Singh v. Moti Snigh*, A.I.R. 1925 Oudh 125; *Muschamp v. Bluet*, 123 E.R. 1253; *In re Mackay*, 20 Eq. 186. Thus a testator gave an estate to A with an injunction never to sell it out of the family, but if sold at all, it must be to one of the brothers hereinafter named: *Held*, that the restriction on alienation was inoperative—*Attwater v. Attwater*, 18 Beav. 330. On a sale of certain property the vendee executed on the same day a separate instrument by which he agreed that when he or his heirs should want to transfer the property purchased, he or they should sell it to the vendor or his heirs for the same price which he had paid for it, and to no one else; and that any transfer to any other person would be void: *Held* that the agreement in substance amounted to an absolute restraint on alienation and was unenforceable—*Dolsing v. Khub Chand*, 64 I.C. 408, 19 A.L.J. 848; *Nabin Chandra v. Rajani*, 25 C.W.N. 901, 63 I.C. 196 (198); *Asghari Begam v. Maula Baksh*, A.I.R. 1929 All. 381 (382).

91. Conditions which are valid—Examples:—Where a Hindu widow executed an agreement in favour of her husband's cousins in settlement of disputes in respect of her husband's property, by which she agreed not to lease the property without obtaining their signatures, adding that if the document (of lease) be not signed and consented to by both parties it would be null and void, it was held that the agreement being only a qualified restraint on alienation was valid—*Kuldip v. Khetrani*, 25 Cal. 869 (871).

A sold his house to B for Rs. 175 and B made an agreement that in case he would transfer the house he would sell it back to A for the same price and to nobody else, unless A declined to purchase it for that price, *held* that it was merely a personal contract between A and B, it was not void as absolute restraint on alienation and could be enforced against a purchaser who had notice of the contract—*Debi Dayal v. Ghasita*, A.I.R. 1929 All. 667. Where the defendants made a gift of certain property to the plaintiffs on the condition that the land would be liable to be taken back in the event of the plaintiff transferring it, it was held that the gift was a gift subject to a power of revocation and was not repugnant under this section and sec. 12—*Makund v. Rajrup*, 4 A.L.J. 708.

Pre-emption:—A stipulation for pre-emption is not void. Thus, a stipulation in a deed of sale to the effect that in the event of the purchaser selling the property he will give the vendor the first offer, is perfectly valid—*London and S. W. Ry. Co. v. Gomm*, 20 Ch. D. 562. Where a *wajib-ul-arz* says that there is a custom of pre-emption

on a transfer of a share, it applies not only to a transfer of a completed share, but also to a portion of it—*Rauf Ahmad v. Mt. Fatima Begum*, A.I.R. 1940 Oudh 116. This subject has been fully discussed in Note 107 to sec. 14 under heading "Personal covenant". A provision reserving a right of pre-emption or pre-mortgage is a valid provision. Thus, a stipulation in a lease deed that should necessities of alienation arise for the lessee (who had permanent rights) the property would be surrendered to the lessor, is valid under this section, and is specifically enforceable against the covenantor and persons claiming under him—*Chethu Kutti v. Kunhunni*, 9 M.L.T. 484, 9 I.C. 171 (173). Where in execution of a decree for specific performance of a contract to execute a sale deed the Court executes the deed, it does not do so as a vendor, but for and on behalf of the judgment-debtor acting as the machinery of law for enforcing the execution of the deed with the result that the property conveyed by the deed is open to pre-emption—*Ram Avadh v. Ghisa Pande*, A.I.R. 1941 Oudh 611. Where a partition deed states that in case any of the sharers desires to sell his share it shall be sold to whomsoever among the other sharers offers to purchase it, the restriction is not hit by this section—*Parameswaran Nair v. Janaki Amma*, A.I.R. 1957 Trav.-Co. 156. *Mahmud Ali v. Brikkodar*, A.I.R. 1960 Assam, 178.

92. Restraint on alienation by lessees:—The exclusion of leases from the main provisions of secs. 10 and 12 is based on a very definite principle. Under sec. 105 "a lease of immovable property is a transfer of a right to enjoy such property." It is thus not a transfer of property itself which remains the property of the owner—*Shiba Prasad v. Lekhraj Shewakaram & Co.*, A.I.R. 1945 Pat. 162. The holder of an impartible estate made a grant of certain pargana to a junior member of the family who was to enjoy and possess the income of the pargana in perpetuity in lieu of maintenance. The grant was made *inter alia* with the condition: "No one would be competent to get this property attached or sold for your debts. If the said property is sold by auction for your debts, then this settlement will stand cancelled and the said property shall come in my khash possession": *Held* that there was no absolute restraint on alienation by the grantee, *ibid*.

It is permissible for a lessor to fetter the liberty of alienation which the lessee would otherwise possess (and this principle is applicable even to grants of permanent leases)—*Vyankatraya v. Shivram*, 7 Bom. 256 (260); *Subbaraya v. Krishna*, 6 Mad. 159; *Tamaya v. Timapa*, 7 Bom. 262 (265); *Deputy Commissioner v. Md. Amir*, 5 C.L.J. 149, 46 I.C. 73. A landlord is entitled to insert a stipulation in a permanent lease providing for the fulfilment of certain conditions without which a transfer by the lessee would not be binding on the landlord—*Abdul Rashid v. Sachidananda*, A.I.R. 1939 Cal. 523; *Dinabandhu v. W. C. Banerjee*, 19 Cal. 774; *Nabijan v. Neburali*, A.I.R. 1933 Cal. 506.

Stipulation in a Kabuliyat that if the tenant or his successors gift or sold or otherwise transferred the Kabuliyat lands, the tenant and the transferee would be liable to pay to the landlord as *chouth* one

fourth of the price of the land, otherwise the transfer would not be valid and the landlord would be entitled to Khash possession, are perfectly valid and legal—*Chandi Charan v. Tara Nath*, A.I.R. 1942 Cal. 452, 46 C.W.N. 686. A mortgage by conditional sale followed by a decree for foreclosure and the taking of possession thereunder constituted a transfer within the meaning of the Kabuliyat, and consequently the mortgagee was liable to pay the *chouth* to the landlord, *ibid*.

A covenant in a lease forbidding transfer by the lessee is valid and enforceable even when the lessee has not transferred the whole of the property leased but reserved a fraction for himself—*Umesh v. Kala Chand*, 34 I.C. 516 (Cal.).

But it should be noted that a mere stipulation in a lease that "the lessee shall not transfer his interest to any third person and that such transfer should be void" is not valid; in order that stipulation should be valid under this section it is necessary that such stipulation should be *for the benefit of the lessor, i.e.*, it must be supplemented by a clause that "the lessor shall have a right of re-entry in case of the lessee's breach of the condition against alienation." In other words, if there is a clause in a lease merely stipulating that the lessee should not transfer his interest to any third person, but the lease *does not reserve a right of re-entry*, the clause is inoperative, in as much as it cannot be said to be a condition *for the benefit of the lessor*, and an assignment by the lessee of his interest in the lease would not work a forfeiture of the lease—*Nilmadhab v. Narottam*, 17 Cal. 826; *Netrapal v. Kalyan Das*, 28 All. 400; *Sital Prasad v. Nawab Dildar*, 1 P.L.J. 1; *Mahananda v. Saratmam*, 10 I.C. 374, 14 C.L.J. 585; *Basarat v. Manirulla*, 36 Cal. 745; *Udipi v. Seshamma*, 43 Mad. 503; *Parmeshri v. Vitappa*, 26 Mad. 157; *Tamaya v. Timapa*, 7 Bom. 262 (265); *Madar Saheb v. Sanabawa Gujran Shah*, 21 Bom. 195; *Annada v. Dasarath*, 40 I.C. 444 (Cal.); *Khetra Nath v. Baharli*, A.I.R. 1929 Cal. 228. The landlord's remedy in the case of a breach of such stipulation would be a suit for damages only and not a suit for ejectment—*Sital Prosad v. Nawab Dildar*, 1 P.L.J. 1, 33 I.C. 408; *Tamaya v. Timapa*, 7 Bom. 262. See notes under sec. 111, clause (g).

But where there is no restraint on alienation, a covenant for the benefit of the lessor need not reserve a right of entry. Thus, a covenant in a lease that the transferee from the lessee, whoever he may be, will have to pay a *chouth* (one-fourth of the price of the land) to the lessor, and if it does not pay it the transfer would be void, is a valid covenant for the benefit of the lessor and is operative—*Nabjan v. Neburali*, A.I.R. 1933 Cal. 506, (distinguishing the above cases).

Where a patnidar granted a *darpatni* lease and it was provided that the darpatnidar should have full rights to grant leases and make settlements of lands, but that all such subordinate interests created by the darpatnidar should be extinguished on a sale of the darpatni mahal for arrears of rent, *held* that the provision in the darpatni lease was valid as it was obviously for the benefit of the lessor, since his object was to ensure that the property might fetch full value in the event of a sale for arrears of rent—*Madhusudan v. Midnapore Zemindary Co. Ltd.*, 45 Cal. 940 (946). But where in a permanent lease there was a

condition that if the lessee or any of his representatives intended to transfer the whole or any portion of the lease, the transfer would be made in favour of the lessors for proper price, that the lessee would not be able to transfer in favour of a third party without the lessor's permission or wishes, that in the case of a transfer to a co-sharer of the lessee, such consent would not be necessary and that in case of any act against the aforesaid conditions, the said act would be invalid, *held* that the covenant was void and was not binding on the lessee—*Sivarna v. Prahlad*, 26 C.W.N. 874.

A purchaser from a permanent lessee who had covenanted not to alienate, if recognized by the lessor, is not bound by the covenant against alienation—*Khetra Nath v. Baharali*, A.I.R. 1929 Cal. 228.

Where a clause in a permanent lease provides that in case of transfer by the lessee, so long as the transferee does not establish the relationship of landlord and tenant with the landlord the lessee would remain liable for rent and the clause does not provide for anything being done by the transferee before the transfer can be recognized by the landlord, the relation of landlord and tenant as between the lessor and the transferee is established as soon as the document is executed and registered and the landlord's fees are paid. In such a case if the conditions in the lease are complied with, the transfer is operative and binding on the landlord—*Abdul Rashid v. Sachidananda*, 43 C.W.N. 938, A.I.R. 1939 Cal. 523.

The question whether the vendees or lessees of building sites would be liable to pay *liaq-i-chaharan* to the zamindar on transfer of the buildings is not a question of custom having the force of law, but one of contract between the zamindar and the person in occupation of the site—*Ramai v. Ram Dutt*, A.I.R. 1940 All. 314.

93. Involuntary alienations :—A general restriction on assignment does not apply to an assignment by operation of law, taking effect in *invitum*, as a sale under an execution—*Doe v. Carter*, 4 R.R. 586; *Croft v. Lumley*, 27 L.J.Q.B. 32; *Golak Nath v. Mathura Nath*, 20 Cal. 273. Where according to the terms of the lease, the lessee was not competent to transfer his rights under the lease "by sale, gift or any other manner of alienation," and afterwards the rights of the lessee were sold in execution of a decree, *held* that the prohibition in the lease against alienation did not apply to an involuntary alienation (execution sale) and that the execution sale passed a good title to the auction purchaser—*Golak Nath v. Mathura*, 20 Cal. 273; *Nilmadhab v. Narottam*, 17 Cal. 826; *Subbaraya v. Krishna*, 6 Mad. 159; *In re West Hopetown Tea, Co.*, 12 All. 192; *Hamaya v. Timapa*, 7 Bom. 262 (265); *Mohendra v. Gagan Chandra*, A.I.R. 1925 Cal. 471; *Promode Ranjan v. Aswini Kumar*, 18 C.W.N. 1138, 26 I.C. 23.

Where a compromise decree contained a clause that a party to the compromise should have no power to alienate or encumber the property by gift, mortgage or sale, *held* that there was no provision in the compromise restraining sale in execution of a decree, and there was nothing to prevent the property from being attached and sold—*Bachumal v. Vessimal*, A.I.R. 1926 Sind 143.

An arbitrator has no power to make property, which is divisible in law, indivisible for ever—*Jafri Begam v. Syed Ali Raza*, 23 All. 383.

11. Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Nothing in this section shall be deemed to affect the right to restrain, for the beneficial enjoyment of one piece of immoveable property, the enjoyment of another piece of such property, or to compel the enjoyment thereof in a particular manner.

11. Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Where any such direction has been made in respect of one piece of immoveable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof.

Amendment :—The second para. has been amended by sec. 8 of the Transfer of Property Amendment Act (XX of 1929). See Note 98 below.

Compare this section with sec. 138, Indian Succession Act, 1925.

Secs. 10 and 11 :—The difference between sections 10 and 11 is that while the restriction prohibited by the former section is against the *transfer* of the interest, the restriction referred to in the latter section is against its *free enjoyment*.

Scope :—This section applies even if the restriction is for a limited period only—*Umrao v. Baldev*, A.I.R. 1933 Lah. 201 (202). In such a case if the donor meant to grant an absolute estate, he cannot reduce the powers of the owner, but if, on the other hand, it appears that his full intention has been directed towards restriction, it will have to be held, if the restriction is good, that the estate is not absolute. It is necessary to decide what the donor's real intentions were. In order to operate as a valid clause of defeasance, the clause must amount to a definite gift in favour of a definite individual in existence at the time of the gift—*Jagmohan v. Sheoraj Kuar*, A.I.R. 1928 Oudh 49 (F.B.).

94. Principle :—This section recognises the elementary principle that a transferee of property who takes an absolute interest, as for

instance, a donee or a purchaser, cannot be restrained in his enjoyment or disposition of it by any condition inserted in the transfer. Such a condition deprives the property of its legal incidents and is inconsistent with or repugnant to the main purpose of the transfer. It is consequently arbitrary and not enforceable in a Court of law—*Chamaru v. Sona*, 16 C.W.N. 99 (103), 14 C.L.J. 303, 11 I.C. 301. "Notwithstanding the general principle that a donee or legatee can only take what is given him on the terms on which it is given, yet by our law there is a remarkable exception to this general principle. Conditions which are repugnant to the estate to which they are annexed are absolutely void and may consequently be disregarded"—per Lindley, L.J. in *Harbin v. Masterman*, (1894) 2 Ch. 184 (196).

The principle of this section applies as much to mortgages or leases as to gifts or sales—*Mohram v. Ajudhia*, 8 All. 452 (459).

95. Restrictions repugnant to interest created :

(a) *Condition in a sale* :—Where a vendor sold a portion of his property to the vendee by a deed of sale, and on the same date the vendee executed an ikramnama in which he agreed that he would not collect the rents, that he would never demand partition of that portion, and that he would not alienate or mortgage it or otherwise exercise proprietary rights over it, held that the covenant violated the principles enunciated in sections 10 and 11, and was therefore one which no Court would enforce—*Mohram v. Ajudhia*, 8 All. 452 (455, 456).

Where a vendor makes an absolute conveyance by sale for cash consideration, the stipulation in the sale deed for payment of a certain amount to the vendor out of the profits of the property by way of rent is clear restriction on the enjoyment of the right created absolutely in favour of the vendee and as such illegal—*Mt. Shiv Nath Kunwar v. Lachmi Narain*, A.I.R. 1938 Oudh 17. When the ownership of a site of a shop is transferred to the vendee, its enjoyment cannot be restricted by conditions, e.g., that the vendee should not convert the shop into two or more—*Daulat Ram v. Haveli Shah*, A.I.R. 1938 Lah. 479.

A condition that neither the grantee nor her heirs should transfer the properties or any part thereof by way of gift except a gift for religious purpose which also should not exceed 5 *pakhis* of land is repugnant to the absolute estate and is void on that ground—*Saraju Bala v. Jyotirmoyee*, A.I.R. 1931 P.C. 179 (182).

(b) *Restriction as regards succession* :—The Crown has power in British India by a grant of lands to limit their descent in any way it pleases, but a subject has no power to impose upon lands or other property any limitation of descent at variance with the ordinary law applicable—*Rajendra v. Rani Baghubans*, 45 I.A. 134. Where an absolute estate is granted, but conditions are imposed that the property should not in any case pass to the heirs of the daughters of the grantee, held that the condition is an attempt to alter the legal course of succession to an absolute estate and is void; it does not imply an estate to be determined on the death of the grantee—*Sarajubala v. Jyotirmoyee*, A.I.R. 1931 P.C. 179.

(c) *Restraint on partition* :—A condition in restraint of partition is void. Thus, a provision in a will or gift giving property to some persons, but directing that they shall not divide the property for a certain length of time (e.g., twenty years) is void. The donees may proceed to partition at once—*Makoonda v. Ganesh*, 1 Cal. 104; *Rajendra v. Sham Chand*, 6 Cal. 106; *Raikishori v. Debendranath*, 15 Cal. 409; *Poorendra v. Hemangini*, 36 Cal. 75; *Abu Mahammad v. Kaniz Fizza*, 28 All. 185. Similarly, an agreement among co-sharers of an estate that their property should remain joint is not enforceable. The right of a co-owner to have partition of his share is an incident of the right of ownership, and an agreement not to partition for an indefinite period would be contrary to that right and therefore invalid—*Chandra Sekhar v. Kundan Lal*, 31 All. 3 (4); *Radhanath v. Taruknath*, 3 C.W.N. 126; *Ramalinga v. Birupakshi*, 7 Bom. 538. But see *Rup Singh v. Bhabhuti*, 42 All. 30, where it has been held that the members of a joint undivided Hindu family can bind themselves for their own life-time not to claim partition of the joint family property, and *a fortiori* a similar agreement can be entered into by the remaining members of the family after one member has demanded a partition and separated his share; and what may be effected by an agreement may be effected equally by means of a submission to arbitration followed by an award.

(d) *Restraint on alienation for some period* :—Where a Hindu widow by a deed of family settlement transferred the properties inherited from her husband to the latter's reversionary heirs, subject to the condition that they should have no right to transfer any immoveable property belonging to the estate during her life-time, *held* that the condition was void—*Chamaru v. Sona*, 16 C.W.N. 99 (103), 14 C.L.J. 303, 11 I.C. 301.

(e) *Condition as regards residence* :—Where an absolute estate is conferred on the grantee, a condition requiring the grantee to reside at a particular place is not of binding effect—*Sarajubala v. Jyotirmoyee*, A.I.R. 1931 P.C. 179. Certain lands and a house were given by way of Agrahar gift to a donee and his descendants on condition that he should enjoy the produce of the lands and reside in the house and perform the religious duties, and that in case of the donee abandoning the house or going elsewhere, another person would be substituted in his place. After conforming to the above condition for some time, the donee went to another place and eventually sold the house and lands: *Held* that the provision as regards residence was not valid and enforceable; and that the sale by the donee was valid—*Rukminibai v. Laxmibai*, 44 Bom. 304 (313), 22 Bom. L.R. 254, 56 I.C. 361.

(f) *A condition postponing enjoyment of the property* is void. Where a testator intends to make a present gift of his property to his son (a major) but he intends also that his son should have the ultimate enjoyment of the whole estate in the hands of the trustee after the payment of the legacies, the deprivation of the son of the present enjoyment of the estate and the attempted restriction therein are invalid and must be disregarded—*Lloyd v. Webb*, 24 Cal. 44 (52). Where an instrument contains recitals that the donor conveyed the property

to the donee with power to enjoy the same with all rights, the intention of the donor is to create an absolute estate and any subsequent words which are repugnant to an absolute title must be ignored—*Official Receiver v. Samudravijayan*, A.I.R. 1939 Mad. 509; see also *Bhiadus v. Bai Gulab*, 49 I.A. 1, 46 Bom. 153 and *Saraju Bala v. Jyotirmoyee*, A.I.R. 1931 P.C. 179.

(g) *Condition in gift* :—Where under a gift deed the donor unconditionally transfers all his rights over certain property to the donee with absolute powers to deal with the same from the date of gift, a subsequent clause in the deed that on the death of the donee the property should not devolve on any of his heirs but would revert to the donor, is repugnant to the absolute estate, and as such is ineffective and wholly void—*Subramanian v. Kauni Ammal*, A.I.R. 1953 Tr.-Coch. 115.

95A. *Postponment of enjoyment* :—Where an instrument confers an absolute gift but directs that the property so given shall not be made over to the donee until he has attained a certain age beyond the period of his majority, such direction is inoperative unless the instrument confers an interest in the property upon some person for the intervening period, and the donee is entitled to have the property handed over to him as soon as he attains majority—*Mt. Ram Kaur v. Atma Singh*, A.I.R. 1927 Lah. 404 (407); *Husenbhoy v. Ahmedbhoy*, 26, Bom. 319; *Gosavi v. Rivett-Carnac*, 13 Bom. 1463. But where by his will the testator directed that the immediate interest for 13 years in certain properties was not to go to his sons, but was to be dealt with by the trustees in carrying out certain specific trusts, after which period, the properties were to go to the sons absolutely, it was held that the above restraint on the enjoyment of the properties was not bad in law—*Prafulla v. Jogendra*, 9 C.W.N. 528.

96. *Restrictions contained in a decree* :—A condition in restraint of alienation of an absolute estate, though it is *contained in a decree* of the Settlement Court, is void, and such a decree conveys an absolute estate—*Lal Sripat v. Bal Basant Singh*, 1 O.L.J. 421, 25 I.C. 743.

97. *Restrictions which are valid* :—Where an intention to make absolute transfer *in present* of all proprietary right is clear, a condition which derogates from the *immediate* completeness of the gift is regarded as void. But where the condition may be given effect to without in any way detracting from the immediate completeness of the gift or rather the immediate transfer of the right in the substance of the gift, the condition as well as the gift is valid. Thus, any reservation of the proprietary rights in the *corpus* would be inconsistent with an intention to make a gift, but the reservation of a right to the *usufruct* of a portion of the property given would not be inconsistent, if the intention to give the corpus be otherwise manifest—*Fakhr Jahan Begam v. Abdul Ghani*, 5 O.L.J. 49, 45 I.C. 307. If a man was to give a piece of land to another on condition that the latter should give to the former the *whole* of the produce of the land in perpetuity, the condition would be bad. But it is otherwise with a gift by A to B subject to the condition that B should pay periodically to A a *part* of the *usufruct* of the property; in such a case both the gift and the condition

would be invalid. The reason is obvious, for the reservation of an interest by the donor for himself and his heirs does not interfere with the right of property vesting in the transferee by the act of transfer—*Lali Jan v. Md. Shafi*, 34 All. 478 (480). If a Muhammadan woman gives a property to her son and provides that the donee shall be the absolute owner of half the property with all the powers of an owner, and with regard to the other half he shall also be the owner but must give the income of this portion for the maintenance of the minor grandson of the donor, *held* that the condition as to the payment of income of one-half of the property for the maintenance of the donor's grandson is valid—*Lali Jan v. Md. Shafi*, *supra*.

This section applies where on a transfer of property an interest therein is created *absolutely* in favour of any person, but it does not apply where a gift is made not of *full proprietary* right but only of *usufruct* of land for purposes of maintenance. Thus, where certain land was granted to the donees for maintenance without any power of transfer and the deed authorised the grantees to cultivate the land and to appropriate the usufruct thereof but enjoined that if they wanted to transfer their rights they must do so to the grantor or his descendants : *Held* that the deed was not a gift of absolute right, but only of usufruct for maintenance, and this section did not apply, and therefore the conditions in restraint of alienation were valid, as they formed an essential part of the grant itself—*Jugdeo v. Jwala Prosad*, 15 O.C. 345, 15 I.C. 244.

If on a partition between two co-sharers one of them is allotted certain properties subject to the condition that he should only enjoy the income without any power of alienation and that on his death the properties will be taken by his sons and if no sons are born then by the other co-sharer, he gets only a life interest and hence the clause restricting alienation is not bad in law—*Sooramma v. Venkataratnam*, A.I.R. 1952 Mad. 166.

Where a house was conveyed to the transferee subject to a covenant on his part not to use it for any purpose other than a private residence, and the transferee conveyed it to another who converted it into a boarding house, *held* that the covenant not to use the house for any other purpose was not repugnant to the nature of the estate and might be enforced by an injunction—*Hobson v. Tulloch*, (1898) 1 Ch. 424.

A clause entitling the lessor to terminate the lease at any time contained in a lease which is described as permanent and under which a fixed rent is payable and the land is stated to be enjoyable from generation to generation, does not offend against the law of perpetuities—*Rama Rao v. Timmappa*, A.I.R. 1925 Mad. 732 (733), 48 M.L.J. 463, 87 I.C. 433.

Where a gift deed provided *inter alia* that in the event of the subject matter of the gift (site and building) not being required for the purpose stated therein, the property would revert to the donor on the condition of his paying the donee the then estimated value of the building alone : *held* that the reverter clause was not repugnant to the absolute estate created by the deed, but was if at all, only one of

defeasance. It was in fact a covenant between the donor and the donee that the latter should reconvey to the former in a certain contingency. The decision in *Sarajubala v. Jyotirmoyee*, A.I.R. 1931 P.C. 179, did not apply nor did the rule against perpetuity which does not apply to agreements—*Krishnaraya v. Sarvothama*, A.I.R. 1951 Mad. 798, (1949) 2 M.L.J. 459.

In a decree for maintenance there was a charge upon certain property for the payment of an amount of maintenance. Upon some arrears falling due the decree-holder transferred a portion of such arrears, but in order to safeguard his rights in regard to the realization of the rest of the arrears he stipulated in the transfer deed that the transferee shall not have the right to bring the charged property to sale : *held*, the decree-holder was competent to impose such restrictions upon the transferee—*Venkatappa v. Sundarajulu*, A.I.R. 1939 Mad. 431, 1939 M.W.N. 226, 185 I.C. 427.

98. Second para :—The wording of the second para. has been changed, but the law has not been altered.

The *Special committee* (1927) observes :—"Sections 11 and 40 of the Act refer to affirmative and negative covenants in a transfer. Section 11 refers to rights as between a transferor and transferee, while section 40 relates to the rights to third parties against transferees. The words 'to compel its enjoyment', used in the second paragraph of section 11 and in the first paragraph of section 40, indicate that affirmative covenants for the beneficial enjoyment of one piece of the property of which the other piece has been transferred can in all cases be enforced. This paragraph seems to have been based on the observations of Lord Cottenham in *Tulk v. Moxhay*, 2 Ph. 774, a case decided in 1848. But in later English decisions, such as *Haywood v. Burnswich Building Society* (8 Q.B.D. 403), the observations in *Tulk's* case were not approved, and it is now settled that except in certain special cases affirmative covenants cannot be specifically enforced. Thus, in *Austerberry, v. Corporation of Oldham*, (1885) 29 Ch. D. 750, a covenant to spend money on the land was held as not binding on the purchaser of the land, although he had notice of the same. Indian Courts have followed the same principle (27 Bom. L.R. 73). We propose that the second paragraph of sec. 11 and the first paragraph of sec. 40 should be so amended as to make it clear that, although the affirmative covenant is not by itself invalid as between a transferor and transferee (sec. 11), negative or restrictive covenants only can be specifically enforced against a third person (sec. 40)." See Note 177 under sec. 40.

The most common instance of the rule embodied in this para. is to be found in those cases where a person who owns a house and adjoining land and sells the land, enters into a covenant with the purchaser that the latter shall keep a portion of the land transferred vacant and free from buildings, so as not to obstruct the air and light of the vendor's house. Such a covenant, being one intended for the *beneficial enjoyment* of the vendor's house, is enforceable as against the purchaser. See *Tulk v. Moxhay*, 2 Phill. 774; *McLean v. McKay*, L.R. 5 P.C. 327. A covenant which is not made for the beneficial enjoyment of the transferor's property, but is merely an arbitrary condition

imposed for its own sake is not enforceable against the transferee, and the latter may ignore it; e.g., covenant to use the transferred land as a garden (*Tulk v. Moxhay*, supra), covenant to build a second storey, covenant to improve the transferred land (*Haywood's case*, supra), etc. Moreover, these are affirmative covenants which can be rarely enforced against the transferee.

The immoveable property as contemplated by the second paragraph can hardly be said to be an incorporeal right—*National Cement Mines Industries Ltd. v. C. I. T.*, A.I.R. 1956 Cal. 480.

12. Where property transferred is subject to a condition or limitation making any interest therein, reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void.

Condition making interest determinable on insolvency or attempted alienation.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him.

Scope :—This section applies not only to leases but to all transfer deeds. Accordingly a condition in a *Khorposh* grant, which cannot be regarded as a lease, to the effect that the grant will stand cancelled if the property covered by the grant be sold in auction for the debts of the grantee, is wholly void under this section—*Shiba Prasad v. Lekhray Shewakaram & Co.*, A.I.R. 1945 Pat. 162, 23 Pat. 871.

The object of this section is to protect the creditors of the transferee who would otherwise be prevented from having recourse to the property transferred for satisfaction of their debts—*ibid.*

Sec. 12 refers to the transferee "becoming insolvent", not being adjudicated an insolvent, and consequently it cannot be restricted to conditions which would take effect only on adjudication—*ibid.*

A provision for forfeiture or re-entry by the landlord is essential in India under the last sentence of sec. 12 to the validity of a covenant in a lease providing that the lessee's interest shall terminate on the property being sold in execution for his debts. This implies that such a covenant is covered by the provisions of this section—*ibid.*

99. Principle :—This section is an exception to the general principle embodied in secs. 31 and 32 which provide that an interest may be created with the condition superadded that it shall cease to exist on the happening of an uncertain event. The reason is, that it is manifestly unjust that the grantee should enjoy and possess all the *indicia* of absolute dominion over the property, and yet be deprived of the right of alienation incident to such ownership; and it is equally unjust that creditors who may have made advances on the strength of the property should be deprived of its security on account of a clause in the transfer, which none but the grantor and the grantee may know anything about. Under this section, if the grant is subject to such a condition, it will be void and the property will pass to the Official

Assignee in case of insolvency, or to the alienee in case of voluntary alienation.

The assumption of membership of an Association (Shares and Stock Brokers' Association) does not involve the "transfer" of any property on any condition whatever, within the meaning of this section—*Official Assignee v. Shroff*, A.I.R. 1932 P.C. 186.

Where the rules of a provident fund provided that if a member transferred in whatever manner his share or interest therein or part thereof, then and thereby such interest or right would be extinguished, *held* that the condition was invalid under this section—*Re O'Brien*, A.I.R. 1933 Cal. 701.

100. Lease :—The principle enunciated in this section is made subject to an exception in the case of a lease. Hereditary rent-free tenancies of a perpetual character may exist without any right of alienation attaching to them—*Katesar v. Mahomed Amir*, 5 O.L.J. 149, 46 I.C. 73.

A lease which was permanent, heritable and transferable contained a covenant to the effect that the tenant would, if he transferred the property, pay to the landlord out of the purchase-money in his hands one-fourth as *nazar* and would obtain registration of the name of the transferee; the covenant further provided that if this step was not taken the transfer would be invalid and the tenant would continue to be liable for the rent : *Held* that a restrictive covenant of this description is valid when inserted in a lease between a landlord and his tenant—*Saradakripa v. Bepin Chandra*, 37 C.L.J. 538, A.I.R. 1923 Cal. 679 (680), 74 I.C. 555. Such a covenant is one running with the land—*Ibid*. Where one of the conditions upon which the owner of certain land granted permission to a person to build on it was that if the house so built was sold, the licensee would pay to the owner of the land one-fourth of the purchase money, it was held that a purchaser with notice of the covenant was bound by it equally with the vendor—*Parbhu v. Ramjan*, 41 All. 417.

"For the benefit of the Lessor":—For the meaning of these words, see Note 92 under sec. 10.

These words show that if a lease contains a condition that on the lessee becoming insolvent the lease shall determine, the condition is valid. By English law, a clause in a lease is valid which gives a right of re-entry by the landlord in case the term be taken in execution, or in the event of the lessee becoming insolvent or judgment being entered up or *feri facias* being issued out against him, and the above rule as regards the insolvency of the lessee is expressly adopted by the present section—*Vyankatraya v. Shivrambhat*, 7 Bom. 256 (261). Section 111, clause (g) (3) now contains a provision (recently added by the Amendment Act of 1929) that if the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of that event, the lease is determined by forfeiture. See Note 599A under sec. 111.

13. Where on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect unless it extends to the whole of the remaining interest of the transferor in the property.

Transfer for benefit of unborn person.

Illustration.

A transfers property of which he is the owner to B in trust for A and his intended wife successively for their lives, and, after the death of the survivor for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.

Analogous Law :—This section may be compared with sec. 113 of the Indian Succession Act, 1925.

100A. Hindu Law :—Under the Hindu Law, as it stood before the Hindu Disposition of Property Act, XV of 1916 (see App. VII) a gift to a person or persons not in being at the time of distribution was void under the rule in *Tagore Case*, L.R. I.A. Supp. Vol. 47. See also *Javerbai v. Kablibai*, 16 Bom. 492; *Tarokessur v. Soshi Shikhareswar*, 9 Cal. 952 (P.C.); *Amrito v. Surnomoni*, 25 Cal. 662; *Bai Mativahu v. Bai Mamubai*, 21 Bom. 709 (P.C.) and *Chandi v. Sidheswari*, 16 Cal. 71 (P.C.). A Hindu may give property by way of executory gift upon an event which is to happen, if at all, immediately on the close of a life in being and in favour of a person born at the date of the gift, and such a gift over might be a sufficient indication that only a life estate to the first taker was intended. But where the event which is referred to in the grant is an indefinite failure of the male issue of the grantee the attempted gift over itself is void—*Saraju Bala v. Jyotirmoyee*, A.I.R. 1931 P.C. 179 (182). See also *Bai Mativahu v. Bai Mamubai*, supra; *Soorjeemoney v. Denobundhoo*, 9 M.I.A. 123.

101. Scope :—The rule laid down in this section is applicable to moveable as well as immoveable property—*Cowasji v. Rustomji*, 20 Bom. 511.

Although a condition subsequent may be inoperative under this section, still it will not invalidate the prior interest; see sec. 30. Thus, in the illustration, the disposition in favour of A's unborn son for life is inoperative, but the trust will take effect.

Principle :—This section was an attempt to import into an adapt for use in India what was used before 1926 to be known in England as the "rule in *Whitby v. Mitchell*, (1890) 44 Ch. D. 85" or "the rule against double possibilities". The principle is that a person disposing of property to another shall not fetter the free disposition of that property in the hands of more generations than one. The rule is quite

distinct from the rule against perpetuities, though their effects sometimes overlap—*Ardesbir v. Dadabhoy*, A.I.R. 1945 Bom. 395.

102. 'Not in existence':—A child *en ventre sa mere* is considered to be in existence—*In re Wilmer's Trusts*, [1903] 2 Ch. 411; *Elliot v. Joicey (Lord)*, (1935) A.C. 209. A child adopted after a man's death in pursuance of a power given by him is in contemplation of law begotten by that man—*Tagore v. Tagore*, 9 B.L.R. 377 (P.C.).

The fact that unborn children of donees share in the properties is immaterial, so long as secs. 13 and 14 are not offended—*Geeverges v. Krishnan*, A.I.R. 1953 Tr.-Coch. 89.

It is open to a Shia Mahomedan to make a settlement in favour of an unborn person, provided such a settlement follows upon a settlement in favour of a person in existence—*Gulamhusein v. Farmahomed*, A.I.R. 1947 Bom. 185.

Extends :—The word "extends" in this section is directed to the extent of the subject-matter and to the absolute nature of the estate conferred and not to the certainty of its vesting. What is given to the unborn person need not necessarily vest in him at his birth. Vesting must however take place within the limits prescribed by s. 14—*Framrose v. Tehmina*, A.I.R. 1948 Bom. 188, 49 Bom. L.R. 882.

If a gift over to unborn grandchildren of the settlor is to take effect subject to two contingencies, namely, that they must survive certain named persons and that they must attain a certain age, then the gift over is void under this section—*Isaac Nissim Silas v. Official Trustee of Bengal*, A.I.R. 1957 Cal. 118.

14. No transfer of property can operate to create an interest which is to take effect after the life-time of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period and to whom, if he attains full age, the interest created is to belong.

Rule against perpetuity.

This section may be compared with sec. 114 of the Indian Succession Act, 1925, replacing sec. 101 of Act X of 1865. The two illustrations to that section are cited below as elucidating the meaning of the section:—

"Illustration (a):—A fund is bequeathed to A for his life, and after his death to B for his life, and after B's death to such of the sons of B as shall first attain the age of 25. A and B survive the testator. Here the son of B who shall first attain the age of 25 may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of A and B; and the vesting of the fund may thus be delayed beyond the life-time of A and B, and the minority of the sons of B. The bequest after B's death is void."

"Illustration (b):—A fund is bequeathed to A for his life, and after his death to B for his life, and after B's death to such of B's

sons as shall first attain the age of 25. B dies in the lifetime of the testator, leaving one or more sons. In this case the sons of B are persons living at the time of the testator's decease, and the time when either of them will attain 25 necessarily falls within his own lifetime. The bequest is valid."

104. Perpetuities :—It is the policy of the law to discountenance the creation of perpetuities. Property cannot be tied up longer than for a life in being and twenty-one years (in England) after. This is called the rule against perpetuities—*per* Jessel, M.R., in *In re Ridley*, (1879) 11 Ch. D. 645. "The necessity of imposing some restraint on the power of postponing the acquisition of the absolute interest in or dominion over property will be obvious if we consider, for a moment, what would be the state of a community in which a considerable portion of the land and capital was locked up. The free and active circulation of property which is one of the springs as well as the consequences of commerce would be obstructed; the capital of the country withdrawn from trade; and the incentives to exertion in every branch of industry diminished. Indeed such a state of things would be utterly inconsistent with national prosperity; and those restrictions which were intended by the donors to guard the objects of their bounty against the effects of their own improvidence, or originated in more exceptional motives, would be baneful to all"—*Jarman on Wills* (4th Edn.), pp. 250, 251.

*English and Indian law compared :—*According to the English law, the vesting of property might be postponed for any number of lives in being and an additional term of 21 years afterwards, and for as many months in addition as are equal to the ordinary period of gestation, should gestation exist (*Jee v. Audley*, 1 Cox. 324); and the additional term of 21 years might be independent of the minority of any person to be entitled (*i.e.*, irrespective of the fact whether such person is a minor or not). Indian law, however, allows the vesting to be delayed beyond the lifetime of persons in being, for the period only of the minority of some person born in their lifetime; the addition of an *absolute period* of 21 years has not been adopted by this section. So, whereas under the English law the additional period allowed after lives in being is a term of twenty-one years *in gross*, without reference to the infancy of any person, under the Indian Statutes the term is the *period of minority* of the person to whom, if he attains full age, the thing bequeathed is to belong—at 21, if he has a guardian appointed by the Court, at 18 in other cases—*Mukhopadhyaya's Law of Perpetuities*, p. 99.

*Test to determine whether a transfer falls within the rule :—*In order to determine whether a particular disposition in a sale-deed offends the rule against perpetuity, the test is whether the disposition is such that the vesting of property in the vendee *might have* been postponed beyond the period laid down in sec. 14. The test is not whether in the particular case the vesting *actually took place* within the lives in being and 18 years after. If the disposition in the sale-deed was such that the property *might have* remained in the possession of the vendor for 100 or 200 years, it offended against the rule of perpetuities, and was consequently invalid and unenforceable; and the fact that in the particular

case the period within which the property came to the hands of the vendee actually happened to fall within the legal limitation did not take the case out of the mischief of the rule—*Ram Newaz v. Nankoo*, A.I.R. 1926 All. 283. To test whether a transfer violates the rule against perpetuities, the Court must look not to the particular events which have actually happened but to all possible contingencies—*Rajaramji v. Ramnath*, A.I.R. 1927 Pat. 412; *Pan Kuer v. Ram Narain*, A.I.R. 1929 Pat. 353 (357); *Kala Chand v. Jatindra*, 56 Cal. 487, 33 C.W.N. 150 (156); *Nabin v. Rajani*, 25 C.W.N. 901 (904), 63 I.C. 196; *Bramamoyi v. Jogesh*, 8 B.L.R. 400 (407); *Soudaminey v. Jogesh*, 2 Cal. 262 (268); *Dungannon v. Smith*, (1845) 12 Cl. & F. 546; *Jee v. Audley*, (1787) 1 Cox. 324.

A perpetuity is a branch of law of property and its object is to restrain the creation of future conditional interests in property. It is not concerned with contracts as such or with contractual rights and obligations as such. Thus, a contract to pay money to a person, his heirs or legal representative upon a future contingency, which may happen beyond a life or lives being and 18 years thereafter, would be perfectly valid—*Ali Hossain v. Rajkumar*, A.I.R. 1943 Cal. 417 (F.B.). Where the condition must operate *inter vivos*, e.g., where the settlement is to stand cancelled only if the property is sold by auction for the debts of the grantee during the lifetime of the grantor, the rule of perpetuities embodied in this section is not offended—*Shiba Prasad v. Lekhray Shewakaram & Co.*, A.I.R. 1945 Pat. 162.

105. Hindu and Mahomedan Law :—The rule contained in this section applies to Hindus; see *Krishnamani v. Ananda*, 4 B.L.R. (O.C.) 231; *Anantha v. Nagamuthu*, 14 Mad. 200; *Surjeemonee v. Denebundu*, 6 M.I.A. 555; *Kolathu v. Ranga*, 38 Mad. 114; *Shookmoy v. Monohurry*, 11 Cal. 684 (P.C.). "A Hindu cannot by will or gift divest succession permanently. A private individual who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate and the gift must fail and the inheritance takes place as the law directs"—*Mayne's Hindu Law*.

The rule against perpetuity is also applicable to Mahomedans. See *Yusufkhan v. Misal Khan*, 37 I.C. 99.

106. Scope of section :—The rule against perpetuity laid down in this section relates to any property, whatever be its nature and whether it is *moveable* or *immoveable*—*Cowasji v. Rustomji*, 20 Bom. 511.

The rule of perpetuities applies when there is a *transfer* of an interest; it cannot apply where only a *charge* is created which does not amount to transfer of any interest—*Matlub Hasan v. Kalawati*, A.I.R. 1933 All. 934 (937).

Gifts to charities do not fall within the rule. See sec. 17 (now 18). But a perpetuity cannot be created in favour of an individual under the cloak of an illusory gift to a charity—*Mukhopadhyaya's Perpetuities*, p. 136.

106A. Application of the section :—Where a particular interest is stated to be in favour of a particular person for generation to

generation, it is a perpetuity and as such offends against this section—*Wahajuddin v. Ali Ahmad*; A.I.R. 1934 All. 983. A direction to the following effect, “my remaining movable property shall be dealt with by my son G.....and when the sons of my son G shall attain the age of 21 years the same shall be divided and duly received by G and his sons in equal shares” confers an absolute gift on G but the gift over is void—*Anandrao v. Administrator-General*, 20 Cal. 450. A clause ran as follows: “As to my other property.....I give the same to my younger son Mahadeo for his life. He shall have no authority either to mortgage or sell the same. He shall only receive the income and I give the property after his death to his son or his sons in equal shares should there be any. In case he leaves no sons behind him my Mukltiyars shall get a son adopted by his wife and thus perpetuate his name. And they shall give the said property to him on his attaining the age of 21 years.” Held that the gift in favour of a son of Mahadev who might be adopted at any time after Mahadev’s death by a widow who might not have been living at the testator’s decease was void—*Kashnath v. Chimanji*, 30 Bom. 477. But where on a partition by an award one mouza is given to a co-sharer with a direction to use the income to support a named charity and the award provides that if he neglects to do so other co-sharers may take the property, the provision is not hit by the rule against perpetuity because it is not meant to be acted upon literally—*Kamalnarayan v. Ramkishorelal*, A.I.R. 1958 Madh. Pr. 246.

A power to distribute property conferred in a will which is exercisable “when my grandsons may attain their age” is void under secs. 101 and 102 (corresponding to secs. 14 and 15, T. P. Act) as extending the period beyond the limit allowed by sec. 101, whether the point of time referred to is taken to be the attaining of age by the grandsons in existence at the testator’s death, or such attaining of age by all his grandsons. The rule applicable to such cases in India is that “if the exercise of a power is made contingent on the happening of an event which may, by possibility happen beyond the limits of the rule, the mere fact that the contingency has happened earlier and has rendered the exercise of the power practicable within the prescribed limit does not validate the power”—*Sivasankara v. Soobramania*, 31 Mad. 517.

An indemnity bond making a certain property permanently liable to a purchaser and his assignee as surety in case the purchaser is deprived of the possession of the property sold to him is unenforceable as violating the rule against perpetuities—*Natesa v. Gopalasami*, A.I.R. 1928 Mad. 894 (896), 51 Mad. 688, 110 I.C. 830.

Where at the time of family partition between two brothers it was agreed that if any coparcener wished to sell his share in the residential house or if his share was sold in any other way, the other coparcener would be entitled to buy it for Rs. 200, such an agreement was enforceable against the son of the parties to it—*Ratanlal v. Ramanujdas*, A.I.R. 1944 Nag. 187.

A sold certain properties to B for Rs. 300. On the same day B executed in favour of A an agreement agreeing to reconvey the proper-

ties on A paying, on any day, Rs. 300 with interest : *held* that the agreement did not offend against the rule of perpetuities—*Arjuna v. Lakshmi Ammal*, A.I.R. 1949 Mad. 265.

An agreement to grant in future whatever land might be selected as a site for a temple where the date of entry was uncertain is bad as offending against the rule against perpetuities—*Maharaj Bahadur v. Balchand*, 25 C.W.N. 770 (P.C.).

Where by a codicil the testator directed that no devisee of any of his real estates should have a vested interest therein until the attainment of the age of 24 years, it was held that the provisions were void for remoteness—*In re Wrightson*, (1904) 2 Ch. 95.

107. Personal covenants :—The rule against perpetuity applies when an *interest in property* is created, and has no application to *personal contracts*, even though the contract may have reference to land—*Ali Hossain v. Rajkumar*, A.I.R. 1943 Cal. 417 (F.B.). An agreement to sell or resell is not within the mischief of the rule against perpetuities—*Rajammal v. Gopalaswami*, A.I.R. 1951 Mad. 767; *Rakhama v. Laxman*, A.I.R. 1960 Bom. 105. "It is settled beyond argument that an agreement merely personal not creating any interest in land is not within the rule against perpetuities"—*South Eastern Railway v. Associated Portland Cement Manufactures Limited*, [1910] 1 Ch. 12 (33). A covenant to do any act (e.g., to pay money) is not void for the reason that the time for the performance of the act does not fall within the period allowed by this rule—*Walsh v. Secretary of State*, 10 H.L.C. 367. "Whether the rule as to remoteness applies or not depends upon this—does or does not the covenant give an interest in the land? If it is a bare or mere personal covenant, it is of course, not obnoxious to the rule against perpetuity"—*per* Jessel M.R. in *London & S. W. Ry. Co. v. Gomm*, (1882) 20 Ch. D. 562 (580). A personal contract to convey land is not affected by the rule against perpetuities—*Dahya Bhai v. Maharaj Bahadur*, 1 P.L.J. 238 (244, 251), 34 I.C. 482. An agreement to sell or reconvey land is an agreement merely personal, not creating an interest in land (see the last para of section 54 of this Act) though it has reference to land. Such an agreement does not offend the rule against perpetuities—*Charamudi v. Raghavulu*, 39 Mad. 462 (469, 472), *Ramasami v. Chinna*, 24 Mad. 449 (469); *Munusami v. Sagalaguna*, A.I.R. 1926 Mad. 699; *Harikishandas v. Bai Dhanu*, A.I.R. 1926 Bom. 497. (Moreover such a contract does not amount to a transfer within the meaning of this section read with sec. 5, as there is no conveyance of any property in present or in future—*Harikishandas v. Bai Dhanu*, *supra*). An agreement to sell immoveable property by which the vendor agrees to convey the same whenever the vendee pays the purchase-money, is valid and enforceable and not void as offending against the rule of perpetuities—*Raja of Karvetnagar v. Velayuda*, 18 M.L.T. 83, 29 I.C. 435 (436). A covenant of pre-emption is a purely personal covenant, and does not create any interest in immoveable property. Consequently it cannot offend the rule against perpetuities—*Basdeo v. Jhugru*, 46 All. 333 (338, 343), A.I.R. 1924 All. 400, 83 I.C. 390, 22 A.L.J. 265; *Aulad Ali v. Syed Ali*, 49 All. 527 (F.B.), 25 A.L.J. 289, 100 I.C. 683, A.I.R. 1927 All. 170 (overruling *Gopi Ram v. Jeot Ram*, 45

All. 478, and *Balli Singh v. Raghubar*, 45 All. 492; *Muhammad Jan v. Fazaluddin*, 46 All. 514 (*per* Lindsay J.; Sulaiman J. *contra*). Moreover, when a contract of pre-emption is entered into there is no 'transfer of any property' at all and sec. 14 cannot in terms apply to it—*Basdeo v. Jhugru*, 46 All. 333 (341); *Aulad Ali v. Syed Ali*, (*supra*).

The objection against perpetuity does not apply to a mere covenant to convey or re-convey property sold by a deed of sale, as the agreement does not create an interest in the land and no objection based on perpetuity will arise when the privilege under the agreement is conferred on the parties to the contract—*Chinnakhal v. Chinnathambi*, A.I.R. 1934 Mad. 703.

A covenant for pre-emption by compromise in respect of land unrestricted in point of time and expressed to be binding on the parties their heirs and successors did not create interest in land and did not offend the rule against perpetuities—*Ali Hossain v. Rajkumar*, A.I.R. 1943 Cal. 417 (F.B.); *Sheonandanprasad v. Kanhaiyalal*, A.I.R. 1956 Nag. 243. Rule against perpetuities cannot be applied to a covenant for pre-emption even though there is no time limit within which the right of pre-emption has to be exercised—*Ram Baran Prasad v. Ram Mohit Hazru*, A.I.R. 1967 S.C. 744. A bare agreement to sell immovable property in future cannot infringe the rule against perpetuity—*Bai Mangu v. Bai Kijli*, A.I.R. 1967 Guj. 81.

Covenants running with the land :—From the above cases it is evident that a distinction should be drawn between a *personal* covenant (which binds only the parties themselves, but not their heirs or assignees) and *covenants running with the land* (covenants creating an interest in the land) which are binding not only on the parties to the covenant but also on their heirs and assignees. The rule against perpetuity is not obnoxious to the former but invalidates the latter, because, where the covenantor binds not only himself but his heirs and successors, the time for performance of the covenant may extend beyond the statutory limit of time fixed by sec. 14 of the Transfer of Property Act. The leading case on this subject is *London and South Western Ry. Co. v. Gomm*, (1882) 20 Ch. D. 562. In this case a railway company had sold land with an agreement by their vendee on behalf of himself as well as "his heirs, assigns and owners for the time being of the land, and all other persons who should or might be interested therein", and the agreement contained an option to the railway company to repurchase at any time. It was held that the covenant for repurchase, creating an interest in the land in perpetuity without any definite limit as to the period of time within which the covenant was to have effect, could not be enforced. A covenant of pre-emption the operation of which is *not meant to extend beyond a lifetime*, does not violate the rule against perpetuities. Thus, there was a covenant between a mortgagor and mortgagee, who had a right to redeem the property at any time after nine years, to the effect that the mortgagee would have a right of pre-emption in respect of the sale of the mortgaged property, and the language clearly indicated that the covenant was between the mortgagor and the mortgagee only, and there was nothing to suggest that the heirs of the parties were meant to be bound by the covenant: *Held* that there was no violation of the rule

against perpetuity—*Matura Subba Rao v. Surendra*, A.I.R. 1928 Pat. 637. So also, where the grant of an absolute estate is followed by a defeasance clause which provides that if the persons designated as the heirs of the grantee (*viz.*, the grantee's sons and their male descendants and the grantee's daughters) cease to exist, the property will revert to the grantor or his heirs, *held* that the event which is referred to in the defeasance clause, is an indefinite failure of the male issue of the grantee, and the attempted gift over mentioned in the clause is therefore void—*Sarajubala v. Jyotirmoyee*, A.I.R. 1931 P.C. 179.

A covenant ran as follows :—"If the Sitambari Jain Society shall require any place on Pareshnath hill for erecting *mandir* or *dharamsala*, in that case I and my heirs shall give to the Society land, stones, and timber from the hill free of cost for the purpose of making the *mandir* or *dharamsala*, and if I and my heirs refuse to give, the Sitambari Jain Society shall take the same of its own power" : *Held* by the Privy Council that the agreement was one to grant in the future whatever land might be selected as a building site and therefore it created an interest in land, and as the interest created would be one to take effect by entry at a later date and as this date was *uncertain*, the covenant offended against the rule of perpetuity and could not be given effect to—*Maharaj Bahadur v. Balchand*, 6 P.L.J. 163 (166), 2 P.L.T. 131, 25 C.W.N. 770 (P.C.), A.I.R. 1922 P.C. 165, 61 I.C. 702.

By an agreement between the shebait of a thakur and a family of Chatterjees, the latter were appointed pujaris, and some land was placed in their possession in order that the income might be applied for maintenance of the *sheba*, and it was stipulated that the Chatterjees should be *pujaris* from generation to generation but in case they were found guilty of misconduct or negligence they were to forfeit their office of *pujaris*. *Held* that as no interest in land was created in favour of the *pujaris*, the agreement was a personal contract which was not affected by the rule against perpetuities, and that as soon as the *pujaris* were disqualified for their office by reason of their misconduct, they were disentitled to retain possession of the land—*Nafar Chandra v. Kailash Chandra*, 25 C.W.N. 201, 62 I.C. 510 (512).

108. Covenant of redemption in mortgage :—The rule against perpetuity applies only to cases where there is a new interest in immoveable property contemplated to be created after the expiry of the period fixed by the rule. In the case of a mortgage, however, there is no such future interest in property contemplated to be created, because it is of the very essence of the mortgage that the equity of redemption is a present interest in property in exercise of which alone the property is sought to be redeemed. Therefore a clause in a mortgage to the effect that "whenever the party likes he has the right to redeem" does not offend the rule against perpetuity—*Padmanabha v. Sitaram*, 54 M.L.J. 96, A.I.R. 1928 Mad. 28 (33), 106 I.C. 158.

Covenants in leases :—The rule does not apply to contracts for perpetual renewal of leases—*Mukhopadhyaya's Law of Perpetuities*, p. 104. Where in a deed of mining lease for 5 years the lessor covenanted : "I bind myself to give you such leases as you may require from time to time after the expiration of this agreement, on the same

condition. Should I fail to do so, I bind myself to pay you all your expenses that you may incur." *Held* that the clause for renewal did not amount to a *transfer*, and therefore it did not offend the rule against perpetuity and was not rendered inoperative by this section—*Pichu Naidu v. Jefferson*, 44 Mad. 230, 60 I.C. 591. But where on the creation of a permanent lease the lessee covenants that if he or his representative intends to *transfer* the whole or a portion of the leasehold interest, the transfer would be made in favour of the lessor for proper price or to third parties only with the permission of the lessor, and that any transfer in contravention of this covenant would be invalid, *held* that the covenant is void as offending the rule against perpetuities—*Suvarna Kumar v. Prohlad Chandra*, 26 C.W.N. 874, A.I.R. 1922 Cal. 474 (475), 67 I.C. 719. Where the purchaser of a leasehold agrees to pay annuity to the leaseholder and his descendants in perpetuity making it a charge on the property, the agreement is not hit by the rule against perpetuity as it created no interest in property—*Kurunjilkuttia Appu v. Mary*, A.I.R. 1965 Ker. 27.

A clause entitling the lessor to terminate the lease at any time is not bad for remoteness. It is open to the lessor to contract with the lessee that the land should be available for him whenever he requires it—*A. Rama Rao v. Thimmappa*, 48 M.L.J. 463, A.I.R. 1925 Mad. 732, 87 I.C. 433; *Gonesh Sonar v. Purnendu Narayan Singha*, A.I.R. 1962 Pat. 201. Where the proprietor of certain lands created a patni lease with a condition that the patnidar should give back to the lessor such lands as might be required by the lessor, *held* that as no *interest in land* was created in favour of the lessor by the covenant in the lease, but rights were merely reserved to the lessor, the covenant did not offend against the rule of perpetuities. The rule against perpetuities is directed against the creation of *interests in land* which will not have effect within a certain period—*Jogesh Chandra v. Asaba*, 44 C.L.J. 220, A.I.R. 1927 Cal. 41, 98 I.C. 46.

109. "Person in existence":—See Note 102, *supra*.

15. If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails as regards the whole class.

Transfer to a class, some of whom come under sections 13 and 14.

15. If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails *in regard to those persons only and not in regard to the whole class*.

Transfer to a class, some of whom come under sections 13 and 14.

Amendment:—This section has been amended by sec. 9 of the T. P. Amendment Act (XX of 1929). For reasons, see Note 112 below.

Analogous law:—The terms of this section are similar to those of sec. 102 of the Succession Act, 1865, replaced by sec. 115 of the Succession

Act, 1925, which again has been the subject of similar amendment by the Transfer of Property Amendment Supplementary Act XXI of 1929.

110. Principle of old section :—The old section was intended to import into India the English rule in *Leake v. Robinson*, (1817) 2 Mer. 363. The word “fails” when first used in the unamended section meant “may fail”—*Ardesbir v. Dadabhoy*, A.I.R. 1945 Bom. 395, I.L.R. 1946 Bom. 493. The principle of the old section was that a gift to a class which was void as to any member of that class, by reason of being too remote, must fail altogether. And so Grant M.R. observed in *Leake v. Robinson*, 2 Mer. 363 (390) : “The bequest in question is not made to individuals but to classes, and what I have to determine is whether the class can take. I must make a new will for the testator if I split into portions his general bequest to a class, and say that because the rule of law forbids his intention from operating in favour of the whole class I will make his bequest what he never intended them to be, namely, a series of particular legacies to particular individuals.” In *Pearks v. Moseley*, L.R. 5 App. Cas. 714, it is stated :—“The rule is that the vice of remoteness affects the class as a whole, if it affects an unascertained number of the members.”

112. Old section criticised in the light of Hindu law :—The rule in *Leake v. Robinson*, on which the old section was based, has, except in a few early Calcutta cases, never been followed in India—*Ramlal v. Kanailal*, 12 Cal. 663 (683). In the case of Hindus, when a gift is made to a class of persons consisting of children or descendants, some of whom cannot take, the testator may be considered to have a primary and a secondary intention. His primary intention is that all members of the class shall take, and his secondary intention is that if all cannot take, those who can shall do so, the true rule being that those members of the class take, who are at the testator's death capable of taking. Where it appeared from the whole of a will executed by a Hindu testator that his primary intention was that all his nephews then born and those who might be born afterwards should take equally under a bequest made by him, and his secondary intention was that his nephews who were in existence should take, though not specifically named, and where the primary intention could not be given effect to because the bequest was bad in respect of those who might be born subsequently, the Court would carry out the secondary intention and give effect to the bequest as regards the nephews who were competent to take—*Bhagabati v. Kalicharan*, 32 Cal. 992 F.B. (following *In re Coleman*, 4 Ch. D. 165); affirmed by the Privy Council in 38 Cal. 468 (P.C.); *Rodha Prasad v. Ranimoni*, 41 Cal. 1007 (P.C.); *Khimji v. Morarji*, 22 Bom. 533; *Ranganadha v. Bhagirathi*, 29 Mad. 412; *Tribhuvandas v. Rattanji*, 18 Bom. 7; *Rai Bishen Chand v. Asmaida*, 6 All. 560 (P.C.). As a general rule, where there is a gift, to a class, born at the date of the gift or the death of the testator, as the case may be, and where there is no other objection to the gift, it should enure for the benefit of those members of the class who are capable of taking—*Ram Lal v. Kanai Lal*, 12 Cal. 663 (685). Where the gift by a Mahomedan was to a class some of whom were personally incapable of

taking, the remaining donees took the whole of the gift—*Advocate-General v. Karamali*, 29 Bom. 133 (150). But where an estate was given to the testator's daughters for their lives with remainder for their children on attaining the age of 21, the Privy Council reading the will as a whole came to the conclusion that as at the testator's death it could not be certain that in the case of every child a guardian would necessarily be appointed, the bequest would possibly be delayed beyond the life-time of the daughters and the minority of some of their children (see sec 101 Succession Act & sec. 14 T. P. Act) and hence by virtue of sec. 102 of the Succession Act the whole bequest in favour of all the children was invalid—*Soundar Rajan v. Natarajan*, A.I.R. 1925 P.C. 244 (248).

New section—Object of the amendment :—Traditional Hindu law did not permit a gift in favour of a person who was not in existence at the date of the gift. To remove this disability of a Hindu donor three Acts were passed, namely, (1) Madras Hindu Bequests and Transfers Act, 1914, (2) the Hindu Disposition of Property Act, 1916, and (3) Hindu Transfers and Bequests (city of Madras) Act, 1921. It is declared by these three Acts that a transfer inter vivos or disposition by will of any property shall not be invalid by reason only that the transferee or legatee is unborn at the date of the transfer or the death of the testator as the case may be; and secs. 18 and 14 of the Transfer of Property Act and secs. 100 and 101 (now 113 and 114) of the Indian Succession Act were made applicable to gifts and bequests to unborn persons.

Before the three Acts were passed, a gift to a class of persons some of whom were not in existence at the date of transfer did not fail in regard to the whole class, but these three Acts rendered such a gift void in regard to the whole class. Sec. 15 has been amended to restore the position that existed before the passing of these three Acts. The amended section lays down that the transfer will not fail with regard to the whole class, but only with regard to those who cannot take.

112A. Effect of Act XV of 1916 :—The Hindu Disposition of Property Act XV of 1916, while giving validity to dispositions by Hindus previously invalid by reason of the rule in Tagore case, made such dispositions when *inter vivos* subject to the limitations of sec. 14 *ante*. In a case therefore infringing those limitations, the disposition will be covered by the language of this section although it is not expressly mentioned in the Act of 1916, subject to its being shown that there is some rule of Hindu law at variance with that section—*Sewdayal v. Official Trustee*, A.I.R. 1931 Cal. 651 (657).

For the provisions of Act XV of 1916 see App. VII.

No interest can be created in favour of an unborn person; but when the gift is made to a class or series of persons, some of whom are in existence and some are not, it does not fail in its entirety; it is valid with regard to the persons who are in existence at the time of the testator's death and is invalid as to the rest—*Raj Bajrang v. Bakhtraj Kuer*, A.I.R. 1953 S.C. 7; *Rabindra v. Sushil*, A.I.R. 1952 Cal. 427.

112B. "Class":—A gift is said to be to a "class" of persons, when it is to all those who shall come within a certain category or description

defined by general or collective formula—*per* Lord Selborne in *Pearks v. Moseley*, 5 App. Cas. 714; *Kingsbury v. Walter*, [1901] A.C. 187. "A number of persons are popularly said to form a class when they can be designated by some general name, as "children", "grandchildren", "nephews"; but in legal language the question whether a gift is one to a class depends not upon these considerations but upon the mode of the gift itself, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons."—*Jarman on Wills* (5th Ed.), Vol. I, p. 232.

A gift to a "class" as distinguished from a gift to individuals implies an intention to benefit those who constitute the class and to exclude all others; but a gift to individuals described by their several names and descriptions, though they may together constitute a class, implies an intention to benefit the individuals named. Important legal consequences flow from this distinction. Thus, the addition or diminution of members does not affect a class, the share of each being dependent upon the ultimate number of persons. Again, in case of death of a member of the class the legacy does not lapse but passes by survivorship to the other members—*Jiban v. Jitendra*, A.I.R. 1949 F.C. 64.

Ordinarily a class gift means gift to a class of persons who are included or comprehended under some general description and bear a certain relation to the testator. The true test is however the intention of the testator and a gift would rank as a class gift if the testator intended that the donee should take as a class. There are instances again of "composite class" such as when a gift is made to the children of A and the children of B—*ibid*.

The legal incidents of those gifts are in some respects analogous to the case of a member of an undivided family under the Mitakshara system—*ibid*. *per* Mahajan J.

16. Where an interest fails by reason of any of the rules contained in sections 13, 14 and 15, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.

Transfer
to take
effect on
failure of
prior
transfer.

16. Where, by reason of any of the rules contained in sections 13 and 14, **, an interest created for the benefit of a person or of a class of persons fails in regard to such person or the whole of such class, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.

Transfer
to take
effect on
failure of
prior
interest.

Amendment :—This section has been amended by sec. 10 of the Transfer of Property Amendment Act (XX of 1929).

This section may be compared with section 116 of the Indian Succession Act, 1925.

113. Principle :—The rule in this section is substantially in consonance with the English law according to which limitations under void limitations are themselves void. In English law, where a devise is void for remoteness, all limitations ulterior or expectant on such remote devise are also void.—*Jarman on Wills*, 5th Edn., Vol. I, p. 253; *Proctor v. Bishop of Bath*, 2 H. Bl. 358.

Where there was a gift by will to A for life, and after his death to the first son of A for life, and to the first son of A's first son, and in default of such son to B for life, *held* that as the gift to A's grandson was void the subsequent gift to B failed—*Money Penny v. Derring*, 2 DeG. M. & G. 145. A Hindu testator bequeathed as follows :—"My great-grandsons shall, when they attain majority, receive the whole to their satisfaction, and they will divide and take the same in accordance with Hindu law. God forbid it, but should I have no great-grandsons in the male line, then my daughter's sons, when they are of age, shall take the said property from the trust fund and divide it according to the Hindu Sastras in vogue." *Held*, that the bequest to the daughter's sons was dependent on, and not alternative to, the gift to the great-grandsons, and was therefore void—*Brojanath v. Anandamoyi*, 8 B.L.R. 208.

One S gave away property to R for life and after her death if there be any male descendants, whether born of son or daughter, to them absolutely. If R would have only daughters they were to have no power of transfer. In the absence of any issue, male or female, living at the time of her death, the gifted property was not in any way to devolve upon her husband or his family, but it was to go to D, father of R. *Held* that the gift in favour of D was dependent upon the failure of the prior interest in favour of the daughters and the result was that the gift in favour of D also failed—*Girjesh v. Data Din*, A.I.R. 1934 Oudh 35 (39) (F.B.), 9 Luck. 29, 147 I.C. 991.

114. Gift framed in the alternative :—If a gift is capable of being split up into two alternatives, one of which is too remote, and the other can take effect, the Court will disregard the invalid limitations and give effect to that which is legal—*Evers v. Challis*, 7 H.L.C. 531. Thus, a gift over is made of property in the event of there never being any child of A, or in the event of no child attaining majority. Here the first contingency is valid, but the second is too remote (but the gift over will take effect on the happening of the former event)—*Watson v. Young*, 28 Ch. D. 436.

114A. Dispositions in trust-deed :—Even where questions may arise under secs. 14, 16 or 17 in connection with certain dispositions in favour of private persons in a trust-deed, nevertheless an attack on the trust-deed on such grounds cannot be made except in a suit for administration of the trust or the assets belonging to the person who made the dedication or created the trust—*Raman Chettiar v. Muthuswami*, A.I.R. 1941 Mad. 188, (1940) 2 M.L.J. 803, 1940 M.W.N. 1180.

18. Where the terms of a transfer of property direct that the income arising from the property shall be accumulated, such direction shall be void, and the property shall be disposed of as if no accumulation had been directed.

Exception.—Where the property is immovable, or where accumulation is directed to be made from the date of the transfer, the direction shall be valid in respect only of the income arising from the property within one year next following such date; and at the end of the year, such property and income shall be disposed of respectively as if the period during which the accumulation has been directed to be made had elapsed.

17. (1) *Where the terms of a transfer of property direct that the income arising from the property shall be accumulated either wholly or in part during a period longer than—*

(a) *the life of the transferor, or*

(b) *a period of eighteen years from the date of the transfer,*

such direction shall, save as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such last-mentioned period the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(2) *This section shall not affect any directions for accumulation for the purpose of—*

(i) *the payment of the debts of the transferor or any other person taking any interest under the transfer, or*

(ii) *the provision of portions for children or remoter issue of the transferor or of any other person taking any interest under the transfer, or*

(iii) *the preservation or maintenance of the property transferred;*

and such direction may be made accordingly.

115. **Amendment** :—By sec. 10 of the Transfer of Property Amendment Act (XX of 1929), the old section 18 has been numbered as section 17, with substantial amendments.

This section may be compared with sec. 117 of the Indian Success-

sion Act, 1925.

The provision of law restricting accumulation of income originated from the Thellusson Act (39 & 40 Geo. III, c. 98) which again was the outcome of the decision in the famous case of *Thellusson v. Woodford*, 4 Ves. 227 (affirmed on appeal in 11 Ves. 112), in which the income of the property was directed by the testator to be accumulated for nine lives in succession, and such direction was held to be invalid.

The object of this section is to fix a time-limit for accumulation and thus to prevent the hardship which would have been caused to heirs and descendants if unlimited accumulations were allowed, and also to prevent the property being for ever locked up, which would be a menace to the trade of the country.

116. When by a direction the income is separated from the ownership of the property with a view to creating a separate fund or the enjoyment of the property is postponed the direction is said to be one for accumulation. Before the Thellusson Act income could be accumulated for a period which did not exceed the period of perpetuity. The object of the section is to further restrict the period for the accumulation of income. It is needless to point out that independently of this section a direction for accumulation may be void for infringing the rule against perpetuity.

Period :—The period mentioned in clauses (a) and (b) of sub-sec. (1) are in the alternative. A direction for accumulation can validly be given either for the period mentioned in clause (a) or for the period given in clause (b), but the two periods cannot be combined. But a direction may be given in this form : "either during the life time of the transferor or during a period of eighteen years from the date of the transfer, whichever is longer".

If it is directed that the income shall be accumulated for 25 years from the date of the transfer the direction is valid in any case upto 18 years from the date of the transfer. It may be valid for the entire period of 25 years if the transferor dies more than 25 years after the date of the transfer.

If the period exceeds the period permitted by this section the direction for accumulation shall not be altogether void ; it shall be void only to the extent it exceeds the longer of the two periods mentioned in this section.

The three purposes enumerated in sub-sec. (2) scarcely requires any elucidation. Directions for accumulation for the specified purposes are not hit by the rule laid down by sub-sec. (1).

The decisions of the High Courts of Calcutta and Bombay before the extension of the Transfer of Property Act to the Hindus indicate that the legal position under Hindu law as to accumulation was not materially different from what it is at present under sec. 17 of the T. P. Act. For instance, in *Nafar Chandra v. Ratnamala*, 15 C.W.N. 66, it was decided by the High Court of Calcutta that a direction for accumulation for the purpose of providing for the marriage expenses of the testor's son was valid. Similarly in *Rajendra Lal v. Raj Kumari*, 34 Cal. 5, it was held that a direction to accumulate the surplus income until it

amounted to Rs. 100000 and then to spend the amount in feeding the poor did not infringe any rule of Hindu law and was valid.

17. The restrictions in sections 14, 15 and 16 shall not apply to property transferred for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind.

Transfer in perpetuity for benefit of public.

18. The restrictions in sections 14, * * 16 and 17 shall not apply in the case of a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind.

Transfer in perpetuity for benefit of public.

116A. Amendment:—The old section 17 has been numbered as section 18 and in the latter section the words “and 17” have been added, by section 10 of the Transfer of Property Amendment Act (XX of 1929). The object of this amendment is to lay down that “the restrictions contained in sec. 17 as to accumulation should not apply to charities. In India, a direction for accumulation has been held valid in the case of Hindu and Muhammadan religious endowments though it infringed the rule against perpetuities (I.L.R. 34 Cal. 5; 23 C.L.J. 241; 34 Mad. 12)”—*Report of the Select Committee* (1927).

117. Gifts for public purposes:—The question whether a particular charity is for the benefit of the public or not is a question of fact. The offering of prayer at a tomb is certainly for the benefit of the public if it is subordinate to the main purpose of the dedication to feed poor pilgrims—*Raman Chettiar v. Muthuswami*, A.I.R. 1941 Mad. 188.

The personal law of Hindus and Mahomedans sanctions gifts for the benefit of the public, e.g., for charitable and religious purposes, and such gifts are exempt from the rule against perpetuities—*Fatma Bibi v. Advocate-General*, 6 Bom. 42; *Bhuggobutty v. Gooroo Prosonno*, 25 Cal. 112; *Sookmoy v. Monohari*, 11 Cal. 684; *Bikani v. Suklal*, 20 Cal. 116; *Limji v. Bapuji*, 11 Bom. 441.

Under the Mahomedan law the test of whether a deed was or was not valid as a *wakf* in the cases decided before the Mussalman Wakf Validating Act VI of 1913, was that if the effect of the deed was to give the property substantially to charitable uses, it would be valid; but if the effect of the deed was to give the property in substance to the settlor's family it would be invalid—*Ramanandan v. Vava Leval*, 44 Mad. 116 (P.C.). The effect of those decisions has been modified by the said Act VI of 1913 and the Mussalman Wakf Validating Act, XXXII of 1930.

As regards charitable gift or bequest by a Hindu—see *Sarojini v. Gnanendra*, 23 C.L.J. 241; *Dwarka v. Burroda*, 4 Cal. 443; *Rajendra v. Rajcoomari*, 34 Cal. 5; *Amrito v. Surnomoyi*, 25 Cal. 662.

The following are religious and charitable gifts :—

(a) *Wakf* or endowment to charitable and religious uses, e.g., repairs of *imambaras*, keeping *tazias* in the month of Mohurram—*Biba Jan v.*

Kalle Hussain, 31 All. 136; burning lamps in a mosque or reading the Koran in public places—*Mazhar Husein v. Abdul*, 33 All. 400; performance of ceremonies known as *Kadam Sharif*—*Phul Chand v. Akbar Yar Khan*, 19 All. 211.

(b) Gifts of property to temple or idol or for maintenance of priests—*Tackersay v. Hurbhum*, 8 Bom. 432; *Bhuggobutty v. Gooroo Prosono*, 25 Cal. 112.

(c) A gift of *Sadavart* (food given to all who come)—*Jamnabai v. Khimji*, 14 Bom. 1; *Jugal Kishore v. Lakshman Das*, 23 Bom. 659; *Morarji v. Nenbai*, 17 Bom. 351.

(d) Dedication of property to a *dharamsala*, for feeding travellers and maintaining a *Sadavart*—*Jugal Kishore v. Lakshman*, 23 Bom. 650; *Raghubar v. Kesho*, 11 All. 18.

(e) A bequest for giving feasts to Brahmans—*Lakshmi Sankar v. Vajinath*, 6 Bom. 24.

(f) Gifts for building a well and *awada* (a cistern of water for animals to drink)—*Jamnabai v. Khimji*, 14 Bom. 1.

(g) A devise for the support or erection of a hospital—*Fanindra v. Administrator-General*, 6 C.W.N. 321; *Broughton v. Mercer*, 14 B.L.R. 442.

(h) Gifts for maintaining universities or schools of learning—*Manorama v. Kalicharan*, 31 Cal. 166; *Commissioners for Income-tax v. Pemsel*, (1891) A.C. 531.

(i) Trusts and bequests of land or money to devote the income thereof in perpetuity for performing Muklad, Baj, Yejushni and other like Zoroastrian ceremonies are valid charitable bequests and as such exempt from the rule of law forbidding perpetuities—*Jamshedji v. Soonabai*, 33 Bom. 122 (211).

See also the Illustrations to Sec. 118, Indian Succession Act (1925) for instances of religious and charitable gifts.

118. The following are not gifts for public purposes :—

(a) Trusts for purposes of *individual* benefit, e.g., bequest to the effect "that the income thereof be given to procure masses for the benefit of my soul"—*Colgan v. Administrator-General*, 15 Mad. 424; an endowment by which the original grantor and grantee and their descendants are alone to be benefited—*Sathappayar v. Periasami*, 14 Mad. 1; a gift for the performance of ceremonies for the spiritual good of the donor or his family—*Trimmer v. Lamb*, 25 L.J. Ch. 424; *Limji v. Bapuji*, 11 Bom. 441; *Fatma Bibi v. Advocate-General*, 6 Bom. 42.

(b) A gift for the repair of a private tomb or monument—*Richhard v. Robson*, 31 L.J. Ch. 397; *Fowler v. Fowler*, 33 Beav. 616.

A bequest to a "dharma" and directing the executors to spend the income of moveable and immoveable property set apart for the purpose, was held void as the word 'dharma' was too vague and indefinite for the Court to enforce the gift—*Devshunkur v. Motiram*, 18

Bom. 136; *Morarji v. Nenbai*, 17 Bom. 351; *Ranchordas v. Parbati*, 23 Bom. 725 (P.C.); *Parthasarathy v. Thiruvengada*, 30 Mad. 340, but Subramania, J. in this case has been of opinion that Dharma connotes *ishta* and *poorta* donations and refers to certain classes of pious gifts and is not a mere vague and uncertain expression.

Trust for spread of Hinduism has been held to be too vague, but that for spread of Sanskrit language is valid—*Venkata v. Subba Rao*, A.I.R. 1923 Mad. 376. As to the nature of charitable objects see *North of England Zoological Soc. v. Chester Rural Dist. Council*, (1958) 1 W.L.R. 1258.

19. Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

Vested interest.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.

This section (with the Explanation) may be compared with section 119 of the Indian Succession Act, 1925.

Scope :—This section applies in terms to an interest created on a transfer of property. Therefore, where a compromise arrangement did not constitute a transfer of property, but was in the nature of a family arrangement which was binding on the parties and by which no right of transfer was given to any party with regard to certain property until the happening of a certain event, this section did not apply—*Damodar v. Madan*, A.I.R. 1947 Pat. 7.

120. Vested interest and contingent interest :—A person takes a vested interest in property when he acquires a proprietary right in it but the right of enjoyment is only deferred till a future event happens which is certain to happen; but contingent interest is one in which neither any proprietary interest nor a right of enjoyment is given at present, but both depend upon future uncertain events. Thus, if a Hindu widow adopts a son but there is an agreement postponing the son's estate during the life-time of the widow, the interest created in favour of the adopted son is a vested right (see 40 All 692 cited in Note 43 under sec. 6). Similarly, where under a deed of gift a donee

is not to take possession of the gifted property until after the death of the donor and his wife, the donee is given a vested interest, subject only to the life-interest of the donor and his wife; and the donee can transfer the property during the life-time of the donor or of his wife (see 21 O.C. 312 cited in Note 43 under sec. 6). So also, where under a compromise decree it was settled that A was to hold an estate till his death after which it was to go B, *held* that the interest acquired by B under the decree was a vested interest—*Sundar Bibi v. Rajendra*, A.I.R. 1925 All. 389. But where an estate is bequeathed to A until he shall marry, and after that event to B, B's interest in the bequest is *contingent*, because it depends upon a condition precedent, *viz.*, the marriage of A, an event which *may or may not* happen. In a contingent interest, the transfer is not complete until the specified event happens or does not happen. In a vested interest, the interest is complete, but on the happening of a specified event it may be divested—*Festing v. Allen*, 5 Hare 573; *In re Eddel's Trusts*, L.R. 11 Eq. 559.

The true criterion is the certainty or uncertainty of the event on the happening of which the gift is to take effect. Where the event is *certain* though future, and the payment or enjoyment is postponed by reason of the circumstances connected with the estate or for the convenience of the estate, as for instance, where there are prior life or other estate or interests, the ulterior interest to take effect after them will be *vested*. Thus, under a gift by a testator to A at the decease of the testator's wife, A's interest vests at the testator's death—*Subramaniam v. Subramaniam*, 4 Mad. 124, following *Blamire v. Geldart*, 16 Ves. J. 314; *Jairam v. Kuberbai*, 9 Bom. 491. Where a will provided as follows :—"When I die, my wife named Suraj is owner of that property. And my wife has powers to do in the same way as I have absolute powers to do when I am present, and, in case of my wife's death, my daughter Mahalaxmi is owner of the said property after that death," *held*, that the gift over to Mahalaxmi was not *contingent* on her surviving Suraj, but depended upon the death of Suraj which was a *certain* event, and that Mahalaxmi took a *vested* interest in the property subject to the life-interest given to Suraj—*Lallu v. Jagmohan*, 22 Bom. 409 (414).

Where a testator bequeathed his property to two persons for life and the remainder absolutely in favour of a specified class of persons on the termination of the life estates, it was held that the properties became vested in that class and that the mere fact that it was not entitled to immediate possession did not make it a contingent bequest—*Sree Chand v. Kashi Chetty*, A.I.R. 1933 Mad. 885. Where the gift being an entire fund payable to a class of persons equally on their attaining a certain age, a direction to apply the income of the whole fund in the meantime for their maintenance does not create a vested interest in a member of that class who does not attain that age—*In re Parker*, 16 Ch. D 44.

A settlement was made by which the settlor transferred to the trustees a large amount of property in trust to allow the settlor during his life-time to manage the property, and to have the sole benefit of

the income of the properties. The settlement then proceeded to declare certain trusts that should come into operation after his death. These trusts were that as to the property comprised in three schedules the trustees, during the life of the widow and until the youngest son attained the age of 20 were to distribute the income in the manner provided. After the youngest child attained the age of 20, the property was to be sold and the proceeds were to be divided in equal shares between the children then surviving, the issue of any child who was dead was to represent his father's share. As regards the property in the fourth schedule it was not to be distributed until the death of the youngest child, and it was to be divided then amongst the children living at that date. *Held* by the Privy Council "that the result of this disposition was to create first of all a vested interest in all the children in the income of the property; *secondly*, it created a contingent interest in all the children in the corpus in respect of all the property until, at any rate, the youngest child reached the age of 20. The children who were alive at that date obtained a vested interest and to have the proceeds distributed among them as to the property in Schedules 1, 2 and 3. As to the property of Schedule 4, all the children took a contingent interest until the death of the youngest child, and as soon as the youngest child died, the children then surviving and of course their issue, obtained a vested right to have the property distributed among them"—*Ma Yait v. Official Assignee*, A.I.R. 1930 P.C. 17 (18).

Mere direction by the testator that his legacies or gifts are to be given after the debts are discharged would not make the gifts, which are otherwise vested, contingent—*Raghunatha v. Mahana Krishna*, A.I.R. 1926 Mad. 645. Where the interest created in favour of the two sons of the settlor is to take effect after the termination of the trust and the deed of trust provides that the trust will come to an end on the death of the settlor and on the discharge of the debts specified in the deed including the debts to be incurred by the trustee for the discharge of the settlor's debt, the interest in favour of the sons is vested—*Rajes Kanta v. Santi Devi*, A.I.R. 1957 S.C. 255.

Where a person by his will gives the life-estate in his property to some persons with a remainder to another and gives the power of appointment to the first taker, *i.e.*, persons taking the life-estate, the existence of a power of appointment does not prevent the vesting of the remainder, because where estates are subject to a general power of appointment in the first taker, with remainder over in default of such appointment, the power does not suspend the remainder from vesting—*Kali Prasad v. Ram Golam*, A.I.R. 1937 Pat. 163, 167 I.C. 831.

One G who was the sole surviving co-parcener executed a will by which his wife was to take possession of the properties after his death and maintain herself from the income of the properties. After her death the properties were to go to his two sisters as owners. If however a child was born to the wife, it was to be the owner of the properties: *Held*, that the two sisters took vested interest in the properties on the death of G, which was liable to be divested by the birth of a child to the widow—*Vithalbai v. Shivabhai*, A.I.R. 1950 Bom. 289, 52 Bom. L.A. 301.

The terms of a compromise decree were as follows : In the event of BR surviving BL he, that is, BR will be the permanent owner with powers of transfer and of transmitting inheritance of the whole of his property. In the event of BR not so surviving, his male descendants according to the rule of lineal primogeniture will be entitled to the said property with powers of transfer and heritability subject to the conditions stated in para. 4 of the compromise. The other male descendants will be entitled to maintenance. *Held*, that the remainder man's estate in its entirety and absolutely was simultaneously conferred on BR and this was vested interest. The possibility that BR might not be alive at the determination of the prior estate to come into possession of his remainder man's estate cannot convert the same interest into a contingent one—*Lal Bahadur v. Rajendra*, A.I.R. 1934 Oudh 454. For other instances of vested interest see *Badra Das v. Sundar Das*, A.I.R. 1927 Lah. 116; *Gosavi v. Rivett-Carnac*, 13 Bom. 463; *Bilaso v. Munni*, 33 All. 556; *Jairam v. Kuverbat*, 9 Bom. 491; *Blackwell v. Blackwell*, (1926) Ch. 223; *Bhagabat v. Kalicharan*, 38 Cal. 408 (P.C.); *Lloyd v. Webb*, 24 Cal. 44; *Chuni Lal v. Bai Muli*, 24 Bom. 420; *Tara Charan v. Suresh*, 17 Cal. 122 (P.C.); *U Zoe v. Ma Mya*, A.I.R. 1930 Rang. 184; *Williams v. Clarke*, 4 DeG. & Sm. 472; *Abdul v. Abdul*, A.I.R. 1933 Oudh 439; *Saunders v. Vaultier*, (1841) Cr. & Ph. 240 and *Sundar Bibi v. Lal Rajendra*, A.I.R. 1925 All. 389.

It is possible for a Mahomedan to create a definite interest like a vested remainder and such remainder, though liable to be displaced, is not a mere expectancy in succession by survivorship or other merely contingent or possible right or interest. Amongst the Shias the creation of a life-interest is allowed and during the period of the life-interest the deferred interest can be dealt with by way of sale, gift or otherwise, provided that there is no interference with the particular estate—*Banoo Begam v. Abed Ali*, 32 Bom. 172; *Sirij v. Mushaf*, A.I.R. 1922 Oudh 93. But see *Abdul v. Nuran Bibi*, 11 Cal. 597 (P.C.) where it was held otherwise.

121. Vesting is not postponed :—(The fact that the estate granted is subject to partial trusts or charges for partial purposes does not postpone the vesting in possession. Thus, where a testator, after directing the payment of some annuities to some persons for their lives, gave the whole of his property to his grandsons to be divided among them only after the annuities have ceased on the death of the annuitants, *held* that the fact that the estate was subject to partial trusts did not postpone the vesting in possession of the gift to the grandsons—*Cally Nath v. Chunder Nath*, 8 Cal. 378. So also, a bequest in favour of a person simply (*i.e.*, without any intimation of a desire to suspend or postpone its operation) confers a vested interest, and the appointment of an executor or a guardian to the person while he is a minor, with a direction to make over the property to him on his attaining majority, does not postpone the vesting of interest—*Harris v. Brown*, 28 Cal. 621 (P.C.). But where the testator directs that the interest shall vest at a particular time or on the donee attaining a particular age, it vests at the time fixed by him—*Glanwill v. Glanwill*, 2 Mer. 38; *Knight v. Cameron*, 14 Ves. 389.

If a bequest is to a person for life and after his death to his children, the bequest becomes vested in each child as and when he or she is born and the vesting is not postponed till the death of the life-tenant. The expression "after his death" is taken to indicate merely the time when the gift over becomes reduced to possession and not the time when the right to such possession vests [*Halifax v. Wilson*, 16 Ves. 168 followed]. But if the bequest has not been merely after the death of the life-tenant, but to such of his children as may survive him or should be alive at his death, then clearly the condition of surviving or being alive at his death would be a condition precedent to the vesting itself, and in such a case no child that does not survive will acquire a vested interest in the bequest—*Adams v. Gray*, A.I.R. 1925 Mad. 599 (602); *Rewun v. Mt. Radha*, 4 M.I.A. 137.

122. Construction—Intention of donor :—The question whether particular words create a vested or a contingent interest is one of construction—*Cally Nath v. Chunder Nath*, 8 Cal. 378. No particular words are necessary to the vesting of an interest, and the words of the grantor must be construed in their plain ordinary meaning. Words which have become by accepted usage terms of art in England do not exist in the vernaculars of India where the English mode of creating interests is but of recent origin—*Harris v. Brown*, 28 Cal. 621; *Le Mesurier v. Wajid*, 29 Cal. 890. Where the ultimate object of the testator was clearly to make a gift of the property to the donees, who were also executors, but he directed that a sufficient fund from it should be provided during the life-time of his wife to pay her a certain sum monthly, and charged the property with payment of another sum to his other wife, it was held that as the estate was devised to the executors not for, but subject to, a particular purpose, they were not trustees but devisees of an estate subject to a charge. The testator vested the property in the executors, but postponed their beneficial interest in it until his younger wife's death—*Subrahmaniam v. Subrahmaniam*, 4 Mad. 124; *King v. Denison*, 1 Ves & B. 272. In *Bhagawati v. Kalicharan*, 38 Cal. 408 (P.C.), their Lordships of the Judicial Committee approved the decision in *Ram Lal v. Kanai Lal*, 12 Cal. 683 laying stress on the undesirability of applying rules of construction of English documents in transactions between Hindus "who view most transactions from a different point, think differently and speak differently from Englishmen"—at p. 474.

123. Para. 2—Death of the transferee :—A vested interest is not defeated by the death of the transferee before he obtains possession; and his representative will be entitled to its benefit. This is another point of distinction between a vested interest and a contingent interest. Therefore, where out of two persons in whom an estate vests, one person dies, the whole property does not pass to the other by survivorship but is divisible between the living person and the heir of the deceased—*Krishna Aiyar v. Swaminath*, 1918 M.W.N. 503, 8 L.W. 140, 47 I.C. 723.

124. Explanation :—Intention :—Having regard to the explanation the burden of proving the contrary intention is on those who asserted it, and the weight of the burden is aggravated by the elimina-

tion in the explanation of circumstances which might, apart from the explanation, be thought sufficient to discharge it—*Sewdayal v. Official Trustee*, A.I.R. 1931 Cal. 651 (657), 58 Cal. 768, 134 I.C. 436.

Postponement of enjoyment :—An interest may be a vested one, though its enjoyment may be postponed. Thus, where a Hindu testator made a sufficiently clear gift of his property to his grandsons living at his own decease, but endeavoured to postpone the possessory enjoyment of his grandsons to a certain period after his death, and directed the accumulation of the profits of his estate for a longer period, held that the will contained sufficiently clear words of present gift to the grandsons, and that the other clauses postponing enjoyment and possession and directing accumulation must be rejected as inconsistent with or repugnant to the vested interest—*Cally Nath v. Chunder Nath*, 8 Cal. 378, following *Singleton v. Gilbert*, 1 Cox. 68. Where a testator directed that, out of the net income of his estate, his trustees should expend Rs. 500 every year for the maintenance of J (a minor) and that, when J should attain the age of 30 years, the trustees should give to J the net residue of his property remaining at that time, held that the property vested in J on the testator's death, and that the direction for postponement of enjoyment till the age of 30 years must be disregarded, and was inoperative after his majority, and that the income of the property including all income which accrued since his majority, must be paid to J—*Gosavi Shivgar v. Rivett-Carnac*, 13 Bom. 463.

Prior interest given to some person :—An interest may be vested though the prior interest may be given to some other person. Where the enjoyment is postponed by reason of circumstances connected with the estate or for the convenience of the estate, as it has been termed, for instance, where there are prior life or other estates or interests, the ulterior interest to take effect after them will be vested. Thus, under a gift by a testator to A at the decease of the testator's wife, A's interest vests at the testator's death—*Blamire v. Geldart*, 16 Ves. J. 314. See also *Cally Nath v. Chunder Nath*, 8 Cal. 378 cited under Note 121 above.

Direction for accumulation of income :—A gift in terms which import a present vested interest with a postponed time of payment is not made contingent by a direction to accumulate till the time of payment arrives—*Blease v. Burgh*, 2 Beav. 226. After the interest has vested, the donee is entitled to the income arising therefrom during the period of suspension, provided there is no prior interest, notwithstanding any direction for postponement of enjoyment—*Gosavi v. Rivett-Carnac*, 13 Bom. 463.

Interest passing to another person on the happening of a particular event :—Where there is a gift to an infant with remainder over in the event of his dying under 21, the infant has a vested interest liable to be divested on his death under that age. See the Indian Succession Act (1925), Sec. 119, Illustration (vi); *O'Mahoney v. Burdett*, L.R. 7 H.L. 388; *Maseyk v. Fergusson*, 4 Cal. 304.

125. Right of heir to inherit property :—The right of a son or daughter or other heir of a person to inherit that person's property on his death is not an estate in remainder or in reversion in immoveable property or an estate otherwise deferred in enjoyment. It is neither

a vested nor a contingent right. It does not come within the definition of a "vested interest" in this section or of a "contingent interest" in Sec. 21 *infra*, or Sec. 120 of the Indian Succession Act (1925)—*Abdool Goolam*, 30 Bom. 304.

20. Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appears from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.

When unborn person acquires vested interest on transfer for his benefit.

126. A bequest to an unborn person is not payable until the birth of the person, and the intermediate income would necessarily accumulate for his benefit—*Gibson v. Lord Montfort*, 1 Ves. 485. But it would be otherwise if the bequest is contingent—*Haughton v. Harrison*, 3 Atk. 329; *Shaue v. Cudliffe*, 4 Br. C.C. 144.

21. Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

Contingent interest.

Exception.—Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

Compare section 120 of the Succession Act, 1925.

As to the difference between a vested interest and a contingent interest, see Note 120 under sec. 19.

127. Contingent interest:—Examples:—A sum of money is bequeathed to A in case he shall attain the age of 18 or when he shall attain the age of 18. A's interest in the legacy is contingent until the condition shall be fulfilled by his attaining that age—*Illustration (ii)* to sec. 120, Indian Succession Act (1925); *In re Francis*, (1905) 2 Ch. 295. A devise upon trust of land towards the maintenance of the testator's daughter until she should attain the age of 25, and from and after her attaining that age, then upon trust for his said daughter, creates a contingent interest in favour of the daughter until she attains 25—*Doe d Cadogen v. Ewart*, 7 Ad. & El. 636. Similarly, when the creation of the interest is subject to a condition precedent to be performed by the donee, the interest is manifestly contingent until the condition is fulfilled—*Phipps v. Williams*, 5 Sim. 44. Thus, an estate is

bequeathed to A if he shall pay Rs. 500 to B. A's interest in the bequest is contingent until he has paid Rs. 500 to B—*Illustration (viii)* to sec. 120, Indian Succession Act, 1925. Where, under a deed of settlement by a husband in favour of the wife, her interest in the property is dependent upon the event of any disagreement between the husband and the wife, the wife has only a contingent interest—*Thayammal v. Adhimovlam*, A.I.R. 1956 Mad. 304. See also *Venkatarama v. Seetharatnamma*, (1968) 1 An. W.R. 205 which points out the distinction between a vested and a contingent interest.

A contingent gift or interest has a real existence, capable as much as a vested interest or estate, of being operated upon a condition subsequent and being made to cease or become void—*Egerton v. Brownlow*, 4 H.L.C. 1. Where words of contingency form part of the description of the class of persons to take, as in the case of a gift to those "who shall attain the age of 21", the words must receive their natural construction and no estate vests in any one till he attains the prescribed age. In the case of words of contingency occurring in the description of the class of persons to take, a mere gift over is not sufficient to change their meaning—*Ballin v. Ballin*, 7 Cal. 218. A Hindu by his will provided: "I bequeath to both of you (the testator's wife and his brother's daughter) the rest of the properties..... You will become entitled to sell or make a gift or *heba*, etc., in respect of the said properties and hold and enjoy the same.....If, by the will of God, one of you should die before the other, whoever will survive will hold and enjoy the whole of the property as *malik*": Held that the wife not having predeceased her husband and having survived the period of distribution took an absolute interest—*Nistarini v. Behary Lal*, 19 C.W.N. 52.

A Hindu will provided: "If both the said daughters shall have issue, they shall divide the said properties equally. Those who have no issue shall, as aforesaid, enjoy the income for their lives, and those who have issue shall enjoy the whole property". It was held that the birth of issue was the event on which the absolute gift of a half share to either daughter was to take effect, and there was no reason for construing the words "have issue" to mean "leave issue". Therefore one of the daughters whose only issue died before her took a heritable share—*Gurusami v. Sivakami*, 18 Mad. 347 (P.C.). A husband by *takshimnama* provided: "The property shall devolve upon B or his legal heir and B or his legal heir shall become the absolute owner of my property on the death of my wife." B during the widow's life-time sold the widow's property and died during the life-time of the widow: Held that the interest in favour of B was contingent and came to an end on his death during the widow's life-time—*Ram Chandra v. Jagdeshwari Prasad*, A.I.R. 1937 Pat. 247. See *Abdul Wahid v. Nuran Bibi*, 11 Cal. 597 (P.C.), where also it was held that the title of the sons to succeed was contingent upon their surviving the widow and that no interest passed to their heirs on their deaths in her life-time. As to a contingent interest becoming a vested one see *Mt. Murtazi v. Dildar Ali*, A.I.R. 1930 Oudh 129.

128. Exception :—The principle of the exception is that where the principal is given at a distant epoch and the whole income is given in the meantime, the Court leaning in favour of vesting has said that the whole thing is given; but if there occurs an interval or gap, which separates the gift of the interest from the principal, it is not vested—*per* Page-Wood, V.C., in *Pearson v. Dolman*, L.R. 3 Eq. 315 (321). Where interim interest is given, it is presumed that the testator meant an immediate gift—*Vaudry v. Geddes*, 1 Russ. & M. 208. “I do not know of any case in which the whole income has been absolutely given for maintenance, and yet the legacy has been held not to be vested”—*per* Jessel, M. R., in *Bolding v. Strungell*, 45 L.J. Ch. 208. Compare *Gosavi v. Rivett-Carnac*, 13 Bom. 463, cited in Note 124 under sec. 19.

Where there is no definite ascertained interest “to arise from the fund” the case does not come within the exception—*Cowasji v. Ratanbai*, A.I.R. 1925 P.C. 27, 49 Bom. 167, 52 I.A. 95.

A mere contingent interest though transferable is not attachable—*Rajes Kanta Roy v. Shanti Devi*, A.I.R. 1957 S.C. 255.

22. Where, on a transfer of property, an interest therein
 is created in favour of such members only
 of a class as shall attain a particular age,
 such interest does not vest in any member
 of the class who has not attained that age.

This section may be compared with sec. 121 of the Indian Succession Act, 1925. So long as the donees are below the specified age, they possess only a *contingent* interest which will mature into a vested interest as soon as they attain the specified age.

129. Gift to a class :—As to the meaning of ‘class’ see notes under sec. 15. Where a testator gave his residuary estate to trustees in trust for his nephews and nieces, to be paid in certain proportions and at certain times (*viz.*, that the share of each nephew shall be paid to him upon his attaining the age of 21 years, and the share of each niece to be paid to her on her attaining the age of 21 or previously marrying) with benefit of survivorship between them, *held* that the legatees took vested interests, and that the period of distribution alone was postponed but the bequests were valid—*Maseyk v. Fergusson*, 4 Cal. 304 following *Williams v. Clark*, 4 DeG. & S. 472. Similarly, a gift to children when the youngest attains the age of 21, creates a vested interest in favour of every member who attains 21, although he may not live till the youngest attains 21 or the youngest may die under 21—*Re Hunter*, 1 Aq. 295; *Cooper v. Cooper*, 29 Beav. 229; *Hughes v. Hughes*, 3 Br. C.C. 35.

23. Where, on a transfer of property, an interest therein
 is to accrue to a specified person if a speci-
 fied uncertain event shall happen, and no
 time is mentioned for the occurrence of
 that event, the interest fails unless such event happens before,
 or at the same time as, the intermediate or precedent interest
 ceases to exist.

This section may be compared with section 124 of the Indian Succession Act.

130. Principle :—The object of this section is to prevent property from remaining without any owner. At all times property must vest in some particular person or other. It should never be without an owner. See *Abiss v. Burney*, 17 Ch. D. 211 (at p. 229).

A gift remainder, expectant on the termination of an estate for life, does not fail, but is accelerated by reason of the gift of such prior estate not taking effect—*Adjudhia v. Rakhman*, 10 Cal. 482 (P.C.).

A Hindu at his death left 3 sons, the eldest of full age and the other two minors. In his will there was the following direction : "My 3 sons shall be entitled to enjoy all the moveable and immoveable properties left by me equally. Any one of the sons dying sonless, the surviving sons shall be entitled to all the properties equally". Held by the Privy Council that these words gave a legacy to the survivors contingently on the happening of a specified uncertain event which had not happened before the period of distribution, that is, the testator's death. Therefore, the legacy to the surviving brothers could not take effect and the original gift to the testator's 3 sons was absolute to each in equal shares and indefeasible on his death. The rule must be applied, wherever it is applicable, without speculating on the intention of the testator—*Narendra v. Kamalbasthi*, 23 Cal. 563 (P.C.). See also *Mt. Bolo v. Mt. Koklan*, A.I.R. 1930 P.C. 270.

The section is not exhaustive—*Indraloke Studio Ltd. v. Santi Debi*, A.I.R. 1960 Cal. 609.

24. Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer.

Transfer to such of certain persons as survive at some period not specified.

Illustrations.

A transfers property to B for life and after his death to C and D, equally to be divided between them, or to the survivor of them. C dies during the life of B. D survives B. At B's death the property passes to D.

Analogous Law :—Compare sec. 125, Indian Succession Act, 1925.

131. Cases :—A testator directed his trustees and executors to divide his property among his sons when they should attain the age of 21, and there was also a provision in the will that in the event of any such persons dying in the testator's life-time or at any time thereafter prior to division, leaving lawful issue, such issue should take the estate of the deceased parent. One of the legatees who had attained the age of 21 at the testator's death, died some months after, leaving issue; held

that at the testator's death the legacy vested in the legatee, but became divested by the legatee's death prior to division, and that the gift over to the issue of the legatee was not void but took effect—*Bachman v. Bachman*, 6 All. 583.

If an estate is limited to two jointly, the one capable of taking, the other not, he who is capable shall take the whole—*Humphrey v. Taylor*, 1 Ambler 138, followed in *Nandi Singh v. Sitaram*, 16 Cal. 677 (P.C.).

If all the legatees predecease the tenant for life, their representatives will take; for the event which was to divest them not having happened, the original gift remains. (Thus in the Illustration to this section, if both C and D die in the life-time of B, the property after B's death will pass to the representatives of C and D). See *Henderson's Testamentary Succession*, 2nd Ed., p. 116. See also *Brown v. Kenyon*, 3 Maddock 410; *Re Sander's Trusts*, 1. Eq. 675; *Harrison v. Foreman*, 5 Ves. 207.

A Hindu by his will made the following provision: "I have two sons living B and C; they and an infant son by my eldest son, the late D, and my wife E (four persons) shall succeed to the whole of my estate; these four persons will receive equal shares. If any of these four persons happen to die, the survivor of them will receive this estate in equal shares. If there be a son or a grandson surviving as the heir and representative of the party dying, such survivor shall succeed to his estate" etc. and further provided that "so long as my infant grandson shall not have attained his majority, the whole of my estate shall remain undivided." All the persons named survived the testator. Held that they took absolute interests in the shares named; and that the estate became divisible on the infant son attaining majority—*Ellokassce v. Durponarain*, 5 Cal. 59. As regards the time of distribution generally, the following observations of Sir John Leach, V.C. should be borne in mind: "I consider it, however, to be now settled that if a legacy be given to two or more equally to be divided between them or to the survivor or survivors of them and there be no special intent to be found in the will, the survivor is to be referred to the period of division. If there be no previous interest given in the legacy, then the period of division is the death of the testator and the survivor at his death will get the whole legacy. But if a previous life estate be given, then the period of division is the death of the tenant for life, and the survivor at such death will take the whole legacy"—*Cripps v. Wolcott*, 4 Mad. 11 (15).

The case of *Ram Chandra v. Jagdeshwari Prasad*, A.I.R. 1937 Pat. 247 referred to in Note 127 really comes within the principle of this section.

132. "Surviving at some period":—The words 'surviving at some period' refer to the period when the payment or distribution is to be made—*Stevenson v. Gullen*, 18 Beav. 590; *Howard v. Collins*, 5 Eq. 349. Cf. the words of sec. 125, Indian Succession Act, 1925.

25. An interest created on a transfer of property and dependent upon a condition fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

Conditional transfer.

Illustrations.

(a) A lets a farm to B on condition that he shall walk a hundred miles in an hour. The lease is void.

(b) A gives Rs. 500 to B on condition that he shall marry A's daughter C. At the date of the transfer C was dead. The transfer is void.

(c) A transfers Rs. 500 to B on condition that she shall murder C. The transfer is void.

(d) A transfers Rs. 500 to his niece C if she will desert her husband. The transfer is void.

Analogous Law :—Compare secs. 126 and 127, Indian Succession Act, 1925, and secs. 23 and 36, Indian Contract Act.

"Dependent upon a condition" :—The condition referred to in this section is a condition *precedent* as distinguished from a condition *subsequent*.

133. Condition precedent and condition subsequent :—*Distinctions :—*

(1) A condition *precedent* is one which must happen before the estate can commence. A condition *subsequent* is one by the happening of which an existing estate will be defeated.

(2) Where the condition is precedent, the estate is not in the grantee until the condition is performed; but where the condition is subsequent, the estate immediately vests in the grantee and remains in him till the condition is broken—*Wynne v. Wynne*, 2 M & G. 8 (at p. 14). A clause of forfeiture in case of the devisee not making the mansion house "his usual and common place of abode and residence" is not void for uncertainty—*Wynne Fletcher*, 24 Beav. 430.

(3) In the case of a condition precedent being or becoming impossible to be performed or being immoral or opposed to public policy, the estate will not arise and the transfer will be void. See this section. But in the case of an impossible or immoral condition subsequent, the estate will be or becomes absolute and the condition will be ignored. Thus, if a gift was made with a condition superadded that the donee should marry a certain person on or before she attained the age of 21, and the person named died before she attained that age, it was held that the fulfilment of the condition subsequent having become impossible, the estate became absolute—*Thomas v. Howell*, 1 Salk,

170; Jarman on Wills, Vol. II, p. 12. A gift to which an immoral condition is subsequently attached remains a good gift, though the condition is void—*Ram Sarup v. Bela*, 6 All. 313 (P.C.). There is a clear distinction between an immoral consideration for a gift, and an immoral condition which is subsequently attached to a gift. If the consideration itself is immoral the transfer falls to the ground. On the other hand, if a subsequent condition is tried to be attached to a perfectly valid gift, then the condition, if immoral, is void but the gift remains unaffected—*Chumna v. Ramchandra*, A.I.R. 1925 All. 437.

(4) A condition subsequent must be strictly fulfilled (sec. 29), but a condition precedent is fulfilled if it is substantially complied with (sec. 26). See notes under section 26.

134. Fulfilment impossible :—The fulfilment of a condition may become impossible either at the time the interest is created or subsequently, but in either case the transfer will fail. See Jarman on Wills, Vol. II, p. 12. When the fulfilment of a condition becomes impossible by act of God, the condition becomes void, and the transfer fails—*Ibid.* p. 13. See *In re Greenwood*, [1903] 1 Ch. 749. But if the performance of the condition becomes impossible by the fraud of a person interested in the non-fulfilment of the condition, the condition shall, as against him, be deemed to have been fulfilled; see section 34 *infra*. "Mere difficulty in performance is not to be counted as an impossibility"—Shepherd & Brown, 7 Edn., p. 95.

Where there was a bequest made conditional on the re-excavation of a certain tank by the legatee and the condition became impossible of performance by reason of the testator himself re-excavating the tank, the bequest failed. Where the performance of the condition appears to be the motive of the bequest, the impracticability of the performance will be a bar to the claim of the legatee: the bequest in such cases does not take effect discharged of the condition—*Rajendra v. Mrinalini*, 48 Cal. 1100.

135. Forbidden by law :—The fulfilment of a condition may be forbidden by any law of the land, and it is not necessary that the prohibition should be express—*Forster v. Taylor*, 5 B. & A. 887.

For instances of conditions forbidden by law, see Secs. 26-30, Contract Act.

136. Immoral or opposed to public policy :—Where the transaction amounts to a voluntary gift, it cannot be set aside; but where the transaction, though completed, was intended to be for consideration, it can be impeached if the consideration is immoral, and it makes no difference whether the transaction is executed or executory—*Thasi v. Shunmugavelu*, 28 Mad. 413. An agreement which has for its object the getting of divorce by the wife from her husband is against public policy—*Bai Valji v. Nansa Nagar*, 10 Bom. 152. A transfer by way of bribe (*Harrington v. Victoria Graving Dock Co.*, 3 Q.B.D. 549) or for the purpose of prostitution (*Pearce v. Brookes*, L.R. 1 Ex. 213) is void. Where the donor made a gift of his property to a man and his wife on condition that he should have physical enjoyment of the woman,

held that the condition being immoral, the gift was void—*Ghumna v. Ram Chandra*, 47 All. 619, 88 I.C. 411, A.I.R. 1925 All. 437. See also Notes 63 and 64 under sec. 6. Where a testatrix by a codicil directed that all interest given by her will to her niece should go over, should she not cease to reside in S (the testatrix's mill) within 18 months of the testatrix's death, it was held to be a condition which would require the niece to omit her duty to her husband and as such it was void—*Wilkinson v. Wilkinson*, L.R. 12 Eq. 604. But if a testator bequeaths a certain portion of his property to a female legatee imposing a condition that she would be divested of the bequest if she marries within the life-time of her father or if she lives an unchaste life, such a condition is not void—*Cohen v. Cohen*, A.I.R. 1932 Cal. 350.

26. Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.

Fulfilment of condition precedent.

Illustrations.

(a) A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. E dies. B marries with the consent of C and D. B is deemed to have fulfilled the condition.

(b) A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. B marries without the consent of C, D and E, but obtains their consent after the marriage. B has not fulfilled the condition.

Compare sec. 128 of the Indian Succession Act, 1921.

Principle :—This section is based upon the principle of favouring the early vesting of estates. See *Scott v. Tyler*, 2 W. & T.L.C. 146. This section and the next lay down the doctrine of *cy pres* with reference to the fulfilment of a condition precedent. It is sufficient if a condition precedent is performed *cy pres*, i.e., so performed as to substantially fulfil the testator's intention. See *Williams on Executors*, 11th Edn., p. 1013.

137. Substantial compliance :—A condition *precedent* is fulfilled if it is *substantially* complied with; but a condition subsequent must be *strictly* fulfilled (sec. 29).

Conditions *subsequent* that go in defeasance shall be taken strictly, for they are odious, and hence it is that unless they are strictly fulfilled, the ulterior disposition shall not take effect. But in the case of a condition *precedent*, as the estate cannot commence until the condition is performed, the condition is beneficial as creating an estate and ought to be construed favourably—*Scott v. Tyler*, 2 W. & T.L.C. p. 146. The law is always in favour of vesting of estates (*Taylor v. Graham*, 3 App. Cas. 1287) and a condition precedent should be construed in favour of the devisee.

Where a testator bequeathed a legacy on condition that the legatee should "humbly apply for subsistence", but the legatee instead of "humbly applying" claimed *as of right* and claimed twelve times the amount of the bequest as maintenance "suitable to his rank and position," the bequest failed as there was no substantial compliance with the condition—*Veerabhadra v. Chiranjivi*, 28 Mad. 173 (P.C.).

Where a house is given on condition of residence therein but no manner or period of residence is prescribed, the occasional use of the house and keeping an establishment therein with the intention of using it again as residence, is a sufficient compliance with the condition—*In re the Tagore case*, 1 I.A. 387, 22 W.R. 377. Where a testator bequeathed a legacy to his daughter on her attaining twenty-one or marrying with the consent of her guardian or guardians which should first happen; but the daughter married under twenty-one without the consent of any guardian, there being none, it was held that the condition was not complied with and the daughter took no vested interest although the will empowered the trustees during the minority of the daughter to pay the income of their contingent legacies to his wife for her maintenance and education—*In re Brown's Will*, 18 Ch. D. 61.

A testator devised a property in the country to the use of his son G for life "provided as a *sine qua non*" that he "within six calendar months after my decease shall enter upon and take actual possession of" the property "as and for his residence and place of abode" and "shall as such tenant for life thereafter during his life continue to reside in or upon the said capital messuage for at least six calendar months (but not necessarily consecutively) in every year". After G's death or his failing to take such possession as aforesaid and to reside in the house the testator devised the same to G's first and other sons tail male. G entered and took possession within six months after the testator's death, but as to residence, during the year following he was in the house for 18 days only and in the year following for not more than 24 days. He had however placed the house in charge of a staff of servants and otherwise occupied the house through them and his son who stayed at the house on every alternate Saturday till Monday. *Held* that no forfeiture of G's life estate had taken place—*Warner v. Moir*, 25 Ch. D. 605. See in this connection *Shyama Charan v. Sarup Chand*, 17 C.W.N. 39.

Where, by an agreement between a female and three male persons, it was agreed that a certain property should not be transferred by the female without the consent of the other party constituted by the three male persons, *held* that it was not a substantial compliance with this section if the consent of only one of the three was obtained (the other two being dead at the time). Broadly speaking, till the majority or at least one half of the people whose consent is necessary give it, it cannot be said that there has been a *substantial* compliance with the condition—*Benichand v. Ekram Ahmed*, A.I.R. 1926 All. 181, 90 I.C. 887. Cf. Illustration (a).

Ignorance of condition :—The mere fact that a person to whom a grant is made is ignorant of the condition to be performed is no excuse

for not fulfilling it—*In re Hodge's Legacy*, 16 Eq. 92; *Astley v. Earl of Essex*, 18 Eq. 290. A person who takes under an instrument cannot plead want of knowledge of its contents as an excuse for non-compliance—*Porter v. Fry*, 1 Vent. 199.

27. Where, on a transfer of property, an interest therein is created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor.

But, where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

Illustrations.

(a) A transfers Rs. 500 to B on condition that he shall execute a certain lease within 3 months after A's death, and if he should neglect to do so, to C, B dies in A's life-time. The disposition in favour of C takes effect.

(b) A transfers property to his wife; but, in case she should die in his life-time, transfers to B that which he had transferred to her. A and his wife perish together under circumstances which make it impossible to prove that she died before him. The disposition in favour of B does not take effect.

Compare sections 129 and 130, Indian Succession Act, 1925. The illustration (b) has been taken from *Underwood v. Wing*, 4 DeG. M. & G. 633.

The rule in this section applies both to moveable and immoveable properties—*Evastoff v. Austin*, 19 Beav. 591; *Jull v. Jacobs*, 3 Ch. D. 703.

Scope :—The failure contemplated by this section is the failure of a valid gift. When the gift is *ab initio* void, the subsequent gifts must also fail as provided in sec. 16—*Ismail v. Umar*, A.I.R. 1942 Bom. 155 (158), 44 Bom. L.R. 256.

138. Acceleration :—This section enunciates the doctrine of acceleration. Thus, where there is a gift in remainder, expectant on the termination of an estate for life, and the prior life estate becomes void, the gift does not fail but is accelerated—*Adjudhia v. Rukhman*, 10 Cal. 482 (P.C.). Where in a series of successive limitations, a particular estate is void *ab initio*, the remainder, which is immediately expectant upon such estates, accelerates. Thus, where there was a gift to the testator's daughter of real and personal estate "during her lifetime, and, after her

decease, the property to be equally divided between her children on their becoming of age" and the gift to the daughter was void on account of her having attested the will, it was held that the gift to the children was accelerated and took effect immediately—*Jull v. Jacobs*, 3 Ch. D. 703. So also, where the prior estate is revoked by the donor and thus fail, the remainder immediately expectant upon it accelerates—*Fell v. Biddulph*, L.R. 10 C.P. 701.

Where there is a gift to a legatee, with a gift over to another if the legatee neglects to perform a condition, the gift over takes effect if the legatee never comes into existence or dies before the testator or if the gift to the legatee is itself void, so that the legatee is never able to perform the condition and thus the prior disposition fails—*Scatterwood v. Edge*, 1 Salk. 229; *Avelyn v. Ward*, 1 Ves. 420; *Re Green's Estate*, 1 Dr. & S. 68. Where a testator made a gift to a son to be adopted by his widow, and, on the death of such adopted son without issue in the widow's lifetime, to his (testator's) daughters, and the power of adoption given to the widow was invalid, held that the executory gift to the daughters took effect as the prior gift failed *ab initio* by reason of its object never coming into existence—*Radha Prosad v. Rani Monee*, 33 Cal. 947. A devise was made by X to his child *en ventre sa mere* (under the misapprehension that his wife was *enciente*) and if such child died before a certain age, then a gift to another. When it was found that the wife was not *enciente*, the ulterior estate became accelerated and did not become void—*Wing v. Angrave*, 8 H.L.C. 183; *Hall v. Warren*, 9 H.L.C. 420; *Jones v. Westcomb*, 1 Eq. Cas. Abr. 245.

An award of an arbitrator provided that the managership of certain endowed property should devolve on the next successor after it had been held by the previous one for 21 years. The manager who had been appointed for a term of 21 years died before the expiry of the full period. Held that the effect of the failure of the prior interest was to accelerate the subsequent interest even though the failure did not take place in the precise manner laid down in the award. The intention of the arbitrator was clearly that the ulterior disposition was to take effect on the failure of the prior one, and not that the ulterior disposition was to be ineffectual unless the previous manager completed his full term of 21 years—*Debi Shankar v. Nand Kishore*, A.I.R. 1932 Oudh 161 (163). Where a testator directed that if his pregnant wife should bring forth a son, his property should go to the son, and, if a daughter, she should only have a right of maintenance, and that if the son born should die before attaining age, the property should go over to the testator's brother N, and the wife gave birth to a daughter, held that the gift over in favour of N took effect on failure of the gift to the son, even though such failure was not in precise manner expressed in the terms of the gift—*Okhoymoney v. Nilmony*, 15 Cal. 282, following *Jones v. Westcomb* (*supra*).

The mere fact that the testator contemplated that if his son died a minor and the widow survived him, she would acquire the property before the two daughters and that event did not take effect in that order because the widow predeceased the son, did not deprive the

daughters of the benefit of the legacy given to them—*Durga Prosad v. Raghumandan*, 19 C.W.N. 439.

Para 2 :—A Hindu will provided : “I give and bequeath the whole of the residuary estate to my grandson or grandsons who may be born to my son K within ten years after my death : if there shall be no such grandson to be born as aforesaid, the whole of my residuary estate is to be divided equally between my said grand daughters after the death of my said wife.” There was a proviso that the distribution of the residuary estate among the grand daughters should take place after the death of the testator’s wife, daughters-in-law and son. A grandson was born within ten years of the testator’s death; *held*, that the bequest in favour of the grandson being a bequest to a person not in existence at the death of the testator was invalid (as the law then stood; now see Hindu Disposition of Property Act XV of 1916). But as the grandson was in existence, bequest in favour of the grand daughters could not take effect and there was complete intestacy. Therefore, the grandson took the whole estate as heir-at-law—*Official Assignee v. Vedavalli*, A.I.R. 1926 Mad. 936, 51 M.L.J. 182, 97 I.C. 163.

28. On a transfer of property an interest therein may be created to accrue to any person with the condition superadded that in case a specified uncertain event shall happen such interest shall pass to another person, or that in case a specified uncertain event shall not happen such interest shall pass to another person. In each case the dispositions are subject to the rules contained in sections 10, 12, 21, 22, 23, 24, 25 and 27.

Ulterior transfer conditional on happening or not happening of specified event.

This section may be compared with sec. 131, Indian Succession Act, 1925, from which the following Illustrations may be quoted :—

“*Illustration (i) :—*A sum of money is bequeathed to A, to be paid to him at the age of 18, if he shall die before he attains that age, to B. A takes a vested interest in the legacy, subject to be divested and to go to B, in case A shall die under 18.”

“*Illustration (ii) :—*A sum of money is bequeathed to A for life, and after his death to B, but if B shall then be dead leaving a son, such son is to stand in the place of B. B takes a vested interest in the legacy subject to be divested if he dies leaving a son during A’s life-time.”

138A. Scope :—The distinction between a repugnant provision and a defeasance provision is sometimes subtle, but the general principle of law is that where the intention of the transferor is to maintain the absolute estate conferred on the transferee, but he simply adds some restrictions in derogation of the incidents of such absolute ownership, such restrictive clauses would be repugnant to the absolute estate and therefore void. But where the grant of an absolute estate is expressly or impliedly made subject to defeasance on the happening of a contingency and where the effect of

such defeasance would not be a violation of any rule of law, the original estate is curtailed and the gift over must be taken to be valid and operative. Hence an absolute gift to a wife by the husband subject to the condition that if she dies without issue, the property would pass to other persons living at the date of gift, is valid in favour of a third person on the fulfilment of the condition. The gift over being valid any disposition by the wife during her life would not prevent the vesting of the property or divest the third persons—*Gavindaraju v. Mangalam*, A.I.R. 1933 Mad. 80, 36 M.L.W. 733, 139 I.C. 867.

The direction in a will that "my remaining moveable property shall be dealt with by my son G according as he may think fit, and when the sons of my son G shall attain the age of 21 years the same shall be divided and duly received by G and his sons in equal shares" confers an absolute gift to G and the gift over is void—*Anandrao v. Administrator-General*, 20 Bom. 450. A Hindu testator appointed his wife as her executrix. A clause in the will vested in her whatever might remain after the payment of debts and expenses, absolutely and with complete power of alienation. Other clauses provided for the adoption of sons and in case of there being no adopted son or no son or wife of the adopted son at the time of the widow's death, the heir according to the Hindu Shastras who should be alive at the time, should get properties which should remain after disposal by the widow. The following rules were laid down by Mookerjee, J. :—(a) that the testator gave an absolute interest in his estate to his widow and the gift over of what might remain undisposed of by her was void; (b) if an estate is given in terms which confer an absolute estate to a named donee, and then further interests are given merely after or on the termination of that donee's interest, and not in defeasance of it, his absolute interest is not cut down and the further interests fail; and (c) when an absolute interest has been given to the first taker followed by a gift over of what may not be required by him, the gift over, though concluded in the most direct and precise words, is void for uncertainty—*Suresh v. Lalit*, 20 C.W. N. 463, 31 I.C. 405, followed in *Mohan Lal v. Niranjana*, 3 Lah. 175. See also *Gooroo Das v. Sarat*, 29 Cal. 699. A clause of defeasance in order to be operative must contain express words or words of necessary implication of a gift over to a definite person—*Amulya v. Kalidas*, 32 Cal. 861.

139. Condition superadded :—It means 'condition subsequent'.

Examples :—(a) The death of the donee without leaving a son or son's son—*Soorjeemoney v. Denobundhoo*, 9 M.L.A. 123. Thus, a father may make a gift of his property absolutely to his daughter with a condition superadded that if she does not beget any male issue, the property shall revert to the family of the donor (father)—*Hira Moni v. Anmol*, 26 A.L.J. 944. A.I.R. 1928 All. 699 (702).

(b) The donee marrying or not marrying a particular person or class of persons named—*Page v. Haywood*, 2 Salk. 570; *Parvathi Bhavani v. Velayudhan Govindan*, A.I.R. 1957 Trav.-Co. 167.

(c) The death of the donee before attaining a certain age—*Doe d. Hunt v. Moore*, 14 East 604; *Maseyk v. Fergusson*, 4 Cal. 304; *Parvathi Bhavani v. Velayudhan Govindan*, A.I.R. 1957 Trav.-Co. 167.

(d) Change of religion—*Seymour v. Vernon*, 33 L.J. Ch. 690; *Bid-dulph v. Lees*, 28 L.J.Q.B. 211.

29. An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

Fulfilment of condition subsequent.

Illustration.

A transfers Rs. 500 to B, to be paid to him on his attaining his majority or marrying, with a proviso that, if B dies a minor or marries without C's consent, the said Rs. 500 shall go to D. B marries when only 17 years of age, without C's consent. The transfer to D takes effect.

Compare sec. 132 of the Indian Succession Act, 1925.

140. Strictly fulfilled :—A condition subsequent must be *strictly* fulfilled, whereas a condition *precedent* is deemed to be fulfilled if it is *substantially* complied with (see sec. 26). Conditions subsequent that go in defeasance of a vested interest shall be taken strictly, for they are odious; and hence it is that unless they are strictly fulfilled the ulterior disposition cannot take effect—*Scott v. Tyler*, 2 W. & T. L. C. 146 (189); *Egerton v. Brownlow*, 4 H.L.C. 1; *Clavering v. Ellison*, 3 Drew 451; *E. Enasu v. E. K. Antony*, A.I.R. 1969 Ker. 207.

A condition subsequent which is impossible of performance is ignored as non-existent, and does not defeat the vested interest—*In re Brown's Will*, 18 Ch. D. 61. Thus, where there was a clause in a gift to the donor's daughter that she should marry his nephew at or before she attained the age of 21, and the nephew died before she attained that age, it was held that the condition subsequent, having become impossible of performance by the act of God, must be ignored—*Thomas v. Hewell*, 1 Salk. 170; *Graydon v. Hicks*, 2 Atk. 16. (But the effect would be otherwise in the case of a condition *precedent*, see Note 133 to sec. 25).

Where only a portion of the condition is impossible, the non-performance of the impossible portion may be excused—*Collett v. Collett*, 35 Beav. 312.

So also, a breach of a condition subsequent on account of duress does not result in forfeiture of the interest. Thus, a testator directed that if any of the female members of his family should wilfully leave the family dwelling house and live in any other place they should forfeit their rights under the will. The plaintiff, a widowed and minor daughter-in-law of the testator was taken away from the house by her maternal relations with the aid of the police, and she resided with her mother. Held that there was a plain case of duress on the girl, and the absence of the girl, although in contravention of the direction of the testator, ought not to be treated as working a forfeiture—*Tincouri v. Krishna Bhabini*, 20 Cal. 15.

Prior disposition not affected by invalidity of ulterior disposition.

30. If the ulterior disposition is not valid, the prior disposition is not affected by it.

Illustration.

A transfers a farm to B for her life, and, if she does not desert her husband, to C. B is entitled to the farm during her life as if no condition has been inserted.

Compare section 133 of the Indian Succession Act, 1925.

141. The principle of this section is that specific trusts or specific estates good in themselves are not invalidated by a subsequent illegal disposition of the residue or remainder—*Krishnaramani v. Ananda*, 4 B.L.R. O.C. 231; *Tagore v. Tagore*, 9 B.L.R. 377 (P.C.); *Khetter v. Gunganarain*, 4 C.W.N. 671 (Footnote).

For an application of the principle of this section, see the Privy Council decision in *Narsing Rao v. Mahalakshmi*, A.I.R. 1928 P.C. 156, where "their Lordships are of opinion that the provisions in the unborn son's favour amount to a condition subsequent and it is a well-settled principle of law, which has now been embodied in secs. 28 and 30, T. P. Act, 1882, that in such a case if the ulterior disposition is not valid the prior disposition is not affected by it."—A.I.R. 1928 P.C. at pp. 161-62. See also *Ring v. Hardwick*, 2 Beav. 352; *Bai Dhan Laxmi v. Hariprasad*, 45 Bom. 1038 and *Shyama Charan v. Sarup Chand*, 17 C.W.N. 39.

31. Subject to provisions of section 12, on a transfer of property an interest therein may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen.

Illustrations.

(a) A transfers a farm to B for his life, with a proviso that, in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life-interest in the farm.

(b) A transfers a farm to B, provided that, if B shall not go to England within three years after the date of transfer, his interest in the farm shall cease. B does not go to England within the term prescribed. His interest in the farm ceases.

Compare sec. 134 of the Indian Succession Act, 1925.

142. **Condition of defeasance** :—In Indian law a gift over corresponds to the terms of this section and is a condition superadded to a transfer of property that the interest should cease in case a specified uncertain event shall not happen. Where there has been no defeasance the gift over cannot come into operation, and there can be no defeasance unless some event arises which makes it impossible for the absolute title to continue—*Mahammad Ali v. Nisar Ali*, A.I.R. 1928 Oudh 67 (73). Where a will purports to give an absolute interest with a condition that the devisee should have an interest so long as he resided in the house of the testator, the condition is valid—*Ambika v. Sasitara*, 22 C.L.J. 61; *Shyama Charan v. Sarup Chand*, 17 C.W.N. 39. But where a testator granted a monthly allowance to his wife on her living permanently in his family dwelling house, but the family dwelling house was never built

by the testator or his executors as contemplated in the will, the widow was entitled to the allowance if she lived elsewhere—*Satish Chandra v. Sarat Sundari*, 38 I.C. 103.

Where a transfer deed provides that the property shall go to the transferee and pass to his heirs in the ordinary course of inheritance, a clause providing that in the event of the transferor's return all the properties shall revert to him is legal and enforceable equally upon the transferee and his heirs—*Venkataramma v. Aiyasami*, A.I.R. 1923 Mad. 67. But a condition divesting the interest of a devisee or a legatee, if he enters into the naval or military services of the country is void—*Beard v. Hall*, (1908) 1 Ch. 383.

A Hindu testator devised some property in favour of his wives but there was a direction that they should live in the house, and that any one acting contrary to the terms of the will should be deprived of her interest which should thereupon devolve on the other heirs. The younger widow did not live in the house; *held* that she forfeited her interest in the property, and the next reversionary heir was entitled to take under the gift over—*Bhabotarini v. Pearylal*, 24 Cal. 646. Even though the estate given be an *absolute estate*, a condition may be superadded that the estate would be divested on the happening of a particular contingency. Such a condition is not invalid, either under the law in England or India—*Ahmad Azim v. Shafi Jan*, A.I.R. 1926 Oudh 561 (574).

A condition subsequent by way of defeasance, mentioned in this section, is in the nature of a penalty : consequently, the Court does not enforce it in every case. (Cf. Note 140 under sec. 29). The Court will generally pass a decree for damages for non-performance of the condition—*Munshi Lal v. Ahmad Mirza*, A.I.R. 1933 Oudh 291 (294), following *Popham v. Bamfield*, 23 E.R. 325.

There is nothing, however, in this section, which merely declares that a limitation upon a condition subsequent is a lawful method of grant, to exclude the right of the Court to give relief to the purchaser who fails to make payment of the price or part thereof by the date agreed upon in the contract of sale—*Devendra v. Surendra*, A.I.R. 1936 P.C. 24.

32. In order that a condition that an interest shall cease to exist may be valid, it is necessary, that the event to which it relates be one which could legally constitute the condition of the creation of an interest.

Such condition must not be invalid.

This section may be compared with sec. 135 of the Indian Succession Act, 1925. For invalid conditions see sec. 25.

33. Where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is

Transfer conditional on performance of act, no time being specified for performance.

broken when he renders impossible, permanently or for an indefinite period, the performance of the act.

This section may be compared with sec. 136 of the Indian Succession Act, 1925, from which the following illustrations may be cited :—

*“Illustration (i) :—*A bequest is made to A with a proviso that unless he enters the army, the legacy shall go over to B. A takes holy orders and thereby renders it impossible that he should fulfil the condition. B is entitled to receive the legacy.”

*“Illustration (ii) :—*A bequest is made to A, with a proviso that it shall cease to have any effect if he does not marry B's daughter. A marries a stranger, and thereby indefinitely postpones the fulfilment of the condition. The bequest ceases to have effect”.

Also compare sec. 34 of the Contract Act.

34. Where an act is to be performed by a person either

Transfer conditional on performance of act, time being specified.

as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled.

This section may be compared with sec. 137 of the Indian Succession Act, with the exception that while the present section speaks of the fraud of a person “who would be directly benefited by the fulfilment of the condition” there are no corresponding words in the Succession Act.

This section may also be compared with sec. 18, Limitation Act.

144. Principle :—This section is based on the broad principle that no man is allowed to take advantage of his own wrong, and that relief is given to the party to whose interest it is that the condition should be fulfilled. See *Edwards v. Aberayron Mutual Insurance Society*, 1 Q.B.D. 563. Where the performance of a condition is rendered impossible by the fraud of a person, equity considers that as done which would have been done, and the person guilty of fraud is precluded from taking advantage of it—*Rooper v. Lane*, 6 H.L.C. 443. This rule is based on the principle of estoppel. The principle laid down in this section has, however, no application where the transaction is still incomplete, for it presupposes an actual transfer for consideration—*Jamsetji v. Kashinath*, 26 Bom. 326.

Where a testator by his will directed that if any of the female members of his family either from misunderstanding or any other cause, should live in any other than a holy place for more than three months except for pilgrimage, they should forfeit their rights under the will. A minor widowed daughter-in-law of the testator was removed from the house by her maternal relations and brother with the aid of the police and she resided for more than three months with her mother; *held* that as the girl was not a free agent, her absence did not work a forfeiture. Mere minority was, however, no excuse—*Tin Cowrie v. Krishna Bhabini*, 20 Cal. 15.

Fraud :—For definition of fraud, see sec. 17, Contract Act. Fraud, like any other charge of a criminal offence, whether made in civil or criminal proceedings, must be established beyond reasonable doubt. A finding as to fraud cannot be based on suspicion and conjecture—*Narayanan v. Official Assignee*, A.I.R. 1941 P.C. 93, 196 I.C. 404 (P.C.).

Election.

35. Where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of,

subject nevertheless,

Where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration,

to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

Illustrations.

The farm of Sultanpur is the property of C and worth Rs. 800. A by an instrument of gift professes to transfer it to B, giving by the same instrument Rs. 1,000 to C. C elects to retain the farm. He forfeits the gift of Rs. 1,000

In the same case, A dies before the election. His representative must out of the Rs. 1,000 pay Rs. 800 to B.

The rule in the first paragraph of the section applies whether the transferor does or does not believe that which he professes to transfer to be his own.

A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

A person who in his one capacity takes a benefit under the transaction may in another dissent therefrom.

Exception to the last preceding four rules.—Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claim the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances.

Such knowledge or waiver shall, in absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.

Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

Illustration.

A transfers to B an estate to which C is entitled, and as part of the same transaction gives C a coal-mine. C takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to B.

If he does not within one year after the date of the transfer signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election; and, if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer.

In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

This section may be compared with secs. 180-182 and 184-190 of the Indian Succession Act, 1925.

145. Doctrine of Election :—The principle of election is this : He who accepts a benefit under a deed or will, must adopt the whole contents of the instrument conforming to all its provisions and renouncing every right inconsistent with them—*Streatfield v. Streatfield*, 1 W. & T.L.C. 397; *Williams on Executors*, 11th Ed., Vol. 2, page 1182. If a testator gives property, by design or by mistake, which is not in his power to give, and gives at the same time to the real owner of it other property, such real owner cannot take both—*Per James, V.C.*, in *Wollaston v. King*, 8 Eq. 165 (at p. 178).

The foundation of the doctrine of election is that the person taking a benefit under an instrument must also bear the burden—*Codrington v. Lindsey*, L.R. 8 Ch. 598; *Pickersgill v. Rodger*, 5 Ch. D. 163. A person cannot take *under* and *against* one and the same instrument—*Dillon v. Parker*, 1 Swan. 359. A legatee cannot take a legacy without submitting to the onerous condition of the will. Thus, if his property (a house) has been wrongly devised to another and the testator has made a devise of a sum of money in his favour, then if he wishes to receive the legacy, he must acquiesce in the devise of his house to another. If, however, he chooses to retain the house, he is not entitled to the legacy under the will—*Venkataramayya v. Patchamma*, 78 I.C. 274, A.I.R. 1925 Mad. 164 (166).

This section confines the doctrine of election to a case where a person professes to transfer property which he has no right to transfer and as part of the same transaction confers any benefit on the owner of the property. In England, no case of election arises if the property which the testator professes to dispose of does not belong to the legatee. The word "owner" is used in a very wide sense and includes persons who have vested or contingent rights and reversioners, and remote as well as immediate interest; but a chance of being elected is not an interest in property—*Mohammad Ali v. Nisar Ali*, A.I.R. 1928 Oudh 67 (82), 109 I.C. 835.

145A. Rule of election :—It is an essential condition for the application of the doctrine, that the person sought to be estopped or his predecessor-in-interest must have obtained possession of the property under the deed. It is also plain that the party estopped did not have or did not profess to have any title to the property other than the title derived from the deed—*Venkatarayadu v. Narayana*, (1941) 1 M.L.J. 349, 1941 M.W.N. 208, A.I.R. 1941 Mad. 430 (431).

146. Application of rule :—The doctrine of election is a rule of practice in equity—*Spread v. Morgan*, 11 H.L.C. 588; and being founded on the highest principle of equity, it applies equally to Hindus and to persons governed by other personal laws. The principle is not peculiar to English law alone but is common to all law and based on the rules of justice, and has therefore been often applied by their Lordships of the Privy Council to the consideration of Indian cases—*Forbes v. Ameeroonissa*, 10 M.I.A. 340; *Shah Makhan Lal v. Baboo Kishen Singh*, 12 M.I.A. 186; see also *Mangaldas v. Ranchoddas*, 14 Bom. 438; *Bai Mamubai v. Dossa Morrarji*, 15 Bom. 443; *Tribhuvandas v. Smith*, 20 Bom. 316; and *Rajamannar v. Venkata*, 25 Mad. 361 in which the doctrine has been held applicable to Hindus.

Thus, D, a Hindu widow died making a will in respect of property which she had inherited from her husband; she bequeathed Rs. 2,000 as a legacy to the plaintiff and the immoveable property to K. Both the plaintiff and K were the heirs of her husband. The plaintiff sued for the legacy under the will *as well as* for half the immoveable property as heir. *Held* that the plaintiff must be put to his election *either* to take the legacy under the will *or* half the property as heir—*Mangaldas v. Ranchoddas*, 14 Bom. 438.

In the case of a surrender by a Hindu widow to her immediate reversioners, there is however no scope for application of the doctrine of election or estoppel; for it does not amount to a conveyance by her of property to the surrenderees. The fiction of civil death is assumed when such a surrender takes place and when the reversioners come in, they come in their own right as heirs of the last owner and not as transferees from the widow. The principle is not displaced by a reasonable provision being made out of the estate for the maintenance of the widow—*Venkatarayaudu v. Narayana*, *supra*.

No question of election arises when one of the courses open to the person is not a legal or lawful one. If the result of electing one of the remedies is to put a person to the necessity of choosing a course which is opposed to law, this doctrine should not be invoked. It cannot be resorted to in order to cure an illegality—*Sulaiman v. Kader*, A.I.R. 1953 Mad. 161, (1952) 2 M.L.J. 104.

The doctrine of election applies to all kinds of property and persons. There is no distinction for the purposes of election, between personal estate and real estate, between specific and residuary legatees, or between legatees and the next-of-kin of an estate—*per Jones, L.J.*, in *Cooper v. Cooper*, L.R. 6 Ch. 15.

It is applicable to moveable and immoveable properties alike—*Cooper v. Cooper*, L.R. 6 Ch. 15 (19).

The doctrine is applicable as well to vested as to contingent interests, to reversionary and remote as well as to the immediate interests—*Wilson v. Lord Townshend*, 2 Ves. J. 693 (697). The fact that the alienation as such is void is no bar to the applicability of the doctrine of election—*K. Shanmugham Pillai v. S. Shanmugham Pillai*, A.I.R. 1968 Mad. 207.

Where the party disputing the validity of a bequest does not claim as his own any property that the testator has disposed of, no question of election arises—*Kamal Kumari v. Narendra Nath*, 9 C.L.J. 19. See also *Md. Afzal v. Ghulam Kasim*, 30 Cal. 843 (P.C.). Where it was impossible for some of the testator's children to render a property subject to the trust created by the testator's will, they were not put to their election between that property and the benefits conferred upon them by the will—*Brown v. Gregson*, (1920) A.C. 860. See also *Parker v. Sowerby*, 4 DeG M & G. 321.

D, a Hindu widow, died making a will in respect of property which she had inherited from her husband. She bequeathed Rs. 2,000

as a legacy to the plaintiff and the immoveable property to K, the defendant's father. The plaintiff and K were the heirs of her husband. The plaintiff sued for the legacy under the will and for half the immoveable property as heir : *held*, that the plaintiff should be put to his election whether to take the legacy under the will, or half the property as heir of the testator's husband—*Mangaldas v. Ranchhoddas*, 14 Bom. 438. See also *Atchama v. Ramandha*, 4 M.I.A. 1 (103) and *Wollaston v. King*, L.R. 8 Eq. 165. For a case of election made by the Court for a child, see *Blunt v. Lack*, 26 L.J. Ch. 148.

Compensation :—A testator by his will gave a sum of colonial stock to M and all his shares in a company A to several persons in varying proportions. The gift to M failed, *held*, that the legatees of the shares of company A could not take the benefit of their legacies without compensating M in respect of her legacy of the stock, and that such compensation was a charge on their legacies in an amount equal to the value of the stock at the death of the testator—*Macfarlane v. Macartney*, (1918) 1 Ch. 300. But see *Cavendish v. Dacre*, 31 Ch. D. 466, where under the circumstances of the case it was held that the legatee was not bound to make any compensation.

147. Donor's intention to give property not his own :—In order to raise a case of election it is necessary that the intention of the testator to dispose of the property which is not his own should be clear—*Rancliffe v. Parkins*, 6 Dow. 179. The doctrine of election does not apply where the testator has some present interest in the estate disposed of by him, though it is not entirely his own. In such a case, unless there is an intention clearly manifested in the will or a necessary implication on his part to dispose of the whole of the estate including the interest of third persons, he will be presumed to dispose of that which he might lawfully dispose of and no more—*Grissell v. Swinhoe*, L.R. 7 Eq. 291; *Wilkinson v. Dent*, 6 Ch. 339.

The intention must appear on the face of the will itself, for parol evidence will not be admissible for the purpose of showing it—*Stratton v. Best*, 1 Ves. 185; *Doe v. Chichester*, 4 Dow. 65; *Clementson v. Gandy*, 1 Keen. 309.

148. "Same transaction" :—No case for election arises where the two gifts are not made in the *same* transaction. Thus, a Hindu widow made a gift in excess of her powers and subsequently left a will in the following terms : "Excluding the properties which I have already given away, I will make the following disposition". *Held* that the plaintiff taking under the will of the widow is not precluded from disputing the prior gift. A person accepting a benefit under a will is not precluded by the doctrine of election from disputing some *separate* transaction in which the testator was engaged long before his death and which is not the subject of the will at all—*Ramayyar v. Mahalakshmi*, 42 M.L.J. 583, A.I.R. 1922 Mad. 357 (358), 64 I.C. 481.

149. Different nature of the two properties is no bar to election :—A, who was managing the properties inherited by the daughter of his deceased brother, died leaving a will whereby he bequeathed a portion of these properties to B, and a sum of Rs. 800 to his niece. In a

suit brought by the niece to recover the properties inherited by her and bequeathed to B, and also the legacy of Rs. 800, held that the doctrine of election applied, notwithstanding that the niece would get an absolute right in the sum bequeathed to her, while B would take only her life interest in the properties bequeathed to him—*Ammalu v. Ponnammal*, 36 M.L.J. 507, 49 I.C. 527. Where there were two nuptial settlements of even date, one of realty and the other of personality, they were one settlement for the purpose of election by a person whose property was affected by one and who claimed a benefit under the other; the circumstance that the property so affected was a remainder in tail which the settlor might have barred, was unsuccessfully relied upon in favour of a contrary view—*Bacon v. Cosby*, 4 DeG. & S. 261.

150. The benefit shall revert to the transferor :—If the transferee does not take according to the instrument, he must relinquish the benefit conferred upon him, and the benefit so relinquished shall revert to the transferor on the principle that it is impossible to ascertain what the testator would have done, if he were aware of the defect in his instrument. And the Court cannot speculate what would have been the transferor's intention under the circumstances—*Whistler v. Webster*, 2 Ves. 370; *In re Brookshank*, 34 Ch. D. 163. But the disappointed donee is entitled to take out of the benefit the value of the property attempted to be transferred to him.

There is a distinction between the English and the Indian Law as to the disposal of the balance after satisfying the disappointed donee. Under the English Law the balance goes to the refractory donee; whereas under the Indian law the balance goes to the transferor or his representatives. Thus, in the first illustration to this section, if C elects to retain the farm of Sultanpur, he forfeits the gift of Rs. 1,000, but B is entitled to get Rs. 800, the value of the property attempted to be transferred to him. The remaining Rs. 200 will go, according to Indian Law, to A or his representatives; but according to English Law, it will go to C. See *Dillon v. Parker*, 1 Swan. 394. Under the English Law, the refractory donee by electing against the instrument does not incur a *forfeiture* of the whole benefit conferred on him, but is merely bound to make *compensation* out of it to the disappointed transferee, and after making compensation, *takes the balance himself*. In other words, *compensation* and not *forfeiture* is the principle on which the doctrine of election proceeds, under the English law. Williams on *Executors*, (11th Edn.), Vol. II, pp. 1188, 1189.

Another point of difference between the English and the Indian Law is that when the donee does not take according to the instrument and relinquishes the benefit, the benefit under the Indian Law reverts to the transferor or his representatives, and the compensation to be paid to the disappointed transferee is a charge upon the transferor or his representatives; but under the English Law, the benefit relinquished by the donee does not revert to the transferor but remains in the hands of the donee, subject to the giving of a compensation to the disappointed transferee; in other words, the compensation to be given to the disappointed transferee is a charge upon the refractory donee. See *Pickersgill v. Rodgers*, 5 Ch. D. 163.

151. Clause (2) :—“Whether the transferor does or does not believe” :—The transferor’s belief is immaterial. It is not necessary to prove that the transferor was aware that the subject of disposition was not his own—*Coutts v. Acworth*, 9 Eq. 519. The obligation of making an election will be equally imposed on the transferee, although the transferor proceeded on an erroneous supposition that both the subjects of transfer were absolutely at his own disposal. Williams on *Executors*, Vol. II, p. 1182. The Court will not speculate on what the transferor would have done if he had known that the property was not his—*Whistler v. Webster*, 2 Ves. 367.

Clause (3) :—Person taking benefit indirectly need not elect :—No case of election arises when a benefit is given indirectly. For a devisee or donee who claims derivatively through another does not take under the deed, and is not bound by the equity attaching thereto. Thus, “the lands of Sultanpur are settled upon C for life, and after his death upon D, his only child. A bequeaths the lands of Sultanpur to B and Rs. 1,000 to C. C dies intestate shortly after the testator, and without having made any election. D takes out administration to C, and as administrator elects on behalf of C’s estate to take under the will. In that capacity he receives the legacy of Rs. 1,000 and accounts to B for the rents of the lands of Sultanpur which accrued after the death of the testator, and before the death of C. In his individual character he *retains the lands* of Sultanpur in opposition to the will”—Illustration to sec. 184, the Indian Succession Act, 1925.

152. Clause (4) :—Person acting in different capacities :—Compare sec. 185 of the Indian Succession Act :—“A person who in his individual capacity takes a benefit under the will, may in another character elect to take in opposition to the will.”

“Illustration.”—The estate of Sultanpur is settled upon A for life, and after his death upon B. A leaves the estate of Sultanpur to D, and Rs. 2,000 to B, and Rs. 1,000 to C, who is B’s only child. B dies intestate shortly after the testator without having made an election. C takes out administration to B and, as administrator elects to keep the estate of Sultanpur in opposition to the will, and to relinquish the legacy of Rs. 2,000. C may do this and yet claim his legacy of Rs. 1,000 under the will.”

Where a person takes a benefit in a capacity different from that in which he asserts his rights, no question of election can arise merely because owing to certain circumstances the two capacities have temporarily merged in him—*Deputy Commissioner v. Ram Sarup*, 20 O.C. 243, 42 I.C. 18.

A testator being entitled under a settlement, subject to a life-interest, to a moiety of a fund by will, after reciting erroneously that he was under the settlement “subject to the trusts therein contained” entitled to the whole, purported to bequeath the whole and to give one moiety to the husband of the lady who was really entitled under the settlement to a moiety of the fund : *held*, that the husband, who had become his wife’s administrator, was not bound to elect between the legacy and his wife’s moiety—*Grissell v. Swinhoe*, L.R. 7 Eq.

291. As to creditors not bound to elect, see *Kidney v. Cowsmaker*, 12 Ves. 136.

153. Exception :—Such benefit is expressed to be in lieu of that property :—Where a Hindu testator in bequeathing all his property, included therein the share of his brother's widow, but made a suitable provision for her maintenance, and the widow at first sued for and obtained the allowance for maintenance but subsequently sued for her share in her husband's property, *held* that the second suit would be precluded with regard to the doctrine of election, as the widow must have known that the maintenance was provided for in lieu of her husband's property—*Promoda Dasi v. Lakhi Narain*, 12 Cal. 60.

154. Clause (5) :—Acceptance of the benefit amounts to election :—Acceptance of the benefit by the donee amounts to election. But in order to presume an election from the acts or conduct of any person, he must be shown (i) to have been aware of his right to elect, (ii) to have intended to exercise such right, and (iii) to have had full knowledge of such matters as the value of the different properties and his own rights in respect of them, unless he has waived the inquiry which would have resulted in such knowledge. *Shepherd and Brown*, 7th Edn., p. 110; *Briscoe v. Briscoe*, 1 Jo. & Lat. 334; *Wilson v. Thornbury*, L.R. 10 Ch. 239. *Worthington v. Wiginton*, 20 Beav. 67; *Dillon v. Parker*, 1 Swanst. 359. Hence it follows that if a person acts through ignorance or mistake, the doctrine gives way. Thus, a holder of a mere life-estate granted a perpetual lease (which he had no right to grant), and the reversioner (plaintiff) accepted rent from the lessee for three years after the lessor's death. *Held* under sec. 35 that the mere acceptance of rent by the plaintiff did not constitute an election by him to confirm the lease, when there was nothing to show that he was aware of the circumstances under which the lease was granted or of the terms on which it was held by the person paying the rent. There can be no election when the person receiving the rent is not aware of his duty to elect or of the fact that a perpetual lease had been granted by the intermediate holder, which it was in his power to repudiate or confirm. Under these circumstances, the acceptance of rent even for three years could not operate as an estoppel or waiver by the plaintiff of his right to avoid the lease—*Gopi Koeri v. Raj Roop*, 78 I.C. 191, A.I.R. 1925 All. 190 (192). But see *Madhu Sudan v. Rooke*, 25 Cal. 1 (P.C.) where a widow in possession of her widow's estate made a grant of *putni* tenure and in the suit brought by the reversioner on her death for setting aside the grant it was held by the Privy Council that the plaintiff had elected to treat the grant as valid as he had accepted rent.

Where under a will of her husband a *purdanashin* widow was to get certain benefits and the will also contained terms disadvantageous to her, and she took unconsciously the benefit granted to her by the will, it was held that she was not bound by the disadvantageous terms in the absence of evidence that the will had been explained to her—*Indubala v. Manmatha*, A.I.R. 1925 Cal. 724, 41 C.L.J. 258, 87 I.C.

178; *Triguna v. Radharani*, 37 C.L.J. 20; *Sopwith v. Maughan*, 30 Beav. 235.

An election made under a misconception of the extent of the claims on the fund elected, may be revoked—*Kidney v. Coussmaker*, 17 Ves. 136; *Worthington v. Wiginton*, (supra); *Tribhovandas v. Smith*, 20 Bom. 316.

155. Clause (6) :—Two years' enjoyment :—Acceptance of a benefit may be presumed from two years' enjoyment of the benefit. Thus, where a donee on her mother's death entered on the land and from that time continued in possession for two years, received the rents, made no application to the trustees to sell nor brought a bill against them to sell, though she had a right to apply to them to sell and as *cestui que trust* might have contracted for selling, held that such action raised a presumption of acceptance—*Crabtree v. Bramble*, 3 Atk. 680. But, if a person acts in *ignorance* of his right, no presumption will be made in favour of acceptance even though the possession be for 2 years or more. Thus, where a person on whom a benefit has been conferred had been in receipt of the same for 16 years, being ignorant of his right to elect, held that he was not estopped from acting the other way—*Sopwith v. Monghan*, 30 Beav. 235.

If one or both of the two properties are reversionary, the period of two years will not begin to run before both fall into possession, for until then they cannot be enjoyed—*Padbury v. Clark*, 2 Mac. & G. 298.

Clause (7) :—Election when parties cannot be placed the status quo :—Election will be presumed when the donee has acted in respect of the property gifted to him in such a manner as to make it impossible for him to return it to the true owner in the same position in which it has remained before. See the illustration. This is based on the principle of English law that a contract cannot be avoided where it has become impossible for the parties to be placed in the same position as if it never had been made—*Shephard and Brown*, 7th Edn., p. 110.

156. Clause (8) :—Time for election :—The Indian law specifies a time within which an election must be made. In England, no such time is fixed by law, but if a time is limited by the instrument itself, the donee must elect within that period, and if he fails to do so he will be deemed to have renounced the benefit under the instrument—*Dillon v. Parker*, 1 Swan. 385.

157. Clause (9) :—Disability :—The last para. of this section corresponds to section 190 of the Indian Succession Act, 1925.

In the case of a minor the period of election will be postponed during the minority, unless the minor is represented by a qualified guardian, in which case he can elect.

Where a minor member of the mortgagee family is not a party to the deed of mortgage creating a usufructuary mortgage but enjoys the mortgaged properties along with the adult members of the family for forty years, he must be deemed to have affirmed the mortgage and the mortgagor can redeem his, that is, the minor's share in the mortgage—*Beepathuma v. Velasari Shankaranarayana*, A.I.R. 1965 S.C. 241.

Apportionment.

36. In the absence of a contract or local usage to the contrary, all rents, annuities, pension, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.

Apportionment of periodical payments on determination of interest of person entitled.

This section may be compared with secs. 338-40 of the Indian Succession Act, 1925. The English law on the subject is embodied in the Apportionment Act of 1870 (33 & 34 Vict., c. 34).

158. Scope of section :—This section is applicable only as between the transferor and the transferee of the benefit of the payment, and not as between the person liable for and the person entitled to the payment—*Rangappaya v. Shiva*, A.I.R. 1933 Mad. 699 (700). Thus, this section has no application as between landlord and tenant—*Janki Bai v. Bayabai*, 16 C.P.L.R. 55. Therefore, if a landlord dispossesses his tenant in the middle of the year, he does not thereby in all cases forfeit his right to rents which have already accrued due. Whether he does or not must depend upon the circumstances, e.g., if it be an agricultural tenure, the question would be whether the raiyat has enjoyed all the year's profit or has been prevented from enjoying any by the landlord's act of interference—*Bunsee Dhur v. Bheem Lal*, 24 W.R. 219.

Again, the apportionment which this section contemplates is one following upon the transfer of the interest of the person entitled to receive the rent and not upon the transfer of the interest of the person bound to pay it—*Satyendra v. Nilkantha*, 21 Cal. 383 (386).

This section applies only in the absence of a contract to the contrary. Where the contract shows that the whole rent for the year accrues on a fixed date in the year, it cannot be said that the rent accrues from day to day; consequently, it is a contract to the contrary of what is enacted in this section which cannot apply to the case—*Subbaraju v. Seetharamaraju*, 39 Mad. 283 (287), 28 I.C. 232. But the Allahabad High Court holds that sec. 36 applies even though under a special custom the rents or profits become due on a particular day of the year and not from day to day, because section 36 speaks of a proportionate division of the profits, and does not affect the date when they become due from the tenants. That date remains as of before. Section 36 expressly lays down that on a transfer of an interest the rents, etc., shall as between the transferor and the transferee accrue from day to day and be apportionable accordingly but shall be payable on the days appointed for the payment thereof—*Lala Ganga Ram v. Mewa Ram Singh*, A.I.R. 1922 All. 275. "Suppose, a house fetching monthly rent is sold on 10th May. The seller would, in the absence of a contract to the contrary, be entitled to the rent of 9 days, and the vendee to the rent of 22 days. But the tenant holds

under a monthly contract, and he cannot be made to pay the rent of 9 days to the seller on the 10th of May. He will pay the rent as usual on the 1st of June. But he will pay in the proportion indicated"—Mukherji's *Law of Transfer of Property*, 2nd Edn., p. 48.

Moreover, this section is confined to transfers by act of parties, and does not apply to transfers by operation of law, e.g., execution sales—*Satyendra v. Nilkantha*, 21 Cal. 383 (386); *Subbaraju v. Seetharamaraju*, 39 Mad. 283 (286). This section does not even apply to transfers by operation of customary law. Thus, where according to custom the eldest son having succeeded to the Raj estate, the second son (plaintiff) became *hikim* entitled to certain customary property, and claimed refund of rent for 55 days up to the end of *fasli* year from the first defendant who as mortgagee in possession of certain *mouzas* held under the plaintiff's predecessor had personally collected from the tenants of the *mouzas* the entire rent for the *fasli* year, *held* that having regard to sec. 2 (which prohibits the Transfer of Property Act from applying to transfers by operation of law), this section did not apply to the case, and that the claim was not maintainable—*Mathewson v. Shyam Sundar*, 33 Cal. 786. But in Madras the principle of this section (though not the section itself) has been applied to a transfer by *execution sale*, on the ground of equity and good conscience—*Lakshminaranappa v. Melothraman*, 26 Mad. 540. In this case, certain lands had been leased out at yearly rent, payable in two half-yearly instalments, by the person having a life-interest therein. The interest of the lessor in the lands was sold in execution of a decree, and purchased by the plaintiff at Court sale. The lessor died on the 26th of the month at the end of which the first half-yearly rent was payable. The plaintiff now sued to recover as much of the rent as was due up to the date of the death of the lessor. *Held* that he was entitled to recover. In other Madras cases also it has been held that as this section embodies a rule of justice, equity and good conscience it should be applied in cases of apportionment of rent between the original lessor and the purchaser of his interest in execution at a Court sale—*Rangiyah Chetty v. Vajravelu*, 41 Mad. 370, 33 M.L.J. 618, 43 I.C. 78; *Sendatilaka v. Sangili*, A.I.R. 1937 Mad. 195. In an Allahabad case, the principle of this section has been applied to the case of a suit for profits brought by a co-sharer against the *lambardar*; and it has been held that the date fixed for the payment of the profits does not imply that the right to a share in the income does not vest till the arrival of the date, but the profits accrue from day to day and become vested in the co-sharers, although the time of payment is postponed for the sake of convenience till the date fixed—*Mohammad Abdul Jalil v. Mohammad Abdus Salam*, A.I.R. 1932 All. 178 (181). Recently, the Calcutta High Court has also held that having regard to sec. 2 (d) though this section in its terms does not apply to a case of apportionment of rents collected by the successor of an impartible estate as between him and the heir of the last holder, it should be applied in such a case as the section embodies a rule of equity. And the higher doctrine of equity which is the foundation of Lord Hardwick's dictum in *Paget v. Gee*, [(1873) Amb. 138], should be applied to a case not between persons standing in the relation of lessor and lessee or persons bound by covenants relating to payment

of rent at stated intervals. Section 2 (d) does not accept the application of this doctrine—*per* Mukherji and S. K. Ghose, JJ., in *Sivaprasad v. Prayagkumari*, A.I.R. 1935 Cal. 39 (58-59).

Though according to cl. (d) of s. 2 *ante* the Act does not apply to execution sales, yet the principle of sec. 36, which embodies a rule of justice, equity and good conscience, can be applied and rent can be apportioned from day to day as between the lessor and the purchaser of his right in execution in the course of a year of the lease—*David v. Rangaraju*, A.I.R. 1944 Mad. 568, (1944) 2 M.L.J. 51.

Apportionment :—The expression 'apportionment' is used in two senses—(1) to denote distribution of a common fund among the several claimants; and (2) to denote the contribution made by several persons having distinct rights to discharge a common burden—*Story's Equity Jurisprudence* (2nd Edn.), p. 305. It is in the first sense that the word is used in this section.

159. Rents :—Under this section, in the absence of a contract or local usage to the contrary, all rents shall, upon the transfer of the interest of the person entitled to collect them, be deemed as between the transferor and transferee to accrue due from day to day, and to be apportionable accordingly though they are payable on the days appointed for the payment thereof. Thus, where a transfer of property took place on the 24th Falgun 1322, the transferee would be entitled to the rents accruing *after*, and not *before*, that date, although the rents from Magh to 24th Falgun, being included in the *Chait Kist*, would be payable in *Chait*. The *Chait Kist* must be deemed to accrue from day to day and to be apportionable accordingly—*Aparna Devi v. Shiva Prasad*, 3 Pat. 367 (371). Similarly, where the plaintiff purchased the property on the 20th February 1919, and the question arose as to who should get the Rabi rent falling due on the 1st May, 1919, *held* that the rights of the transferor and the transferee should be determined on the basis of the total Rabi rent and the number of days in the Rabi season, the transferor being given credit for a proportion of the Rabi rent based on the number of days which fell within the period of his lawful possession, and the transferee being credited with a share of the Rabi rent based on the number of days between the date of his purchase and the date on which the Rabi rent fell due—*Nand Kishore v. Ram Sarup*, A.I.R. 1927 All. 569. The Rangoon High Court has expressed an opinion that agricultural rents are not apportionable, for they accrue once and for all at the time the crops are reaped and do not accrue from day to day, and hence there can be no question of apportionment—*Ma Hawa v. Sein Kho*, 5 Rang. 803, A.I.R. 1928 Rang. 67 (68), 109 I.C. 191. See also *Ram v. Harihar*, A.I.R. 1937 Pat. 237 (238, 239).

In a case where the petitioner purchased certain agricultural land by private sale, the land being under a lease with a yearly rent at the time of the sale, the year expiring a month after the sale, if a different intention is not expressed or necessarily implied, the transferor would be entitled to the rents and profits thereof accruing before the transfer as stated clearly in s. 55 (4) (a) and the transferee would be entitled

to the rents and profits accruing after the transfer as stated in secs. 8 and 55 (6) (a). Such rents and profits should be apportioned under sec. 36 which applies to agricultural rents. Even if it does not apply in terms, the rule will apply as a rule of justice, equity and good conscience. Hence petitioner in this case was only entitled to one month's rent which alone accrued after the transfer—*Poongavanom v. Subramanya*, A.I.R. 1951 Mad. 601.

The Receiver appointed in a mortgage suit leased the property and the lessee was in possession. The property was sold in execution of the decree on 18-12-1941. Under the terms of the lease granted by the Receiver rent was payable on 31-12-1941. The auction purchaser claimed a right to receive the entire rent as it was payable on a date subsequent to the purchase. The trial Court apportioned the rent as between the auction-purchaser and the Receiver representing the estate : *Held* that the trial Court was right—*David v. Rangaraju*, A.I.R. 1944 Mad. 568.

An assignee of a lease from a lessee can claim as against the lessor an apportionment of rent accruing due after the date of the assignment to him according to the period before and after the assignment, and the rent can be deemed accruing from day to day as between him and the lessor—*Kunhisou v. Mulloli*, 38 Mad. 86 (89).

Where an assignee from a tenant of his interest subsequently gets an assignment of the interest of the landlord, the assignor of the landlord's interest is entitled to the rents accrued up to the date of the assignment, from the assignee, on the principle of this section—*Bikram Kumar v. Mahit Krishna*, 64 I.C. 178 (Cal.).

An apportionment of rent due in respect of several villages should not be on the basis of the assets of the different villages at the time of the creation of the original tenure, but on the basis of the present assets of the different portions of the tenure which by division have passed into different hands—*Hari Kishan v. Tilukdhari*, 7 C.W.N. 453 (454).

The provisions as to apportionment do not apply to disputes as to rent of land between an auction-purchaser and the original landlord by reason of the saving clause (d) of sec. 2—*U Kyau v. Ah Doe*, A.I.R. 1924 Rang. 365.

One of the joint landlords cannot, as a matter of right, claim from the tenants what he estimated to be his proportionate share of the rent, before the rent was actually apportioned—*Satyesh v. Jillar Rahaman*, 27 C.L.J. 438 ; *Reshwa Prasad v. Mathura Kuar*, A.I.R. 1922 Pat. 608. This section has no application to cases of partition—*Mammad Kunhi v. Ibrayani Haji*, A.I.R. 1959 Ker. 208.

159A. Royalty :—Where a contract states that royalty at a known rate is to be payable on coal, in the absence of any direction as to when it is payable, the Court is bound to hold that it becomes payable within a reasonable time of its extraction—*Byomkesh v. Madhabji*, A.I.R. 1940 Pat. 609, 21 P.L.T. 442, 188 I.C. 411. Royalty cannot be regarded as due at the end of some given period, as it is difficult to treat royalty

on the same footing as rent, because the amount cannot possibly be ascertained until the raisings of coal have been weighed and checked etc. Three months have been held to be a reasonable time—*Ibid.*

160. Dividends :—According to the definition given in the English Apportionment Act, 1870 (33 & 34 Vict., c. 35), the word 'dividend' includes all payments made by the name of dividend, bonus, or otherwise, out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed time or otherwise; but this does not include payment in the nature of a return or reimbursement of capital. Such payments would be excluded by this section also, because they are not "periodical payments in the nature of income." The moneys distributed as interim dividend have been held to be not apportionable under the Act—*Jowitt v. Keeling*, (1922) 2 Ch. 442.

A share of profits is properly called a dividend when declared in respect of shares taken in a trading concern—*In re Cox's Trusts*, 9 Ch. D. 159 (163).

The term 'dividend' includes occasional bonuses or surplus profits of shareholders—*Carr v. Griffith*, 12 Ch. D. 655. Dividends out of profits from time to time declared by a commercial company are apportionable—*Hartley v. Allen*, 27 L.J. Ch. 621.

161. Other periodical payments :—The expression "other periodical payments" can only refer to payments *eiusdem generis* with rents, annuities, pensions and dividends—*Gobind Rao v. Bhagirathi*, 14 C.P.L.R. 84. They must be payments which are made periodically, recurring at fixed times not at variable periods, nor in the exercise of the discretion of one or more individuals, but from some antecedent obligation; and further, they must be *in the nature of income*, that is, coming in from some kind of investment—*Jones v. Ogle*, L.R. 8 Ch. 192, 198. It has been held that the profits of a private partnership regulated by a deed under which the accounts are made up in January of each year and the profits are divisible among the partners by four instalments, are not periodical payments in the nature of an income, but are in reality payments of a different nature, in as much as those profits only accrue after the adjustment of the account, and cannot be presumed to be made *from day to day*—*Jones v. Ogle*, 42 L.J. Ch. 334.

The profits derived from a share in a village are not apportionable in the manner indicated by this section. There is one very obvious reason why such profits cannot be apportioned. The accounts for the year might show a deficit to which each co-sharer would be liable to contribute, and as no portion of the loss could be recovered from a co-sharer who had assigned his share before the end of the agricultural year, the result of applying the rule of apportionment directly would contravene the maxim that he who derives the advantage ought also to sustain the burden—*Gobind Rao v. Bhagirathi*, 14 C.P.L.R. 84 (86).

The profits of a newspaper bequeathed to trustees upon trust are

neither "rents, annuities, dividends or other periodical payments within the meaning of the English Apportionment Act, 1870—*In re Cox's Trusts*," 9 Ch. D. 159. Under a deed of settlement executed in 1913 the question arose whether income derived from rents and shares was apportionable *de die in diem*, (1) between the estate of the deceased settlor (who had retained a life-interest) and persons beneficially entitled for a period of thirteen months after his death and (2) between those persons and persons beneficially entitled after that period: *held* that the income was not so apportionable since an intention to that effect was not expressed clearly and unambiguously in the deed—*Pherozshaw v. Bai Goolbai*, 50 I.A. 276.

Wherever there are periodical payments accruing when the event calling for apportionment occurs, the Act is at once brought into operation and must be applied and when, subsequently, the accruing payments become due and payable, they must be distributed in accordance with the Act—*Muirhead v. Hill*, (1916) 2 Ch. 181.

162. Accrue from day to day :—The general principle of apportionment which is one of equity is that all rents, annuity, dividends and other periodical payments in the nature of income shall be deemed to accrue from day to day—*Md. Askkar v. Md. Abdul*, A.I.R. 1927 Oudh 605, 101 I.C. 91. In Bengal rent is not ordinarily regarded as accruing from day to day but as falling due at stated periods according to the contract of the tenancy, or, in the absence of such contract, according to the general law as laid down in sec. 53 of the Bengal Tenancy Act—*Satyendra Nath v. Nilkantha*, 21 Cal. 383 (385); *Satya Bhupal v. Rajnandini*, A.I.R. 1924 Cal. 1069.

In Madras, it has been held that rent should be deemed to accrue from day to day. "In England the law of apportionment has been regulated by statutes, and all rents, like interest on money lent, are considered as accruing from day to day and apportionable in respect of time accordingly. In India, there is no reason for not applying to rent the principle adopted in England in the case of interest"—*Kunhisou v. Mulloli*, 38 Mad. 86 (91).

In its origin the right of a widow for maintenance is one which accrues from day to day during her life-time—*Rangiappa v. Shiva*, A.I.R. 1933 Mad. 699.

37. When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty shall be performed

Apportionment of benefit of obligation on severance.

med for the benefit of such one of the several owners as they shall jointly designate for that purpose :

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section, unless and until he has reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes unless and until the "State Government" by notification in the Official Gazette so directs.

Illustrations.

(a) A sells to B, C and D a house situate in a village and leased to E at an annual rent of Rs. 30 and delivery of one of fat sheep, B having provided half the purchase money and C and D one quarter each. E, having notice of this, must pay Rs. 15 to B, Rs. 7½ to C, and Rs. 7½ to D, and must deliver the sheep according to the joint direction of B, C and D.

(b) In the same case, each house in the village being bound to provide ten day's labour each year on a dyke to prevent inundation, E had agreed as a term of his lease to perform this work for A ; B, C and D severally require E to perform the ten day's work due on account of the house of each. E is not bound to do more than ten days' work in all, according to such direction as B, C and D may join in giving.

Compare section 30 of the Easements Act (V of 1882).

Amendment :— The words "Provincial Government" in the last para. of this section was substituted for the words "Local Government" by the Government of India (Adaptation of Indian Laws) Order, 1937. Then they were replaced by "State Government" by A.L.O. 1950.

164. Rent :—Where in consideration of a patni tenure granted by the landlords, the patnidar has undertaken to pay year by year into the Collectorate a certain sum to be credited to the Government revenue payable by the landlords, the yearly sum is one payable in consideration of the patnidar's use and occupation of the land, and though payable into the hands of the Collector, is agreed to be paid on account and to the credit of the landlords ; and therefore it is *rent* paid to the landlords, and it can be apportioned as between the several landlords—*Gour Gopal v. Gosta Behari*, 21 C.W.N. 214 (216). 34 I.C. 409.

When the plaintiffs, joint landlords, have in suits separately instituted asked for apportionment of rent and for recovery of rents due on such apportionment and all the parties interested have been made parties, the rent can be apportioned and the apportionment may take place in respect of arrears alleged to be due as well as future rents—*Rajnarain v. Ekadasi*, 27 Cal. 479. Upon the death of the obligee of a money bond each of his heirs cannot maintain a separate suit for recovery of his share of the money due under the bond—*Kandhiya v. Chandar*, 7 All. 313 (F.B.).

Where as a result of the partition of a village with two mahals the

occupancy holding of a tenant fell into one mahal owned by one co-sharer, whilst a house as appurtenant to the occupancy holding fell into the other mahal owned by the other co-sharer, the partition effected no change in the position of the tenant. So long as he continued in possession of the occupancy holding he could not be ejected from his house nor could he be required to pay rent therefor—*Saddu v. Behari*, 30 All. 282.

165. Notice :—The proviso lays down that the person on whom the burden of obligation lies is saved from liability until he had reasonable notice of the severance. Compare sec. 50 as well as sec. 109 which applies the principle embodied in secs. 37 and 50 to leases. The notice here mentioned may be given either by the assignor or by the assignee, and not necessarily by the assignor. It is immaterial whether the notice of the assignment was received by the tenant from the assignor or from the assignee. When a tenant pleads payment to the assignor, the Court has to consider upon all the circumstances of the case, whether the payment alleged to have been made by him was *bona fide*. If he has made the payment with notice, actual or constructive, of the assignment, he cannot escape liability merely by proof that the notice received was from the assignee and not from the assignor—*Peary Lal v. Madhoji*, 17 C.L.J. 372, 19 I.C. 865 (868). The tenant cannot successfully plead that he has paid the rent *bona fide* to the assignor, if he has received notice of the assignment from the assignee; see *Pope v. Biggs*, (1829) 9 B. & C. 245, 32 R.R. 665; *Rogers v. Humphreys*, (1835) 4 A. & B. 299, 43 R.R. 340.

166. Where section does not apply :—This section does not apply where the indivisible character of the property is kept up on a transfer (by inheritance). Thus, on the death of a creditor, his numerous heirs are only *jointly* entitled to enforce the right which the deceased creditor, if alive, could singly enforce, and no question of apportionment can arise—*Ahinsa Bibi v. Abdul Khader*, 25 Mad. 26 (33). The English Law in this respect is the same. "The authorities all agree that whatever be the number of parceners, they all constitute one heir. They are connected together by unity of interest and unity of title; and one of them cannot distrain without joining the others in the avowry. If they cannot distrain separately, how can they separately claim a portion of the rent? In as much as there has been no division of those rents, nor any agreement by the defendant to hold one-third of them separately for the plaintiff, he has no right separately to sue the defendant"—*per Tindal, C.J.*, in *Decharms v. Horwood*, 10 Bing. 526, cited in 25 Mad. 26 (34). It has been held by the Andhra High Court in *Damodram Chetti v. Rukmaniamma*, (1967) 2 An. W.R. 200 that under the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960 one of two joint landlords can file a petition for eviction impleading the unwilling landlord as a respondent. This decision is opposed to the principle that there cannot be eviction from a part of the tenancy.

167. Agricultural leases :—Agricultural leases have been exempted from the operation of this section for it would otherwise cause great hardship to agriculturists.

The Madras High Court has held that though secs. 37 and 109 may not directly apply to agricultural leases in the Madras Presidency, the principles embodied in these sections ought to be followed by Indian Courts, and that under the principles of law embodied in those sections, the tenant is bound to pay to each of the owners his proportionate share of the rent, where in consequence of a transfer the property is held in separate shares—*Sri Raja Simhadri Appa Rao v. P. Ramayya*, 29 Mad. 29 (36). See also *Badri Prasad v. Shyam Lal Jaiswal*, A.I.R. 1963 Pat. 85.

(B).—*Transfer of Immoveable Property.*

38. Where any person, authorised only under circumstances in their nature variable to dispose of immoveable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

Transfer by person authorized only under certain circumstances to transfer.

Illustration.

A, a Hindu widow, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to B. B satisfies himself by reasonable enquiry that the income of the property is insufficient for A's maintenance and that the sale of the field is necessary, and, acting in good faith, buys the field from A. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

168. Application of section :—This section embodies the principle deducible from the cases decided with reference to Hindu Law, especially the case of *Hunooman Persaud Pandey v. Babooee Munraj Konweree*, 6 M.I.A. 393; and the rule enacted in this section has long been recognised in this country. This section is intended to apply to Hindus, as the illustration shows—*Dalibai v. Gopibai*, 26 Bom. 433; *Shri Beharilalji v. Bai Rajbai*, 23 Bom. 342; *Ramanadhan v. Rangammal*, 12 Mad. 260 (F.B.); *Soorja Koer v. Nath Baksh*, 11 Cal. 102; *Ram Kumwar v. Ram Dai*, 22 All. 326.

This section presupposes an *actual* transfer for consideration and has no application where the transaction is still incomplete—*Jamsetji v. Kasinath*, 26 Bom. 326; *Jugmohan v. Pallonjee*, 22 Bom. 1 (10).

It is only in the case of *immoveable* property and in the case of person having only a *restricted right* to transfer such immoveable property that any considerations as to reasonable inquiries, etc., on the part of the purchaser are at all relevant and material under this section. In the case of moveable property, provided the vendor has got the power to give a good title and the vendee pays consideration, the vendor

has absolute power to give such title to the purchaser. The fact that the vendor professes to exercise that right and power reciting false state of facts, cannot affect the vendee—*Subramania v. Krishna*, 39 M.L.J. 590, 60 I.C. 77 (80).

169. “Persons authorised under circumstances variable”:—The expression “circumstances variable” includes such circumstances as constitute legal necessity, and which vary according to the status of the person and other surrounding circumstances. The persons meant by the expression are persons having a limited power to transfer; thus, the *Karta* or manager of a Hindu joint family [*Niamat v. Din Dayal*, A.I.R. 1927 P.C. 121], the father of a Mitakshara son [*Giridhari Lal v. Kantoo Lal*, 1 I.A. 321; *Shahu Ram Chandra v. Bhup Singh*, 39 All. 437 (P.C.); *Saheb Singh v. Giridhari Lal*, A.I.R. 1924 All. 24], the Shebait of a Hindu idol or *mutt* [*Niladri v. Chatturbhuj*, A.I.R. 1926 P.C. 112], a woman holding a Hindu widow’s estate [*Banga Chandra v. Jugal Kishore*, 44 Cal. 186 (P.C.); *Janhabi v. Bulbhadra*, 15 C.W.N. 793; *Uday v. Ashutosh*, 21 Cal. 190, *Ravaneshwar v. Chandi*, 38 Cal. 721 affirmed in 43 Cal. 417 (P.C.); *Brij Lal v. Indra Kunwar*, 37 All. 187 (P.C.); *Bhagwat v. Debi Dayal*, 35 Cal. 420 (P.C.)], or other limited owner [*Venkata v. Kanienayani*, 35 Mad. 108], mother and other natural or *de facto* guardian [*Hunooman Persad v. Mt. Babooi Munraj Koonwaree*, 6 M.I.A. 393; *Balappa v. Chanbasappa*, 17 Bom. L.R. 1134; *Dalibai v. Gopibai*, 26 Bom. 433] are “persons authorized to dispose of immoveable property only under circumstances in their nature variable”. The first marriage of a member of a Hindu joint family is a lawful family necessity and sometimes a second marriage also may be such for which alienation of family property will be justified—*Bhagirathi v. Jokhu Ram*, 32 All. 575; *Sundrabai v. Shivnarayan*, 32 Bom. 81; *Debi v. Nand*, 1 Pat. 266.

The law in this respect has been laid down by the Privy Council in the following words : “The power of the Manager for an infant heir to charge an estate not his own is, under the Hindu law, a limited and a qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong, to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause Their Lordships think that the lender is bound to inquire into the necessities for the loan and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the

application of the money..... Their Lordships do not think that a *bona fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived"—*Hunooman Persad v. Mt. Babooi Munraj Koonwaree*, 6 M.I.A. 393 at pp. 423-24. See also *Uday v. Ashutosh*, 21 Cal. 190.

The validity of the alienation by a guardian of a minor should be judged on the circumstances obtaining on the date of the transaction and not on events which subsequently happened, such as steep rise in prices consequent on world war which could not have been even thought of at the time of the transaction. In dealing with the property of a ward, considerable latitude should be allowed for the exercise of the guardian's discretion, though if the act was of a speculative character, it cannot be supported by the Court—*Nagammal v. Varada*, A.I.R. 1950 Mad. 606, (1950) 1 M.L.J. 505. It is also not necessary to prove that the creditors were actually making demands, before it could be found that there was a pressure on the estate. So where, at the time of the alienation, debts existed that were binding on the minor which could not be discharged from the surplus income of the property, the alienation was binding on the minor, *ibid*.

170. Inquiry into circumstances necessitating transfer :—When a transferee takes a transfer from a person who is entitled to transfer property only under "circumstances in their nature variable," that is, whose power of transfer is limited and qualified, it is the duty of the transferee to ascertain by inquiry whether the circumstances necessitating the transfer do exist. Thus, where a creditor is endeavouring to establish a claim under a hypothecation bond given by a Hindu father having a limited interest, against his son, the Courts will require proof on the part of the creditor, that before he entered into the transaction he at least made reasonable inquiries as would satisfy a prudent lender that the money was required to pay off an antecedent debt, or for the legal necessity of the family—*Maharaj Singh v. Balwant Singh*, 28 All. 508. Where a person claims title under a conveyance from a Hindu woman who is a limited owner, and seeks to enforce his right against the reversioner, he must prove that the conveyance was genuine, that the lady had full knowledge, and that the alienation was for necessity or that he was satisfied of the necessity upon reasonable inquiry—*Bhagwat v. Debi Dayal*, 35 Cal. 420 (P.C.).

Where a guardian (in this case a Hindu mother) transfers immovable property of the minor, what has to be shown is not merely that a large portion of the consideration money was utilized for proper purposes, but also that the alienation was itself justified. The burden to show the danger to be averted or the pressure of circumstances was such as to leave no other alternative but to effect a sale is on the alienee—*Tulsiram v. Narayan*, A.I.R. 1950 Nag. 69. The contention that the sale of a minor's property, effected by his natural guardian, being only voidable, cannot be allowed to be avoided by him except in a suit instituted for that purpose, is not maintainable. A minor can raise the plea in defence that such a transfer is void and not binding on him, *ibid*.

Inquiry should be made from the creditors mentioned in the sale-deed; an inquiry merely from the widow herself is not sufficient—*Janhabai v. Bulbhadra*, 15 C.W.N. 793. This section is deemed to enact a rule as to reasonable inquiry in respect of what is required by the Privy Council in *Hunooman Persad's case*, supra; *Venkata v. Kanienayani*, 35 Mad. 108.

Onus and proof :—The burden of proof in such cases is on the purchaser—*Bhagwat v. Debi Dayal*, supra; *Banga Chandra v. Jagat Kishore*, 44 Cal. 186 (P.C.); *Chandra Deo v. Mata Prasad*, 31 All. 176 (F.B.); *Balappa v. Chanbasappa*, 17 Bom. L.R. 1134; *Brij Lal v. Inda*, 36 All. 187 (P.C.). Lapse of time does not affect the question of onus regarding legal necessity, except in so far as it might give rise to a presumption of acquiescence or save the alienee from adverse inferences arising from the scanty proof which might be offered. In order to justify legal necessity it must be shown that the expenses could not have been met from the income of the property in the widow's hands and that they were reasonable—*Ravaneshwar v. Chandi*, 38 Cal. 721, affirmed in 43 Cal. 417 (P.C.). Representations by the borrower are evidence of the existence of such necessity but are not generally in themselves sufficient to discharge the burden which rests upon the creditor of showing a reasonable inquiry as to the binding nature of the purpose for which the loan was contracted. In particular circumstances, however, they may suffice to shift the burden of proof to the person impeaching the debt or alienation—*Venkata v. Kanienayani*, supra. Sometimes consent of the next reversioners may afford a presumptive proof which, if not rebutted, will validate the transaction—*Rangasami v. Nadrippa*, 42 Mad. 523 (P.C.).

Not only should the consideration for a transfer of a minor's property by his guardian be a necessary one, but also that there should be a necessity for the transfer itself. The burden in all such cases is on the transferee to justify the transfer—*Amroo v. Babarao*, A.I.R. 1951 Nag. 403. So, where there was a considerable property belonging to a minor in possession of his guardian-mother who derived considerable income therefrom, no necessity existed for the transfer of a field for payment of Rs. 475 towards the arrears of a monthly pay of an agent engaged by her to look after her litigation—*ibid*.

Recitals :—Recitals in deed cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain. They can only be evidence as between the parties to the conveyance and those who claim under it. After a long period however having elapsed between the alienation and the suit to set it aside, when all those who could have given evidence have grown old or passed away, recital consistent with possibilities and circumstances of the case assumes greater importance and cannot lightly be set aside. The recital is clear evidence of the representation, and if the circumstances are such as to justify a reasonable belief that an inquiry would have confirmed its truth, then when proof of actual inquiry has become impossible, the recital, coupled with such circumstances would be sufficient evidence to support the deed—*Banga Chandra v. Jagat Kishore*, 44 Cal. 186 (P.C.); *Md. Nuh v. Brij Behari*, A.I.R. 1924 All. 939. But ordinarily recitals as

to the existence of legal necessity are not of themselves evidence of such necessity without substantiation *aliunde*—*Brij Lal v. Indra Kumwar*, 36 All. 187 (P.C.); *Amroo v. Babaroo*, *supra*.

This section lays down that if the transferee has taken reasonable care to ascertain the existence of the circumstances alleged by the transferor as necessitating transfer, those circumstances shall be presumed to exist. In other words, "the actual existence of the circumstances is not a condition precedent to the validity of the alienation. It is enough if the alienee, being a purchaser for value, has taken reasonable care and has honestly satisfied himself of their existence"—*Shephard and Brown*, 7th Edn., p. 116. If a purchaser, before embarking on transactions with a Hindu widow has made reasonable and *bona fide* inquiries and has satisfied himself to the best of his knowledge and belief that legal necessity exists, the real existence of such legal necessity in point of fact is not a condition precedent to the success of the purchaser. This principle is laid down in sec. 38, T. P. Act—*Shankar Rao v. Pandurang*, 9 N.L.J. 22, 92 I.C. 646 A.I.R. 1927 Nag. 65 (66).

171. Limits of the inquiry :—It has been stated by the Judicial Committee in *Hunooman Persaud Pandey's case* (6 M.I.A. 393 at pp. 419, 420) that the creditor (*i.e.*, the mortgagee) may rely on the representations made by the borrower (mortgagor), and that the representations made by the borrower are not merely evidence of the existence of circumstances necessitating the loan, but are sufficient to discharge the burden which rests upon the creditor of showing a reasonable inquiry as to the binding nature of the purpose for which the loan is contracted. But this section seems to require something more; it requires a reasonable care on the part of the transferee in ascertaining the existence of the circumstances alleged by the transferor of immoveable property. However, it may be laid down that the inquiry required from lender should be limited to the representations of the borrower. Something more than the mere representation of the borrower is necessary to constitute reasonable inquiry on the part of the lender—*Maharaja of Bobbili v. Zamindar of Chundi*, 35 Mad. 108 (112). Thus, where the purchaser of immoveable properties from a Hindu widow did not enquire from the creditors mentioned in the sale-deed (who were to be paid off out of the consideration money) as to the necessities of the transaction, but satisfied himself with an enquiry merely from the widow herself, and it was found that the statement regarding the payment to the alleged creditors was false, *held* that the purchaser had not made the necessary inquiry and the sale could not be supported—*Janhabi v. Balbhadra*, 15 C.W.N. 793 (795), 10 I.C. 350. This section directs the transferee from a limited owner of property to act with reasonable care and good faith and to satisfy himself by an inquiry as to the existence of the legal necessities of the transfer, and that the transfer was in the particular instance for the benefit of the estate. If he does so, he is safe; but he is not bound to *see to the application of the money*—*Hunooman Persaud v. Babooee*, 6 M.I.A. 393; *Uday Chundur v. Ashutosh*, 21 Cal. 190; *Dalibai v. Gopibai*, 26 Bom. 433; *Ghansham v. Badiya*, 24 All. 547 (548). See in this connection *Monahar v. Brajamohan*, A.I.R. 1952 Or. 239. Nor is it necessary that

the lender should ascertain that every pice of the money advanced by him is required for legal necessity—*Ghansham v. Badiya*, supra.

The question whether a manager or a limited owner of property should borrow money or sell property to obtain money to enable him to meet his necessity, is for the borrower to decide, and a transferee is not to show that what that person did was the only proper course which he could take. For, without entering on the management of the estate, a transferee would not know whether one course was preferable to another—*Mahagu v. Narayan*, A.I.R. 1953 Nag. 60.

Inquiry when unnecessary :—If the sole person who has title or interest to challenge the validity of the transfer has made representations, or induced a belief by his conduct in the purchaser that the transaction was unobjectionable, the inquiry may be dispensed with—*Sarat Chunder v. Gopal Chunder*, 20 Cal. 296.

39. Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immoveable property, and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee if he has notice of such intention, or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

Transfer where third person is entitled to maintenance.

39. Where a third person has a right to receive maintenance, or a provision for advancement or marriage from the profits of immoveable property, and such property is transferred * * * the right may be enforced against the transferee, if he has notice thereof or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

Transfer where third person is entitled to maintenance.

Illustrations.

A, a Hindu, transfers Sultanpur to his sister-in-law B in lieu of her claim against him for maintenance in virtue of his having become entitled to her deceased husband's property, and agrees with her that, if she is dispossessed of Sultanpur, A will transfer to her an equal area out of such of several other specified villages in his possession as she may elect. A sells the specified villages to C, who buys in good faith without notice of the agreement. B is dispossessed of Sultanpur. She has no claim on the villages transferred to C.

(Omitted).

Amendment :—This section has been amended by sec. 11 of the Transfer of Property Amendment Act (XX of 1929). The words "with the intention of defeating such right" have been omitted; the words "of such intention" have been substituted by the word "thereof"; and the illustration has been omitted. This amendment has been made in accordance with the opinion expressed by Beaman J. in *Yamnabai v. Nanabhai*, 12 Bom. L.R. 1075, 8 I.C. 1057.

172. Amendment retrospective :—The amendment made in this section in 1929 is retrospective with the result that the widow is not to prove the intention of defeating the right of her maintenance, but only that the purchaser had notice of that right—*Ismail v. Umar*, A.I.R. 1943 Bom. 187, 45 Bom. L.R. 259.

173. Object and scope of section :—The object of this section, so far as it relates to maintenance, is to declare in what cases a right of maintenance may be enforced against transferees of the property from which the maintenance is recoverable—*Ram Kunwar v. Ram Dai*, 22 All. 526 (328). Where the right to maintenance is available against a person in his individual capacity and not in virtue of his holding any property this section does not come into play—*Sheodeni Kuer v. Umashankar*, A.I.R. 1963 Pat. 74.

This section does not deal with charges, but with a right which falls short of a charge. The charge does not arise until it is fixed by a decree or any agreement or by operation of law—*Ghasiram v. Kundanbai*, A.I.R. 1940 Nag. 163 (165), 1940 N.L.J. 1. This section does not apply to a charge created by a decree—*Mahesh v. Mt. Mundar*, A.I.R. 1951 All. 141 (F.B.), 1951 A.L.J. 39.

The right protected by this section is a right of maintenance; but the claim of a Hindu widow to *reside* in the family house stands much on the same footing as a claim for maintenance and can be claimed against a purchaser *with notice* of the claim for residence—*Yamnabai v. Nanabhai*, 12 Bom. L.R. 1075, 8 I.C. 1057 (1058); but not where the property is sold to pay off her husband's debt. See *Jayanti Subbiah v. Alamalu*, 27 Mad. 45 (51).

Where a person is only entitled to receive part of his maintenance from the profits of a particular village, the case is governed by this section and such right cannot be enforced against a transferee for consideration and without notice of the right nor against such property in his hands—*Kesho Prasad v. Upper India Bank*, A.I.R. 1933 Oudh 76, 141 I.C. 474.

174. Essentials of the section :—Under the old law, in order that the right of maintenance might be enforced against the transferee, two things were necessary, viz., (1) the transfer must have been made with the intention of defeating the maintenance-holder's right, and (2) the transferee had notice of the intention, or the transfer was gratuitous. Under the present law, all reference to the transferor's intention has been omitted, and it is sufficient if the transferee has notice of the maintenance-holder's right, or if the transfer is gratuitous.

Old Law :—*Intention to defeat the maintenance-holder's right :*—

Under the old section, an essential condition for the enforcement of the right of maintenance against a transferee was that the transfer must have been made with the intention of defeating the right; that is, the transferor must have acted in fraud of the person entitled to the right. This right could not be equitably enforced against a transferee for value unless the transfer was made in fraud of the right of maintenance—*Ram Kunwar v. Ram Dai*, 22 All. 326 (328); *Bharatpur State v. Gopal Dei*, 24 All. 160 (163); *Mohini Debi v. Purna Sashi*, 36 C.W.N. 153 (157). Where a transfer was made with the intention of defeating the right of the person entitled to maintenance, and the transferee had notice of it, he could not defeat that right although he might be a transferee for valuable consideration—*Ram Kunwar v. Ram Dai*, 22 All. 326 (328); *Abu Mahomed v. Saraswati*, A.I.R. 1926 Cal. 1068, 43 C.L.J. 604, 97 I.C. 194.

If the parties knew that there was not sufficient property then left in the hands of the vendor from the profits of which the maintenance could be realised, the conveyance was clearly made with the intention of defeating the right of maintenance—*Digambari v. Dhankumari*, 10 C.W.N. 1074 (1080); *Abu Mahomed v. Saraswati*, 43 C.L.J. 604, A.I.R. 1926 Cal. 1068, 97 I.C. 194. The intention to defeat the right of maintenance could be gathered from the fact that all the properties available for satisfying the maintenance claim had been transferred to the purchaser—*Dan Kuer v. Sarla Devi*, A.I.R. 1947 P.C. 8, 51 C.W.N. 81, 73 I.A. 208, I.L.R. 1946 All. 756. But where there was ample estate out of which to provide for the widow, so that she might still get her claim fixed and secured, no imputation of bad faith or of abetting it could be made against the purchaser of a portion of the joint property—*Lakshman v. Satyabhamabai*, 2 Bom. 494; *Digambari v. Dhankumari*, 10 C.W.N. 1074 (1078).

Old Law :—Notice of fraudulent intention :—The mere circumstance that the purchaser had notice of the claim for maintenance was not sufficient under the old section to bind the property in his hands—*Lakshman v. Satyabhamabai*, 2 Bom. 494; *Ramanandan v. Ranganmal*, 12 Mad. 260 (F.B.); it had further to be established that the purchaser had notice of the intention of the transferor to defeat the maintenance-holder's claim—*Abu Mahomed v. Saraswati*, A.I.R. 1926 Cal. 1068; *Mohini Debi v. Purna Sashi*, 36 C.W.N. 153 (157). Where the heir sought to defraud the widow and the purchaser was acting with notice not merely for her claim but of this fraud which was being practised upon her claim, the claim could be enforced against the estate in the hands of the purchaser. As West, J., observed : "What was honestly purchased is free from her (widow's) claim for ever. What was purchased in furtherance of a fraud upon her or with knowledge of a right which would thus be prejudiced, is liable to her claim from the first"—*Lakshman v. Satyabhamabai*, 2 Bom. 494 (500). If a fraudulent intention on the part of the transferor was found to exist in the case, there could be no question that the transferee, if he had notice of such intention, could not take the property except as subject to the liability of making good the maintenance out of the property in his hands—*Digambari v. Dhankumari*, 10 C.W.N. 1074 (1079). Where a large part of the property

was sold *with the object of defeating the widow's claim to maintenance*, the purchaser having *knowledge of the fraud*, the widow's right to recover maintenance attached to the property in the hands of the purchaser, *although there might be other property* from which the widow's claim could be satisfied—*Sri Beharilalji v. Bai Rajbai*, 23 Bom. 342.

Present Law :—The Amendment of sec. 39 has made a considerable alteration in the law. Under the old section the persons who had the right to maintenance were only protected against a transfer provided it was with the intention of defeating that right. Such intention is no longer necessary under the amended section, but sec. 39 as amended does not create any new right in favour of any person—*Pranlal v. Chapsey*, A.I.R. 1945 Bom. 34. Consequently, where a property was alienated before the amendment but the suit by the claimant to maintenance to enforce his right against the transferee was brought after the amendment, sec. 39 as amended would apply and therefore the claimant had not to prove the intention on the part of the transferor to defeat the right of maintenance, but only that the purchaser had notice of that right—*Dan Kuer v. Sarala Devi*, A.I.R. 1947 P.C. 8, 756; *Ramamurthi v. Kanakaratanam*, *infra*; *Chandramma v. Maniam*, A.I.R. 1958 Andhra Pr. 396. See also *Lali Jan v. Md. Shafi*, 31 All. 478 (480) where it was held that if the transferee had notice of the condition regarding the payment of maintenance, he was bound by it, although he was a transferee for valuable consideration. See also *Ramaswami Gounder v. Baghvammal*, A.I.R. 1967 Mad. 457.

The amendment to this section was not intended to create a charge where none existed previously. The rule of Hindu law that though a Hindu widow has a right to be maintained out of the family estate, she has no charge in respect of such right over any portion of the estate till one is created by agreement or by a decree of Court, is not intended to be affected by the amendment of this section, so that any alienation made for purposes which would have precedence over the widow's claim for maintenance would, in the absence of any charge created as indicated above, bind the widow, and her right to have her maintenance charge upon an appropriate portion of the family estate can be enforced only subject to such alienation—*Ramamurthi v. Kanakaratanam*, A.I.R. 1948 Mad. 208.

Notice of right of maintenance :—Under the old section, it was held that where a transfer was *not made with the object* of defeating the right of maintenance, the right could not be enforced against the transferee *although he had notice* of such right—*Ram Kumwar v. Ram Dai*, 22 All. 326 (328); *Bharatpur State v. Gopal Dei*, 24 All. 160 (163); *Digambari v. Dhan Kumari*, 10 C.W.N. 1074 (1079). These rulings are no longer good law. It was further held that if the purchaser had notice of the widow's existence and of her claim for maintenance and yet purchased with the rational and honest opinion that the transaction was one originating in an honest desire to pay off debts or satisfy claims for which the estate was justly liable, the purchaser would acquire a title free from the widow's claim—2 Bom. 494 (524). This decision is no longer correct.

Where the transfer is for consideration and the transferee has *no notice of the right of maintenance*, it cannot be enforced against him, even though the transfer was made with the intention of defeating the right—*Ram Kunwar v. Ram Dai*, 22 All. 326; *Ramamurthi v. Kanakarathnam*, supra. Given a right to recover maintenance from the profits of immoveable property, and given a transfer made with the object of defeating that right, the only transferee who can defeat the right is a transferee for value *without notice of the right*—*Ibid* (at p. 328).

A married daughter has ordinarily no right of maintenance out of the property left by her father, and it is not therefore a circumstance which would ordinarily be enquired into by a prudent transferee—*Renuka Bala v. Nagendra Nath*, A.I.R. 1939 Cal. 655 (656), 43 C.W.N. 666, 184 I.C. 518.

Gratuitous transfer :—If the transfer is gratuitous, the transferee can in no case defeat the right—*Ram Kunwar v. Ram Dai*, 22 All. 326 (328).

174A. Provision for advancement :—Advancement “is a payment to persons who are presumably entitled to, or have a vested or a contingent interest in an estate or legacy before the time fixed by the will for their obtaining the absolute interest in a portion or the whole of that to which they would be entitled”—*per* Cotton, L.J., in *Re Aldrige*, 55 L.T. 554. It is a word applicable to an early period of life, and is a sum paid out of capital to secure a permanent benefit or advantage in life for the person advanced—*Simpson's Law of Infants*, 4th Edn., p. 216.

The principle of English law that when a property is purchased or a deposit is made in the name of a wife or child, it would be presumed that the purchase or deposit was intended for her or its advancement does not hold good in India—*Paul v. Gopal Nath*, A.I.R. 1931 All. 596; following *Suri Lakshmiah v. Kothandaramma*, A.I.R. 1925 P.C. 181. See also *Kerwick v. Kerwick*, A.I.R. 1821 P.C. 56; *Guran Ditta v. Ram Ditta*, A.I.R. 1928 P.C. 172; *Dharwar Bank v. Md. Hayat*, A.I.R. 1931 Bom. 269; *Copee Krist v. Gunga Pershad*, 6 M.I.A. 53; *Jhonstone v. Gopal*, A.I.R. 1931 Lah. 419; *Panchanan v. Balak Ram*, A.I.R. 1930 All. 374; *Shambhu Nath v. Pushkar Nath*, A.I.R. 1945 P.C. 10; *Jeevon v. Mehtab*, A.I.R. 1953 Hyd. 77. But in the cases of persons of European nationality there may be presumption of such advancement—*Paschaud v. Nixon*, A.I.R. 1930 Oudh 441.

Where a sale is by the husband to the wife, the presumption that the purchase is made by the husband with his own funds for the benefit of his wife and children arises only in the absence of evidence to the contrary—*Achuthan v. Parameswara*, A.I.R. 1951 Tr.-Coch. 195. In *benami* transactions all subsequent proceedings and conduct are always consistent with the original intention of the purchaser and the subordinate parts are notoriously fitted in to correspond with the *benami* arrangement. No doubt the burden is upon him who alleges that the property belongs to another, but this onus is easily discharged

when the motive or the reason with which the property was purchased, is given—*Jeecon v. Mehtab*, *supra*.

174B. Provision for marriage :—According to Hindu law a marriage is a "Sanskara" and as such is a lawful necessity—*Sundrabai v. Shivanarayana*, 32 Bom. 81; *Debi v. Nand*, 1 Pat. 266. Even a marriage for the second time may be such a necessity—*Bhagirathi v. Jokhu Ram*, 32 All. 575.

175. Maintenance—charge—decree :—This section deals with personal rights, and has no application to cases where such rights arise out of a specific charge on immoveable property—*Razia Begam v. Ishrat*, 6 O.W.N. 493, 117 I.C. 405, A.I.R. 1929 Oudh 316 (318); *Fateh Ali v. Gobardhan*, 5 Luck. 172, A.I.R. 1929 Oudh 316 (318); *Shyam Narain v. Khubla Mahato*, A.I.R. 1968 Pat. 238.

The maintenance of a Hindu widow is not by itself a charge upon the estate of her deceased husband unless it is fixed and charged upon the estate by a decree or by an agreement—*Bharatpur State v. Gopal Dei*, 24 All. 160 (163); *Ram Kunwar v. Ram Dai*, 22 All. 326 (327); *Yannabai v. Nanabhai*, 12 Bom. L.R. 1075, 8 I.C. 1057; *Gajadhar v. Khula Kunwar*, 12 O.C. 37, 1 I.C. 690; *Brij Raj v. Ram Dayal*, A.I.R. 1932 Oudh 40 (42); *Sowbagia v. Manika*, 33 M.L.J. 601, 42 I.C. 975; *Daulat v. Champa*, 55 I.C. 28 (Lah.); *Lakshman v. Satyabhambai*, 2 Bom. 494; *Mahesh v. Mt. Mundar*, A.I.R. 1951 All. 141 (F.B.), 1951 A.L.J. 39; *Mt. Jogi v. Smt. Raikumar Saheba*, A.I.R. 1956 Nag. 138; *Pirdhadas Parsumal v. Hajrabai Mahomad*, 9 Guz. L.R. 24. If the right to maintenance is charged upon a property, the purchaser having taken the conveyance subject to such charge would be bound to pay the maintenance—*Digambari v. Dhan Kumari*, 10 C.W.N. 1074 (1077). Where a charge is created, it would bind the immoveable property even in the hands of a transferee for consideration and without notice. Section 39 would not apply to such a case—*Razia Begam v. Ishrat*, *supra*; *Fateh Ali v. Gobardhan*, *supra*. Where the maintenance has been specifically charged on the property transferred, it would be liable, although it be shown that there is other property in the hands of the transferor or his heirs sufficient to meet the claim—*Sham Lal v. Banna*, 4 All. 296. It should be noted that an agreement, in order to create a charge on the property, must be such as to make the property security for the payment of maintenance; if no particular or specific property is mentioned as liable for the claim for the maintenance, the agreement cannot create a charge on any property—*Mohini v. Purna Sashi*, A.I.R. 1932 Cal. 451. If the contract creating the right to receive maintenance out of the profits of a village is unregistered, there can be no charge on the property and right to receive maintenance cannot be enforced against a subsequent transferee for value without notice—*Kesho Prasad v. Bank of Upper India*, A.I.R. 1933 Oudh 76. But if a Hindu widow by virtue of an agreement with the members of the family is in possession of a portion of the joint family property in lieu of maintenance, she is entitled to hold that property against a purchaser. The right of the widow in such a case is distinguishable from either a mere claim for maintenance or a charge—*Ram Kunwar v. Amar Nath*, 54 All. 472.

Upon proper construction of this section a Hindu widow's maintenance is payable, in the first instance, from the profits of the whole of the husband's immovable property, and so if a purchaser has notice of the existence of the widow, then he is to see that her claims are discharged before he purchases the property—*Dattatraya v. Tulsabai*, A.I.R. 1943 Bom. 412, 45 Bom. L.R. 802. But see *Pavayammal v. Samiappa*, A.I.R. 1947 Mad. 376, (1947) 1 M.L.J. 329, where it has been held that in the case of a Hindu wife and unmarried daughter it cannot be said that they have a right to receive maintenance "from the profits of immovable property" within the meaning of sec. 39, and mere knowledge on the part of the transferee of the legal right of the wife and the daughter is not enough. What the section contemplates is a claim based on the right to receive maintenance and notice of such claim.

The purchaser in execution of a mortgage decree buying the mortgaged property free from encumbrances gets the title both of the mortgagee and those interested in the equity of redemption. He is not a mere successor-in-interest of the owner of the equity of redemption at the date of the sale. Hence the interest of the purchaser is not liable upon the death of the mortgagor to be burdened with the maintenance of the mortgagor's widow or daughter—*Jadunath v. Parameshwar*, A.I.R. 1940 P.C. 11 (14, 15).

If the right to maintenance has been merged in a *decree* and the decree directs that certain property is charged with the maintenance, a transferee of such property for consideration and even without notice is not entitled to protection, because the decree declaring the charge operates as a notice of the claim to the transferee. In such a case, sec. 39 would have no operation—*Kuloda v. Jageshar*, 27 Cal. 194; *Ram Kunwar v. Ram Dai*, 22 All. 326 (327); *Maina v. Bachchi*, 28 All. 655 (657). See also *Sathurulu v. Narra*, A.I.R. 1930 Mad. 824, 54 Mad. 132, 127 I.C. 809. So long as a person has a mere right of maintenance, sec. 39 applies; but as soon as she gets in lieu of her right of maintenance a *decree* fixing a definite sum and charging a specific property with payment thereof, what was previously a mere right of maintenance becomes a right of a quite different nature, and sec. 39 no longer applies. The right created by the decree is enforceable against *bona fide* transferees for value without notice—*Maina v. Bachchi*, *supra*; and the property charged can be sold in execution of the decree, no separate suit being necessary—*Rai Sital Sahai v. Shampoti Kuer*, A.I.R. 1958 Pat. 2. But a mere money-decree (which creates no charge upon the property) will not have this effect—*Beer Chunder v. Nobodeep*, 9 Cal. 535; *Lakshman v. Satyabhamabai*, 2 Bom. 494; *Adhiranee v. Shona Malee*, 1 Cal. 365.

When the decree provides for the payment of future maintenance and makes provision expressly or impliedly for its own execution, it does not put an end to the suit and consequently whether the matter be placed on the ground of *lis pendens* or on that of estoppel by record, the result is the same. But when the decree is merely declaratory and unexecutable, the suit *qua* suit is at an end then those rules do not apply and the decree *qua* decree does not operate as notice of charge

—*Ghasiram v. Kundanbai*, A.I.R. 1940 Nag. 163 (172), 1940 N.L.J. 1. A written agreement for maintenance can be varied without the necessity of instituting a suit. But when the rate of maintenance is fixed in a decree, its alteration or variation can only be obtained by a separate suit properly framed for the purpose—*Ibid*, at p. 173; see also *Trimbak v. Mt. Bhagubai*, A.I.R. 1939 Nag. 249.

Where properties are specified in the decree and it is stated that the future maintenance is to be recovered from those properties by selling them without attachment, the decree makes the future maintenance a charge on the properties—*Abdul v. Seethalakshmi*, A.I.R. 1931 Mad. 120 (121).

A person who purchases a portion of a property which is subject to charge with notice of the charge, is liable to pay the whole amount of the charge. The chargeholder is entitled to enforce payment against the whole or any portion of the property charged. If the purchaser is made to pay the whole amount, his remedy will be in a suit for contribution against persons in possession of other portions of the property—*Sharif v. Hunter*, A.I.R. 1937 Oudh 420 (423), 167 I.C. 52. Enhanced maintenance too can be claimed from the purchaser—*Vedabati Williams v. Rama Bai*, A.I.R. 1964 Mys. 265.

176. Sale of property for necessity :—If a property is sold for purposes which authorise the sale, (e.g., for legal necessity) the purchaser takes a good title free from the widow's claim for maintenance—*Gur Dayal v. Kaunsilla*, 5 All. 367; *Soorjo Koer v. Nath Buksh*, 11 Cal. 102 (105); *Yamnabai v. Nanabhai*, 12 Bom. L.R. 1075, 8 I.C. 1057 (1058); *Lakshman v. Satyabhamabai*, 2 Bom. 494. The property in the hands of the purchaser will not be liable for maintenance, if the transfer was made to satisfy a claim for which the ancestral property is liable by Hindu law, and which under that law takes precedence over that of maintenance—*Sham Lal v. Banna*, 4 All. 296. In the absence of any specific charge on the family estate as to the future maintenance of a widow, the sale of ancestral property by the heir in possession for discharging the valid debts of the widow's late husband (or of her husband's father or grandfather) is valid, and the *bona fide* purchaser for value is not affected although he may have had notice of her claim of maintenance. The principle is that under Hindu law the binding debts of the deceased owner take precedence even over the claim for maintenance of the widow—*Lakshman v. Satyabhamabai*, 2 Bom. 494; *Gur Dayal v. Kaunsilla*, 5 All. 367; *Somasundaram v. Unnamalai*, 43 Mad. 800 (801); *Brij Raj v. Ram Dayal*, 7 Luck. 411, A.I.R. 1932 Oudh 40 (43), 135 I.C. 369; *Jamnabhai v. Balakrishna*, A.I.R. 1927 Mad. 1092. But this rule of Hindu law applies only so long as the two obligations are both not made charges on the property. If either of them assumes that shape, (e.g., if the maintenance is charged on the property), then it would take precedence over the other—*Somasundaram v. Unnamalai*, 43 Mad. 800 (802), 12 L.W. 163, 59 I.C. 398. A Hindu widow's right of maintenance is not a charge on the estate of the deceased husband; hence it is liable to be defeated by a transfer of the husband's property to a bona fide purchaser for value

without notice of the widow's right—*Laxmi v. Krishna Bhatta*, A.I.R. 1968 Mys. 288.

40. Where, for the more beneficial enjoyment of his own immovable property, a third person has, independently of any interest in the immovable property of another or of any easement thereon, a right to restrain the enjoyment of the latter property, or to compel enjoyment in a particular manner, or

Burden of obligation imposing restriction on use of land.

40. Where, for the more beneficial enjoyment of his own immovable property, a third person has, independently of any interest in the immovable property of another or of any easement thereon, a right to restrain the enjoyment * * in a particular manner of the latter property, or

Burden of obligation imposing restriction on use of land.

where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon,

or of obligation annexed to ownership, but not amounting to interest or easement.

such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

Illustration.

A contracts to sell Sultanpur to B. While the contract is still in force he sells Sultanpur to C, who has notice of the contract. B may enforce the contract against C to the same extent as against A.

Amendment :—The first para has been amended by seq. 12 of the T. P. Amendment Act (XX of 1929). See Note 177 below.

177. Para 1 :—Restrictive covenants :—The first para has been amended by omitting the words "compel its enjoyment." These words refer to affirmative covenants and by the omission of these words the Legislature has confined the operation of the first para of this section to restrictive or negative covenants only. In *Tulk v. Moxhay*, 2 Phill. 774, the plaintiff, the owner of a vacant piece of land and of houses surrounding it, had sold the vacant piece of ground to a person who covenanted that he would keep the same in its then form in an open state uncovered with buildings, and the defendant bought the land from that person with notice of the covenant; *held* that the covenant was enforceable against the defendant who had notice thereof, and therefore he was not entitled to build on the land. It should be noted that the covenant, though affirmative in terms, was really of a negative character (*viz.*, not to build upon the land), and in this view the decision was correct. But the language used by Lord Cottenham seemed to lay down that both affirmative and negative covenants were enforceable against

the purchaser's transferee. This case was therefore questioned in the Court of Appeal in *Haywood v. Brunswick Building Society*, 8 Q.B.D. 463, where it was held that covenants of a negative character only could be enforced on the principle of *Tulk v. Moxhay*. The present section has been amended in the light of *Haywood's* case. See the remarks of the *Special Committee* cited in Note 98 under sec. 11.

The doctrine of *Tulk v. Moxhay*, *supra* applies only to restrictive or negative covenants. It cannot be extended to affirmative covenants, such as a covenant compelling a man to lay out money or to do any other act of an active character. The covenant must be one restricting or affecting the user of the land and the remedy is not a remedy at law by way of specific performance under a species of implied privity, but a remedy in equity by injunction against the violation of the covenant—*Jagdish v. Md. Bakhtiyar*, A.I.R. 1953 Pat. 409. See also *Ganges Manufacturing Co. v. Radharani*, *infra*. In deciding whether a covenant in a lease is an affirmative or negative covenant, the Court must look to the substance and not to the form—*Ganges Manufacturing Co. v. Radharani*, A.I.R. 1945 Cal. 89, 49 C.W.N. 63. A covenant in the head lease implying an obligation on the part of the lessee to pay a specified rent, being a positive or affirmative covenant, cannot be enforced against the sub-lessee, there being neither privity of contract nor privity of estate between the sub-lessee and the original lessor—*ibid*.

The Court will not enforce against an assignee of a covenantor an affirmative covenant involving expenditure of money on land, whether such assignee takes with or without notice—*Chaturbhuj v. Mansukhlram*, A.I.R. 1925 Bom. 183, 27 Bom. L.R. 73, 86 I.C. 19.

The first para of this section deals with what are called restrictive covenants which are enforced in equity in England on the ground that the person entitled to the right has an equitable interest in the land or a right in the nature of an equitable easement—*Basdeo v. Jhagru*, 46 All. 333 (336).

A restrictive covenant is one which would entitle a third person to interfere with the free use which the transferee may choose to make of the property which is the subject matter of the contract—*Pemsel and Wilson v. Tucker*, [1907] 2 Ch. 191. A covenant which runs with the land is a restrictive covenant because it is something which restricts the user of the land. A positive covenant never runs with the land either in law or in equity—*Jogesh Chandra v. Asaba*, A.I.R. 1927 Cal. 41 (43), 98 I.C. 46. If there is a restrictive covenant and the purchaser takes with notice of it, the person in whose favour the covenant is made can restrain the purchaser from acting contrary thereto—*Mohini Mohan v. Ramdas*, 28 C.W.N. 271, 80 I.C. 210, A.I.R. 1924 Cal. 487 (488). A covenant granting a right of way over plot P for the beneficial enjoyment of plot Q, can be enforced by the lessee of Q against the lessee of P taking P with notice of the covenant—*Rajpur Colliery Co. v. Pursottam Gohil*, A.I.R. 1959 Pat. 463. A covenant by a vendor not to build a beer-house or tavern on the plots of land remaining unsold is a restrictive covenant, and enforceable against the purchaser—*Richards v.*

Revitt, L.R. 7 Ch. D. 224. M was allowed by the zemindar of certain lands to build houses on the lands on condition that if M sold any of the houses so built, he should pay one-fourth of the purchase money (*haq-i-chaharum*) to the zamindar. M sold one of the houses to one R who had notice of the covenant in favour of zemindar, who thereupon sued R (as well as M) to recover one-fourth of the purchase-money: *Held* that the covenant was a restrictive covenant, binding M not to transfer his interest without the zemindar receiving his one-fourth share of the purchase-money; the covenant was therefore enforceable against R as much as against M (jointly and severally)—*Prabhu Narain v. Ramzan*, 41 All. 417 (419, 420), 17 A.L.J. 469, 49 I.C. 865. This case has been dissented from in *Haji Abdul v. Nandlal*, 1931 A.L.J. 429, 133 I.C. 543, A.I.R. 1931 All. 552, which lays down that a contract to pay a certain sum of money (e.g., a *haq-i-chaharum*) on the happening of a certain event cannot be held to be a restrictive covenant. But in *Kumar v. Narendra*, A.I.R. 1930 Cal. 357 (360), 57 Cal. 953, B. B. Ghose and S. K. Ghose, JJ., *held* that a covenant binding a tenant, his heirs or successors-in-interest to pay a certain share of purchase money to the landlord on the sale of the tenure, as a condition precedent to the landlord recognizing the sale as valid and binding on him, is a covenant running with the land and makes the purchaser liable for the same. Absence of a negative form of expression in a covenant is immaterial when from the substance of the agreement a negative agreement can be seen to be implied. A covenant in a putni lease that the putnidar shall submit duly, year after year in the landlord's office, the *Jama-wasil-baki* and *lawazima* papers, runs with the land and therefore bind the assignees from the parties—*Hooghly Bank v. Mahendra*, A.I.R. 1950 Cal. 195, 54 C.W.N. 327.

Where some of the co-sharer landlords reduced the *jama* for their share and concealed the fact of reduction when they sold their interest, and it was admitted that the other co-sharers had not reduced the *jama*, the transferee was not bound by the reduction—*Tark Nath v. Raghu Nandan*, A.I.R. 1950 Pat. 22, 28 Pat. 844.

In India a lessor granting a lease in perpetuity or for a long term, such as 499 years, still retains the reversion, and if for the benefit of the reversion a covenant (in this case against the working of a coal mine in a certain way) is entered into, then the essential of a restrictive covenant that the covenantee must retain some interest in the land is satisfied. It is not necessary that the property for the benefit of which the restrictive covenant is entered into must be independent of and outside the demised premises—*Mati Lal v. Radha Damadar Jew*, A.I.R. 1936 Cal. 727 (736), 41 C.W.N. 263, 64 C.L.J. 308. See also *Dyson v. Forster*, (1909) A.C. 98. If in a deed of lease there is an express covenant that the assignee shall be liable to pay to the lessor the chouth money in respect of selami the covenant does not run with the land and hence the lessor cannot recover the chouth money from the assignee—*Rambriksh Prasad v. Shyamsunder Prasad*, A.I.R. 1962 Pat. 193.

178. Para 2 :—Obligation arising out of a contract :—This para may be compared with sec. 91 of the Indian Trusts Act (II of 1882) which lays down that "where a person acquires property with notice that an-

other person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract." Thus, where a mortgagee at the time of his mortgage is aware of circumstances which ought to have put him on enquiry and such enquiry, if made, would have revealed the existence of an agreement by the mortgagor to mortgage the property to a third party, the mortgagee's rights will on the principles of this section and sec. 91, Trusts Act, be postponed to the rights of the third party—*Kameswaramma v. Sitaramanuja*, 29 Mad. 177. Similarly in the case of an agreement to sell, the title of the subsequent purchaser with notice of the prior agreement in favour of another is subject to the obligation under sec. 91, Trusts Act. He holds the property for the benefit of this latter to the extent necessary to give effect to the contract—*Appa Rao v. Veeramma*, A.I.R. 1953 Mad. 409, (1952) 2 M.L.J. 166. See in this connection *Ali Hossain v. Rajkumar*, A.I.R. 1953 Cal. 417 (F.B.).

The rights described in this para arise out of a contract between the person entitled to the right and the owner of the property transferred. They involve an obligation on the latter but do not presuppose the possession of any property by the former. This para deals with contractual obligations relating to land but falling far short of any interest therein.

The right of reconveyance of an easement granted in perpetuity is a positive covenant arising out of contract and can be completely dissociated from the land itself. This condition cannot be fastened on the land itself, so as to make it a covenant running with the land; it is a personal covenant independent of the land—*Zal Rustomji v. Anjuman Mofidal Islam*, A.I.R. 1943 Nag. 4.

A mere contract of sale, though it does not confer an interest in the subject-matter of the contract, still creates an obligation annexed to the ownership of the property which can be enforced by the promisee under the contract against a transferee with notice—*Rebala Venkata v. Yellappa*, 5 L.W. 234, 38 I.C. 107 (108); *Puthenpurayil v. Kondiyal*, (1916) 2 M.W.N. 31, 34 I.C. 906 (908); *Gangaram v. Laxman*, 40 Bom. 498 (502). Thus where subsequent to a contract to sell certain property, it is attached in execution of a decree, the attachment does not prevail over the pre-existing contract to sell even though the attaching creditor has no notice of the contract to sell—*Athinarayana v. Subramania*, A.I.R. 1942 Mad. 67, see also *Diravyam v. Veeraman*, A.I.R. 1939 Mad. 702, I.L.R. 1939 Mad. 853 (1939) 2 M.L.J. 822.

A contract giving rise to a right of *pre-emption* falls under the second para of this section. The promisee in such a contract is clearly entitled to the benefit of the obligation entered into by the promisor, namely that when he proposes to sell the land, he will give the promisee the first offer. Such a contract is binding on the representatives of the parties to the contract, as well as on transferees with notice and gratuitous transferees—*Basdeo v. Jhagru*, 46 All. 333 (336, 346), A.I.R. 1924 All. 400; see also *Jagamaya v. Tulsa*, A.I.R. 1926 All. 70; *Muhammad Jan v. Fazluddin*, A.I.R. 1924 All. 657. It has been held by

the Lahore High Court that in such cases the covenant to indemnify the vendee either by cash compensation or by delivery of other property of the vendor is not enforceable at the instance of the pre-emptor, as such a covenant does not run with the land—*Mt. Banti v. Mandu*, A.I.R. 1928 Lah. 357, (358), 9 Lah. 659, 110 I.C. 425. The Allahabad High Court has however taken a contrary view in *Hampant v. Chandi*, A.I.R. 1929 All. 293 (295), 51 All. 651, 119 I.C. 243.

Where P enters into an agreement with D by which D agrees to a restriction of the ordinary user of his property, it is merely a restrictive covenant which binds D's transferee with notice of the covenant. No interest in D's property or easement thereon is created by the agreement—*Gordhandas v. Mohanlal*, 45 Bom. 170 (173).

Annexed to the land :—A covenant between a lessor and a lessee is primarily binding on these two but upon an assignment either of the reversion or of the terms, it may also be binding on the grantee of the reversion or the assignee of the terms. Similarly the benefit of a covenant may pass to these parties respectively. If the covenant is for the benefit of the lessee and directly concerns the land it runs with the land in favour of the assignee. An option to renew the lease runs with the land and so both the lessor's and the lessee's successors in title are bound—*Radha Kamal v. Puri Municipality*, A.I.R. 1954 Or. 110.

In order that the second para of this section may apply, the covenant must be *annexed to the land*. Thus, an undertaking by a vendor that he would pay any revenue that might be assessed on the land was not held to be a covenant falling under this section but was merely a *personal* covenant—*Ramadhin v. Sheoratan*, 6 O.C. 184; *Pachan Singh v. Jangjit Singh*, 39 All. 166 (170). Where on a partition between the brothers, a mortgage-debt due by the family is apportioned and there is a covenant by which a defaulting member's share will be liable for any excess amount paid by another member, such a covenant is a restrictive covenant in the nature of an obligation annexed to the ownership of immovable property; and a member making the excess payment is entitled to enforce the covenant against a purchaser of the defaulting member's property with notice (actual or constructive) of the covenant—*Abdul Razak v. Abdul Rahman*, A.I.R. 1933 Mad. 715.

In an agreement between the Raja of Paresh Nath Hills and the Setambari Jain Society, the former stipulated: "If the Society shall require any place on the hill and below thereof at Madhuban for erecting Mandir and Dharmasala and for doing repairs and making bricks for the said purpose, in that case I and my heirs shall give for making Mandir, Dharmasala and bricks, land, stones from the hills and timber free of costs and if I and my heirs refuse to give in that case the Setambari Jain Society shall take the same of its own power." The Society was resisted by the defendants who subsequently to the agreement had acquired lease-hold interests in the land on which the Society sought to erect a temple: *Held* by the Privy Council that the agreement did not create in the Society some present estate or interest

which would prevent the owner from making a grant to the defendants and the covenant not being one running with the land could not be enforced against the assignees from the Raja—*Maharaj Bahadur Singh v. Balchand*, 25 C.W.N. 770 (P.C.).

The terms "annexed to the ownership" must not be understood to mean 'creating any interest or charge in the land' but simply 'relating to the ownership or by virtue of the right of proprietorship'. A contract of *pre-emption* entered into by the proprietors in a village, though a personal one in the sense that it creates no interest in the land, is also entered into by virtue of their position as proprietors and is entered into in respect of their property, and must from its very nature be deemed to have been annexed to the ownership of the property—*Basdeo v. Jhagru*, A.I.R. 1924 All. 400; followed in *Jagamaya v. Tulsa*, A.I.R. 1926 All. 70.

Where an *ekranama* provided that in the event of the executant not paying the allowance fixed for maintenance the obligee was to have liberty to proceed against the properties relinquished by her, and in case she was unable to realise the arrears from those properties she might have recourse to the other properties of the obligor, no particular or specific property having been mentioned as liable for the claim, the deed could not be construed as creating any charge but only an obligation arising out of a contract, annexed to the ownership of immoveable property within the meaning of this section—*Mohini v. Purna Sashi*, A.I.R. 1932 Cal. 451. Unless the obligation creates an interest in or charge on the property, it cannot be enforced against a *bona fide* purchaser without notice—*Ibid*. But an obligation to pay *zar-i-chaharum* (one-fourth of the sale price, payable by the tenant to the landlord, in case the former sold his interest in the land) is merely a personal obligation to pay a certain sum of money to a third party, arising out of a contract, and is not an obligation annexed to the ownership of land—*Haji Abdul v. Nandlal*, A.I.R. 1931 All. 552 (553).

179. Transferee with notice :—It is essential that an assignee of the original covenantor must have *notice* of the restrictive covenant, if he is to be bound by it. A purchaser is not guilty of negligence in not asking for the title deeds of an adjoining property which *prima facie* he has no right whatever to ask his vendor to produce. As between the vendor and the purchaser, it is the vendor who is to disclose to the purchaser any covenant restricting the enjoyment of the property sold—*Chaturbhuj v. Mansukhram*, A.I.R. 1926 Bom. 183 (184). The rights or obligations under this section may be enforced against a transferee with notice thereof, on the equitable doctrine that a person who takes with notice of a covenant is bound by it—*Rogers v. Hosegood*, [1900] 2 Ch. D. 383. The transferee's liability rests on the ground that in justice he ought not to evade the discharge of the obligation which was incumbent on his transferor. On his taking as a purchaser with notice of the obligation there is no reason why his position should be better than that of his vendor, for presumably the existence of the obligation has been taken into account in fixing the price—*Shephard and Brown*, 7th Edn., pp. 124-125.

A person who purchases property knowing that it is encumbered with a debt is liable under this section to discharge the debt—*Mahadeo v. Sant Baksh*, 28 O.C. 118, 57 I.C. 513 (516).

The notice referred to in this section must be a clear unequivocal notice. Vague references are of no effect—*Nur Mahomed v. Dinshaw*, A.I.R. 1922 P.C. 393 (396).

The notice may be actual or *constructive*. Where a vendee had constructive notice of the covenant of pre-emption embodied in a registered deed of lease, the covenant was enforceable against the vendee—*Jagamaya v. Talsa*, A.I.R. 1926 All. 70. Thus, when a mortgagee is aware of circumstances which ought to have put him on inquiry, and when by such inquiry he would have known of the existence of a previous agreement by the mortgagor to mortgage the same property to a third person, he must be deemed to have had constructive notice of the agreement, and in accordance with the provisions of this section his mortgage-rights must be postponed to those of the party in whose favour there has been a previous agreement—*Kameswaramma v. Sitaramanuja*, 29 Mad. 177. Where a mortgagee in possession entered into an agreement to purchase the mortgaged property, he can bring a suit to enforce the contract as against a subsequent purchaser. As the subsequent purchaser knew that the property was in the possession of the mortgagee, he ought to have enquired of the mortgagee as to the nature and extent of his interest (*i.e.*, whether he was in possession as mortgagee or by virtue of any other right) and as he abstained from making any inquiries of him, he must be deemed to have had notice of the agreement to sell in favour of the mortgagee, and cannot therefore resist his suit—*Punthenpurayil v. Kondiyal*, (1916) 2 M.W.N. 31, 34 I.C. 906 (908).

If the contract is contained in the *wajib-ul-arz* of the village in which the property is situated, it is sufficient notice, and the transferee by purchase cannot be allowed to plead want of notice—*Basdeo v. Jhagru*, A.I.R. 1924 All. 400.

The right or obligation can be enforced under this section against a transferee with notice, even though he has purchased under a *registered* deed. A party who purchases under a registered deed, with notice of a prior agreement for sale, shall not be allowed to retain the property, as against the person claiming under the prior agreement—*Chundernath v. Bhoyrub*, 10 Cal. 250; *Gangaram v. Laxman*, 40 Bom. 498 (502); *Desaibhai v. Ishwar*, 44 Bom. 586 (588). A registered purchaser of land, who buys with notice of a prior unregistered contract by his vendor to sell the same land to the plaintiff, cannot resist a suit for specific performance on the plea of registration—*Kavar v. Ismail*, 9 Mad. 119. Where a *bona fide* contract, whether oral or written, is made for the sale of property, and another party afterwards buys the property with notice of the contract, the title of the party claiming under the contract prevails against the subsequent purchaser, although the latter's purchase may have been registered and he has obtained possession under his purchase—*Chunder Kanta v. Krishna Sunder*, 10 Cal. 710. See also *Cooverji v. Bhimji*, 6 Bom. 528; *Puchha Lal v. Kunj Behari*, 18 C.W.N.

445, 19 C.L.J. 213, 20 I.C. 803; *Krishna v. Gangaram*, 13 All. 28; *Chand Mohammad v. Murtuzakhan*, A.I.R. 1958 Bom. 194.

180. Obligation created by decree :—This section deals with personal rights in cases where such rights do not arise out of a specific charge on immoveable property. But where such a charge (e.g., obligation to pay money out of certain property) is created by a *decree*, it would bind the immoveable property even in the hands of a transferee for consideration and without notice; the purchaser cannot avoid a specific charge created by the decree on the property of the vendor on the ground of his being a *bona fide* purchaser without notice—*Razia Begam v. Ishrat*, A.I.R. 1929 Oudh 316 (318, 319).

There is no difference in principle between a charge created by a contract and one created by a decree. In either case the charge is not a transfer of an interest in the property. Thus where a particular right is charged on specific immoveable property, such right cannot be enforced against a subsequent transferee for valuable consideration and without notice of the charge—*Rustomalli v. Aftabhusain*, A.I.R. 1943 Bom. 414.

Gratuitous transferee :—The right will be enforced against a gratuitous transferee. On taking the property as a gift there is no reason why he should be in a better position than his transferor or why the right of the third person should be defeated by the transfer. Moreover, in the case of a gratuitous transfer, the notice must be presumed to have been conveyed to the transferee.

181. Execution sale :—Although the word 'transferee' in this section refers to a transferee under a private alienation, still the rule of this section may apply to a purchaser at Court-auction—*Rebala Venkata v. Mangadu Yellappa*, 5 L.W. 234, 38 I.C. 107 (108). Therefore, where a creditor attaches a property which is subject to a particular obligation arising out of a contract, he is not able to override that obligation but can sell the property only subject to such obligation. Thus, where B entered into a contract to sell his property to A, and subsequently C, B's creditor, attached the property in execution of a decree he had obtained against B, *held* that A was entitled to the property as against execution-purchaser—*Rebala Venkata v. Mangadu Yellappa*, 5 L.W. 234, 38 I.C. 107 (108, 109). In *Nur Mahomed v. Dinshaw*, A.I.R. 1922 P.C. 393 (396), their Lordships of the Judicial Committee applied the principle of this section to a Court-sale.

41. Where, with the consent, express or implied of the
Transfer by ostensible owner. persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it : provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

182. Principle :—"This section is based on the principle that where one of two innocent persons must suffer from the fraud of a third party, the loss should fall on him who has created or could have prevented the opportunity for the fraud, and that in such cases hardship is caused by the strict enforcement of the general rule that no one can confer a higher right on property than he himself possesses." (*Per* Sir Courtney Ilbert)—*Gazette of India*, 1884, Supplement, p. 182. The principle is that of the two innocent persons or equally guilty persons if the law has to make its choice as whom to penalize, the law will choose the person whose indiscretion has enabled the fraud and favours him who is in possession—*Mt. Ghulam Fatima v. Mt. Gopal Devi*, A.I.R. 1940 Lah. 269. See also *Henderson & Co. v. Williams*, (1895) 1 Q.B. 521; *Palaniveluppa v. Nachappa*, A.I.R. 1919 Mad. 247 and *Mewa Ram v. Ram Gopal*, A.I.R. 1926 All. 591 (601). This section forms an exception to the general rule that no one can convey a better title than he himself has in the property—*Kanthu Lal v. Palu Sahu*, 5 P.L.J. 521 (535), 57 I.C. 353; *Nainsukhdas v. Gowardhandas*, A.I.R. 1948 Nag. 110, I.L.R. 1947 Nag. 510. Where a Court sees that the rights of one of two innocent parties must be sacrificed, it is entitled to consider whether anything in the conduct of the party who comes into Court and seeks relief has debarred him from asserting his right—*Thakuri v. Kundan*, 17 All. 280 (281).

The rule in this section is based upon the doctrine of estoppel. "It is a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title unless he can overthrow that of the purchaser by showing that either he (the purchaser) had a direct notice, or something which amounted to constructive notice of the real title, or that there existed circumstances which ought to have put him upon an inquiry which, if prosecuted, would have led to a discovery of it"—*Ram Coomār v. McQueen*, 18 W.R. 166, 11 B.L.R. 46 (P.C.); *Khwaja Muhammad Khan v. Muhammad Ibrahim*, 26 All. 490; *Baidya Nath v. Alef Jan Bibi*, 36 C.L.J. 9; *Raja of Karvetnagar v. Saravana*, 4 L.W. 200, 35 I.C. 893 (898); *Maung Po v. Ma Myit*, A.I.R. 1933 Rang. 361 (362); *Lal Singh v. Paras Ram*, A.I.R. 1922 Nag. 226. A person shall not be permitted to represent a state of facts at one time, and afterwards when such representation has induced another to change his position, seek to show that as such his representation was erroneous—*per* Lord Halsbury, L.C. in *Colonial Bank v. Cady*, 15 App. Cas. 267. "Strangers can only look to the acts of the parties and to the external *indicia* of property, and not to the private communications which may pass between a principal and his banker, and if a person authorises another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority"—*per* Lord Ellenborough in *Pickering v. Busk*, 15 East 38 (43).

This section is another species of estoppel when the representation

is not made directly to the representee but when it consists in enabling the ostensible owners to mislead those with whom they are dealing on account of the special position of vantage in which they were placed by the conduct, express or implied, of the real owners—*Satyanarayana-murthi v. Pydayya*, A.I.R. 1943 Mad. 459. See also *Kapura v. Madso-dan*, A.I.R. 1943 Lah. 168; *Lal Singh v. Guru Granth Sahib*, A.I.R. 1951 Pepsu. 101. If the property was vested in an idol no estoppel could operate against it, unless perhaps it was guilty through its recognized agent of some laches and thereby induced a purchaser to believe in the ownership of a stranger. But human representative of the idol cannot defeat the claims of the idol merely by setting himself up as the owner of the property. If the property was vested in the trustee there could be no person against whom any estoppel could operate—*Ratan v. Suraj*, A.I.R. 1944 All. 1, I.L.R. 1944 All. 20.

As to the conditions which the section requires for its application see the following cases: *Baidyanath v. Alef Jan*, A.I.R. 1923 Cal. 240; *Gholam Siddique v. Jogendra Nath*, A.I.R. 1926 Cal. 916; *Sahar Banu v. Raj Bahadur*, 1934 Oudh 233; *Krishna Kishore v. Sarat Kumar*, 41 C.W.N. 797; *Catholic M. P. Convent v. Subbanna*, A.I.R. 1948 Mad. 320.

This section being an exception to the general rule that a person cannot convey a better title than what he himself has in the property, the conditions laid down in the section must be strictly fulfilled before its benefit can be available to the transferee—*Khushalchand v. Trimbak*, A.I.R. 1947 Bom. 49, I.L.R. 1946 Bom. 984.

183. Scope of section :—This section does not apply to a transfer of a decree of foreclosure, because such a transfer is not a transfer of immoveable property—*Mahomed v. Mu O*, 9 Bur. L.T. 121, 36 I.C. 426.

But the principle of this section applies to mortgages—*Mt. Ghulam Fatima v. Mt. Gopal Devi*, A.I.R. 1940 Lah. 269. See also *D. A. V. College v. Umrao Singh*, A.I.R. 1935 Lah. 410; *Arur Singh v. Santi*, A.I.R. 1936 Lah. 405. Where a Mahomedan, his wife and son had executed a mortgage of two houses and the mortgage deed had been registered as executed by the husband alone, the wife allowing the husband to represent himself as the ostensible owner of one of the houses belonging to her, this case was covered by the provision of this section—*Jai Singh v. Wali Mohammad*, A.I.R. 1940 Lah. 252. See however *Parvati v. Angamuthu*, A.I.R. 1942 Mad. 730, where it has been held that sec. 41 does not apply to the case of a mortgage. The fact that the assignee of a mortgage is a *bona fide* holder for consideration, cannot prevent the mortgagor or his successors successfully pleading that the mortgage bond in suit was not supported by consideration. If on the death of the mortgagee the entire mortgage security is released by one of the co-heirs, such release is not binding on the other co-heirs, because the co-sharer so releasing cannot be regarded as an ostensible owner—*Hajarkhan v. Kesarkhan*, A.I.R. 1968 Guj. 229.

The word 'transfer' in this section includes a payment in redemption of a mortgage. The payment redeeming a mortgage and thereby extinguishing the rights transferred by the mortgage is a transfer under

this section, inasmuch as the rights created by the mortgage in favour of the mortgagee are re-transferred to the mortgagor—*Ganpat v. Budhmal*, A.I.R. 1927 Nag. 86.

This section does not apply to the case of a purchase of the equity of redemption. A person who purchases the equity of redemption cannot repudiate his liability under the mortgage even if he purchases without notice of the mortgage, because there is no law which requires a mortgagee to give notice of his mortgage to the world—*Narayan v. Purushottam*, A.I.R. 1931 Nag. 144 (145).

A person making a purchase at an auction sale is not a transferee from a transferor who was in possession of the property with the consent, express or implied of another. In an auction sale the transfer is not by act of parties but by operation of law to which the judgment-debtor is no consenting party. The only remedy the law gives an auction purchaser is the refund of the purchase money in case the judgment-debtor is found to have no saleable interest at all. This section cannot, therefore, be applied in favour of an auction purchaser—*Mt. Shahar Bano v. Raj Bahadur*, A.I.R. 1934 Oudh 233 (235); *Mangat v. Ghasi*, (1930) A.L.J. 481; *Puran Mal v. Siva Pal*, (1934) 32 A.L.J. 1260; *Nand Lal v. Sunder Lal*, A.I.R. 1944 All. 17, I.L.R. 1943 All. 892; *Lalit Mohan v. Lachmi Raj*, A.I.R. 1946 Oudh 213. However, the principle of natural equity on which the provisions of this section as well as those in sec. 115, Evidence Act are based, apply to a Court-sale—*Sheikh Hussein v. Phoolchand*, A.I.R. 1952 Nag. 64.

It is not necessary to enter into any question under sec. 41 in order to decide whether a purchaser *pendente lite* is affected by the doctrine of *lis pendens*. An estoppel arising under this section cannot override the imperative provision of sec. 52—*Gendmal v. Laxman*, A.I.R. 1945 Nag. 86.

This section applies only to a voluntary transfer, and does not apply to a transfer made *in invitum* (auction sale) by an order of the Court under which the judgment-debtor himself does not join in the actual transfer—*Vaman v. Tikaram*, A.I.R. 1927 Bom. 368. See also *Ram Chandra v. Kondoo Jonga*, A.I.R. 1940 Nag. 7, and *Dwarika Halwai v. Sitla Prasad*, A.I.R. 1940 All. 256. But the Madras High Court has stated in a short judgment that although this Act applies only to transfers by act of parties, still the principle of this section applies in favour of an auction-purchaser in a court-sale—*Naraprath v. Paramboli*, 34 I.C. 494 (Mad.); and the Allahabad High Court in an earlier case applied the principle of this section to a case of auction-purchase—*Rasulan v. Nand Lal*, A.I.R. 1930 All. 521.

This section is not applicable to a transferee from a limited holder like a widow, either under the Hindu law or under the customary law, because the widow holds the limited rights in the property in her capacity as a widow and not as an ostensible owner—*Kapura v. Madsudan*, A.I.R. 1943 Lah. 168, 45 P.L.R. 183. A transferee from a Hindu widow, who takes the property from her before the reversioner's right has accrued, cannot successfully plead the bar of this section, although he was a *bona fide* transferee for value who had taken the property

after due inquiry—*Shib Deo v. Ram Prasad*, A.I.R. 1925 All. 79 (84); *Panchanan v. Balak Ram*, A.I.R. 1930 All. 374 (375); *Shambhu v. Muhadeo*, A.I.R. 1933 All. 493 (494). In cases where a person, who has allowed another to occupy the position of an ostensible owner, has a limited estate, the rule of this section applies only during the life-time of a limited owner and is not available to protect transferees against the claim of the reversioners—*Phool Kuer v. Prem Kuer*, A.I.R. 1952 S.C. 207.

Not only is it necessary that the transferee should have acted in good faith, but also that the transfer should have been made by the ostensible owner with the consent, express or implied, of the person interested. Payment of the consideration has also to be proved—*Nand Lal v. Karam Bibi*, A.I.R. 1933 Lah. 258 (259), 146 I.C. 210; *U Po v. Edward*, A.I.R. 1934 Rang. 139, 150 I.C. 898. In the absence of a finding that the transferee after taking reasonable care to ascertain that the transferor had power to make the transfer had acted in good faith, this section does not apply—*Nainsukhdas v. Govardhandas*, A.I.R. 1948 Nag. 110, I.L.R. 1947 Nag. 510. If the co-sharer entrusted with the management of the entire property transfers the entire property, the other co-sharers are not precluded from asserting their title simply because the revenue records mention the name of the transferor alone—*Suraj Rattan Thirani v. Azamabad Tea Co. Ltd.*, A.I.R. 1965 S.C. 295.

This section has no application to a case where the document executed earlier had been presented for registration without undue delay but after the document executed later had already been registered. Section 41 should not be read in such a way as to come into conflict with sec. 47 of the Registration Act—*Mathura v. Ambika*, 12 A.L.J. 993. See also *Bindeshri v. Somnath*, 14 A.L.J. 382.

This section extends to subsequent purchasers as well, and "it may safely be maintained that even if one of such purchasers had some sort of constructive notice, the defendant who is the last purchaser cannot be dislodged from his position as a *bona fide* purchaser for value without notice, without proof of circumstances bringing such notice home to him"—*per* Surhwardy, J. in *Gholam Siddique v. Jogendra Nath*, A.I.R. 1926 Cal. 916 (918).

If the first transferee from the *benamidar* is a *bona fide* purchaser for value without notice he acquires good title and any transferee from him with or without notice of the real title would in equity acquire a good title. If the first transferee is either a volunteer or a transferee for value but with notice, a *bona fide* transferee from him for value without notice would in equity be still protected on that principle—*Per* R. C. Mitter and Roxburgh, JJ. in *Purnendu v. Hanut Mull*, A.I.R. 1940 Cal. 565.

In terms this section does not apply to the Punjab; but the principle underlying it applies—*Shamsher Chand v. Mehr Chand*, A.I.R. 1947 Lah. 147 (F.B.), *Kanhiya Lal v. Deep Chand*, A.I.R. 1947 Lah. 199.

184. Consent :—This section does not require that the transaction to be binding on the real owner must have been entered into with his

consent—*Satyanarayanamurthi v. Pydayya*, A.I.R. 1943 Mad. 459, (1943) 1 M.L.J. 219; *Parvati v. Angamuthu*, A.I.R. 1942 Mad. 730.

For the application of this section it is essential that the consent of the true owner to the possession of the ostensible owner must continue up to the date of the transfer; but it is not necessary that the transfer itself should be with the consent of the owner. If it is proved that transfer was made with the consent of the rightful owner, the case would fall within the purview of sec. 115 of the Evidence Act and the other conditions of sec. 41 of the present Act need not be satisfied. Such consent will estop the owner even though the transferee made no inquiries to ascertain that the transferor had power to make the transfer—a condition which is essential for the application of sec. 41—*Fazal v. Md. Kazim*, A.I.R. 1934 All. 193; *Jesa Ram v. Ghulamam*, A.I.R. 1936 Lah. 816.

The mere fact that an entry is made in the survey register in favour of the transferor is not evidence of consent of the owner within the meaning of this section—*Perumal v. Subramania*, A.I.R. 1939 Mad. 299.

Where a woman allowed her husband to retain possession of title deeds of a property gifted to her by her father-in-law in lieu of dower, it was held that she impliedly consented to the husband holding himself out as the owner of the property and that a mortgagee from him was protected by this section—*Bhagat v. Fatima*, A.I.R. 1937 Pesh. 58. But this section cannot be applied to the case of the widow of a separated member of a Hindu joint family when nothing has been done by her by which her consent can be implied in allowing other members of the family executing a mortgage including therein the property left by her husband to pose as the ostensible owners in respect of that property—*Mt. Komal v. Gur Charan*, A.I.R. 1938 All. 242.

The consent referred to in this section must be an intelligent consent and not one brought about by misrepresentation on the part of the person making it as to his legal rights—*Dungaria v. Nand Lal*, 3 A.L.J. 534.

Consent may be express or implied, *i.e.*, consent need not always be by word, it may be by act or conduct, *e.g.*, by *acquiescence*. Acquiescence does not mean simply an active intelligent consent, but may be implied if a person is content not to oppose irregular acts which he knows are being done—*Duke of Leeds v. Earl of Amherst*, 2 Ph. 117; *Evans v. Smallcombe*, L.R. 3 H.L. 249; *Cowell v. Watts*, 2 Ht. & Tw. 224; *Ananda v. Parbati*, 4 C.L.J. 198 (207); *Sarat Chunder v. Gopal Chunder*, 19 I.A. 203, 20 Cal. 296 (311); *Bhimappa v. Basawa*, 29 Bom. 400 (403).

"If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by other party and upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms"—*per* Blackburn, L.J., in *Smith v. Hughes*, 6 Q.B. 607; *Sukhimoni v. Mohendra*, 4 B.L.R. 16 (P.C.); *Dungaria v. Nandlal*, 3 A.L.J. 534.

It is of the essence of this section that the conduct of the real owner must induce a belief in the transferee that his transferor had power to make the transfer—*Md. Sujat v. Chandbi*, A.I.R. 1927 Nag. 41.

The transferee must prove two things : (1) that he made bona fide enquiry, and (2) that the transferor was the ostensible owner with the consent of the real owner—*Motimul Sowcar v. Visalakshi Ammal*, A.I.R. 1965 Mad. 432; *Asrafi Devi v. Trilok Chand*, A.I.R. 1965 Punj. 140.

Express or implied consent to ostensible ownership imports that the real owner is in some manner, privy to the creation of the ostensible ownership—*Catholic M. P. Convent v. Subbanna*, A.I.R. 1948 Mad. 320, (1948). The words "consent express or implied" refer only to the transferor holding the property as ostensible owner and not also to the transfer sought to be protected under the section, *ibid*. The real owner's inaction or silence at a time when he was not conscious even of his own rights would not debar him from urging his own claim against a transferee even if he be one for valuable consideration—*Shamsher v. Mehr Chand*, A.I.R. 1947 Lah. 147 (F.B.).

Acquiescence is not a question of fact but of legal inference from facts found—*Beni Ram v. Kundan Lal*, 21 All. 496 (P.C.). It cannot be inferred from a mere absence of protest, especially where the party dealing with the property knew or could have known that the property he was dealing with belonged to another—*Fatehyab v. Muhammad*, 9 All. 434; *Uda Begam v. Immamuddin*, 1 All. 82; *Basauntappa v. Ranu*, 9 Bom. 86; *Chintaman v. Dareppa*, 14 Bom. 506. But it can be inferred from absence of acts of ownership for a long time. Thus, where for a long term of years no act of ownership was exercised by the plaintiff over the house in dispute, but, on the contrary, she allowed her husband's cousin to deal with the house apparently as the ostensible owner thereof, and in consequence of such conduct the defendant had been induced to purchase the same, it was held that the plaintiff could not successfully sue for recovering her share in the house—*Thakuri v. Kundan*, 17 All. 280 (281, 282).

If A applies to get his name entered in the Revenue papers, and B (the real owner) opposes the application for the entry, but in spite of the opposition A gets his name entered, A cannot be said to hold as an ostensible owner with the consent of the real owner—*Pateshri v. Nageshar*, 8 A.L.J. 358, 10 I.C. 961 (962); affirmed on appeal, *Nageshar v. Raja Galeshri*, 20 C.W.N. 265 (P.C.), 34 I.C. 673 (675), A.I.R. 1915 P.C. 103. Where a revenue sale in favour of the Government is void, a vendee from the Government cannot invoke the aid of sec. 41 against the defaulter—*Ramrao Jankiram v. State of Bombay*, A.I.R. 1963 S.C. 827.

Disclaimer by real owner :—A person who has disclaimed a title cannot be allowed to set it up afterwards to the prejudice of the parties who have purchased the disclaimed property from the ostensible owner in good faith and for value—*Fakhir Jahan v. Abdul Ghani*, 5 O.L.J. 49, 45 I.C. 307.

Transfer by ostensible owner after suit by real owner :—Although a

person may hold himself out as the ostensible owner of a property with the consent (express or implied) of the real owner, still if the real owner brings a suit against the ostensible owner for the possession of the property, and then the latter transfers the property after the institution of the suit, the previous consent must be deemed to be revoked by the act of filing the suit. Moreover, the estoppel arising under sec. 41 cannot override the imperative provision of *lis pendens* laid down in sec. 52. Further, it is immaterial that the ostensible owner, at the time of transferring the property, did not know that the real owner had filed a suit against him; for the pendency of the suit would by itself operate as a constructive notice of the revocation of the previous consent—*Shafiqullah v. Samiullah*, A.I.R. 1929 All. 943 (945).

Minors :—Where the alienation is made by the ostensible owner of a minor's property it is impossible for the latter to give his assent, either expressly or by implication; hence this section does not apply—*Kanhiya Lal v. Deep Chand*, A.I.R. 1947 Lah. 199; *Satyanarayanamurthi v. Pydayya*, A.I.R. 1943 Mad. 459; *Pooran Chand v. Radha Raman*, A.I.R. 1943 All. 197. In such a case the consent of the guardian is not sufficient—*Sadiq Hussain v. Co-operative Central Bank*, A.I.R. 1952 Nag. 106. Suit by a deity to set aside a mortgage by the sebaite is not hit by sec. 41—*Sri Thakur Krishna Chandramajiu v. Kanhayalal*, A.I.R. 1961 All. 206.

185. Person interested :—Under this section alienors must act as ostensible owners with the consent express or implied of "persons interested"—*D. A. V. College v. Umrao Singh*, A.I.R. 1935 Lah. 410, 157 I.C. 92. A guardian is not a person personally interested in the minor owner's property and therefore cannot give consent to a third party to hold himself out to the world as the owner of the infant's property so as to enable a transferee from such party to claim the benefit of this section—*Dambar Singh v. Jawitri*, 29 All. 292 (294). And a minor will not be bound by the consent given by his guardian in possession—*Ram Charan v. Joy Ram*, 17 C.W.N. 10, 16 I.C. 825 (828).

Similarly, religious endowments do not fall under this section, as the property is vested in the shrine and no particular person can give consent express or implied—*Ghulam Haidar v. Manager*, 73 I.C. 711.

186. Ostensible owner :—The expression 'ostensible owner' excludes such persons who hold possession of property professedly as agents, guardians or in any other fiduciary character—*Dambar Singh v. Jawitri*, 29 All. 292 (294); *Abdulla v. Bundi*, 34 All. 22 (24); *Maung Bya v. Maung San*, 4 Bur. L.T. 74, 10 I.C. 778; *Chandra Kanta v. Bhagjur*, 1 I.C. 525 (527); *Sadiq Hussein v. Co-operative Central Bank*, A.I.R. 1952 Nag. 106. A guardian cannot be said to be the ostensible owner with the consent, express or implied, of the minor—*Abdulla v. Bundi*, 34 All. 22 (24). As between members of a joint Hindu family the fact that the name of one member is used in acquisition of the property does not amount to the holding out of that member as the ostensible owner, and a person dealing with one such member can hardly say that he was misled, unless he proves that he had made full inquiries and could not ascertain his title—*Mt. Jasodar v. Mt. Sukurmani*, A.I.R. 1937

Pat. 353, 170 I.C. 1005. If a manager of a joint Hindu family consisting of minors alienates property, the alienee cannot be called an ostensible owner, with the consent of the real owners, because the minors cannot give their consent, express or implied, to the alienee appearing as the ostensible owner. Consequently, if the alienee transfers the property to some other person, that person cannot plead sec. 41, in a suit by the minors to recover possession. In such a case, the question whether such person made reasonable inquiries or acted in good faith is immaterial—*Shankar v. Daooji*, A.I.R. 1931 P.C. 118. The principle that the alienee of the interest of a Hindu coparcener is entitled to enforce his claim against the share to which the alienor was entitled at the time of the alienation unaffected by any birth or death subsequent to the date of alienation, applies to the case of the transferee who is protected under this section. The title of the alienee has to be considered with reference to the date of the transfer which could not be avoided by him or his legal representatives, if the other conditions of this section are found to have been complied with—*Satyannarayanamurthi v. Pydayya*, A.I.R. 1943 Mad. 459.

Where a vendee does not assert his right and the vendor is allowed to carry on the management, the latter may be an ostensible owner—*D. A. V. College v. Umrao Singh*, A.I.R. 1935 Lah. 410, 157 I.C. 92. Where a Burmese husband allowed his wife and children to hold themselves out as the sole owners of the properties and the wife and children mortgaged the property to a person who acted in good faith, it was held that the husband could not impugn the mortgage—*Maung Po. v. Maung Myit*, A.I.R. 1933 Rang. 361, 146 I.C. 1063. Where during the husband's absence on the pilgrimage the wife sold a piece of land which had before the husband's departure been mortgaged by her and the purchaser paid off the mortgage having by proper inquiries satisfied himself that the wife was the true owner, the husband was not allowed to recover the land, nor to redeem the mortgage—*Niras v. Mt. Tetri*, 20 C.W.N. 106. Where some of the co-sharers are shown as owners in the revenue records for a number of years, the other co-sharers cannot challenge a sale by the former—*Udho Das v. Meher Baksh*, A.I.R. 1933 Lah. 262, 144 I.C. 340. Where one partner has permitted another partner to deal with partnership property as an ostensible owner and such property is mortgaged by the latter to a bank, knowledge on the part of one member of the investigating committee of the bank in his personal capacity that the property belongs to the partnership is not itself sufficient to justify an inference as to knowledge on the part of the bank—*Punjab & Sind Bank v. Rustomji*, A.I.R. 1935 Lah. 821 (822).

Where the sons held the property as ostensible owners with the consent of the widow and the transferees had made sufficient inquiries, the widow was bound by the transfer made by the sons—*Mt. Shamsunnissa v. Ali Ashghar*, A.I.R. 1936 Oudh 87. A person entered only as eldest son in property register is not ostensible owner—*Siddappa v. Vishvanathsa*, A.I.R. 1943 Bom. 419. A charge holder under an award, recorded as proprietor in the D Register which refers to the award is not an ostensible owner and a transferee from him cannot assert title under this section—*South Bihar Sugar Mills v. Maharaj Prasad*, A.I.R.

1966 Pat. 75. Where a trustee allowed a person to hold himself out as owner in the sale of trust properties, the provisions of this section were attracted in the purchaser's favour—*Mulchand v. Hussomal*, A.I.R. 1937 Sind 177.

Where P permitted D to hold the shares in suit as exclusive owner, D became ostensible owner of the property with the implied consent of P.—*Chandi v. Anant*, A.I.R. 1943 Oudh 398. See also *Karamshi v. Ratanshi*, A.I.R. 1952 Kutch 55.

The material date for considering whether a particular person is the ostensible owner is no doubt the date of alienation; but inferences showing consent of the real owner can be made from previous as well as from subsequent conduct—*Karamshi v. Ratanshi*, *supra*.

The words "person interested in immoveable property" mean the full owner, and an 'ostensible owner' is a person who is apparently a full or unqualified owner, not a person who is only a qualified owner, such as a mortgagee—*Jogendra v. Salamat*, A.I.R. 1930 Cal. 92, (*per Mitter J.*, *Jack J. contra*); *Sita Ram v. Raj Narain*, A.I.R. 1934 Oudh 283 (285), 150 I.C. 145. A person cannot be said to be an ostensible owner when he had himself admitted in a previous transaction that he was no more than a mortgagee of the property in dispute; the fact that 30 years ago his name was recorded in the revenue papers as owner is immaterial—*Mohammad Shafi v. Mohammad Said*, A.I.R. 1930 All. 847 (848).

Where a charge was created by a decree on the property in the possession of the judgment-debtor, having the effect of reducing his full ownership into a limited ownership, *held* that he was not an ostensible owner of the property with the consent of the decree-holder, and he cannot give a good title to a transferee for value without notice—*Kallappa v. Balwant*, A.I.R. 1925 Bom. 443.

Where A was permitted to live on B's land on condition that A's wife should cook in B's house, it cannot be said that B held out A as the owner of the land—*Chooni Lal v. Nilmadhav*, A.I.R. 1925 Cal. 1034.

Where a Muhammadan husband transferred his property to his wife as *Mahr*, and in spite of it he continued in possession of the property and it stood in his name, *held* that he was the ostensible owner of the property with the implied consent of his wife—*Makkama v. Masabai*, A.I.R. 1925 Bom. 299. Where A, a lessee of Government land, transferred the lease to B by registered deed, but B did not apply to get his name registered in the rolls as transferee, and did not also take steps to obtain possession of the land, and further allowed the document of lease to remain in the possession of A, *held* that A was the "ostensible owner" of the property—*Chettyar Firm v. Mg. Kyaing*, A.I.R. 1929 Rang. 333 (335).

The purchaser from one of the members of a joint family some property owned by the joint family is not an ostensible owner even though the vendor dealt with the property sold as his exclusive property—*Rangaswami v. Sundarapandia*, A.I.R. 1928 Mad. 635 (636); *Ladhibai v. Ravji Nagshi*, A.I.R. 1950 Kutch 34. The female members of a

Mahomedan family being pardanashin ladies naturally leave the management of the property to their male relations; so where a mortgagee from the male members makes no inquiries, and there is nothing to show that he is misled by the female members by word or conduct that they have no proprietary interest in the property, the mortgage cannot be enforced against the interests of the female members—*Azima v. Shama-lanand*, 40 Cal. 378 (P.C.).

Where the manager got his name entered in the municipal house-tax register, during the prolonged absence of the owner, *held* that the entry was only made for the purpose of assessment and collection of house tax and was not intended for registering title. Such an entry was not enough to induce anybody to think that the manager had a right to sell the property—*Mahomed Sulaiman v. Sakina Bibi*, A.I.R. 1922 All. 392. The mere fact that a certain person's name appears in the mutation register is not sufficient to make him the ostensible owner, when the mutation proceedings disclose the fact that other persons claimed ownership in the property—*Amir Jahan v. Khadim Husain*, A.I.R. 1931 Oudh 253 (255).

The question as to whether a person is an ostensible owner with the consent of the real owner is a question of fact—*Jamna Das v. Uma Shankar*; *Siddappa v. Vishwanathsa*, A.I.R. 1943 Bom. 419. If A after obtaining possession under a decree for possession inducts tenants and thereafter the decree is set aside on appeal the tenants cannot say that A being an ostensible owner they cannot be evicted on an application under sec. 144 C.P.C.—*Manickchand v. Gangadhar*, A.I.R. 1961 Bom. 288.

Reversioner :—Since a Hindu female cannot transfer any property without legal necessity, it follows that if she orally transfers a portion of the property to a reversioner and puts him in possession, such reversioner cannot be called an ostensible owner with the consent of the female or of the other reversioners—*Shambhu v. Mahadeo*, A.I.R. 1933 All. 493 (494).

Benamidar :—The *benami* system in this country has long been a common practice. The *benamidar*, though he has no beneficial interest in the property or business standing in his name, represents in fact that real owner, and is, so far as their relative legal position is concerned, a mere trustee for him—*Gur Narayan v. Sheolal*, 46 Cal. 566 (P.C.); *Bilas v. Desraj*, 37 All. 557, 42 I.A. 242. Where the real owner of immoveable property had permitted the *benami* owner to hold himself out as the real owner, and a third person had purchased from such *benami* owner for value, *held* that the real owner could not recover unless he could prove that the purchaser had direct or constructive notice of the real title or that there existed circumstances which ought to have put him on an inquiry which, if prosecuted, would have led to the discovery of the real title—*Jokhu v. Mehdi*, 1881 A.W.N. 67. So if property is purchased in the name of a *benamidar* and the *indicia* of ownership are placed in his hands, the true owner can only get rid of the effect of an alienation by showing that it was made without his acquiescence and that the purchaser took with notice of that fact—*Bhugwan v. Upooch*,

10 W.R. 185. See also *Fakruddin v. Ramayya*, A.I.R. 1944 Mad. 299; *Souriyar v. Raman*, A.I.R. 1952 Tr.Coch. 479. Where the owner of a property, being hard pressed by creditors executes a *benami* sale-deed, but continues in possession of the property, and the benamidar sells the property to a third person who has knowledge of the benami nature of the transaction which amounts to fraud, and the purchaser brings a suit to recover possession, the Court will neither assist the purchaser nor the real owner—*Lakshman v. Vasudeo*, A.I.R. 1931 Bom. 227 (229). Where R after purchasing benami for C at a court sale executes a release disclosing the real position, C's son, in a suit for declaration of title and possession, which is not hit by sec. 66, C.P.C., is entitled to get a decree on the basis of the deed of release, which is sufficient to validate the pre-existing title of C without any formal conveyance—*Rangaswami v. Krishnan*, (1968) 81 Mad. L.W. 301. Where a husband purchased property in the name of his wife, representing that the purchase money was her *stridhan*; the wife took possession of the property and the husband was never in possession, and the husband, in all his acts both private and public, during his life-time, represented that the property was his wife's; and then the wife sold the property after her husband's death, *held* that the heirs of the husband could not recover the property from the purchaser—*Luchman Chunder v. Kalli Charan*, 19 W.R. 292 (P.C.) See also *Satyanarayanamurthi v. Pydayya*, A.I.R. 1943 Mad. 459. The plaintiff executed a sale deed in favour of defendant No. 2 for screening the properties in the deed of sale against his creditors. Defendant No. 1 purchased the properties from defendant No. 2. The actual possession of the properties was with the plaintiff, but such possession was not inconsistent with the title of defendant No. 2. *Held*, the plaintiff could not avoid the sale—*Arta Rout v. Bhagavat Baral*, A.I.R. 1957 Orissa 157. Similarly where a husband purchased property in the name of his wife, and the kabuliya, towjis and counterfoil rent-receipts all stood in the wife's name, and the husband had never himself held title to the property in his own name, *held* that a person taking a mortgage from her was protected by this section—*Annada Mohan v. Nilphamari Loan Office*, 26 C.W.N. 436 (439), 65 I.C. 245. Where the names of the grandsons of a Mahomedan were entered in the revenue papers as being the owners of the property mortgaged by them, the co-sharers of the grandsons had no claim as against the mortgagees except as owners of the equity of redemption—*Mubarkaunnessa v. Md. Raza*, A.I.R. 1924 All. 324. But where the transferee from a benamidar made no attempt to call for the title-deeds of the property which had been with the real owner, he would be deprived of the protection given under this section—*Ram Charan v. Joyram*, 17 C.W.N. 10. Where one of the judgment-debtors paid the decree-holder and got the decree transferred in his benamidar's name and the decree was bought from such benamidar by another for valuable consideration and in good faith and he took out execution against the judgment-debtor: *held* that the principle of this section applied and the judgment-debtor was liable; *held* further that even assuming that the benami was justifiable, the principle that whenever one of two innocent persons had to suffer by the act of a third person, the person who enabled the third person to

occasion the loss must sustain it, was applicable—*Swaminatha v. Krishna*, A.I.R. 1942 Mad. 28.

Proof :—The transferee is to prove that his transferor was the ostensible owner on the date of the transfer, and not at some date in the past—*Sadiq Hussein v. Co-operative Central Bank*, A.I.R. 1952 Nag. 106. Dealing by the person claiming ostensible ownership must be such as to fix those dealing with such person with notice that he was exercising acts of ownership over the property—*Sanker v. Naranji*, A.I.R. 1951 Kutch 85.

186A. Voidable :—This section does not say that a purchaser from the ostensible owner who purchases with notice of the real title acquires no title. He acquires a title which is voidable at the instance of the real owner, and until his purchase is avoided, he can deal with the property—*Purnendu v. Hanut Mull*, A.I.R. 1940 Cal. 565.

187. When purchaser will be protected :—The first step which the transferee is expected to take is to search the registration office to ascertain what transfers, if any, have been made by the transferor. Where the transferee fails to do so, he cannot claim the benefit of this section—*Mt. Fatima v. Shib Singh*, A.I.R. 1933 All. 917 (918).

Where the subsequent purchaser while making search in the Registry Office in the ordinary way could not discover a mortgage owing primarily to the negligence of the mortgagee in giving proper description of the properties and consequent failure to make proper index, the subsequent purchaser was preferred to the mortgagee—*Galliera v. U Thet*, A.I.R. 1929 Rang. 117.

The usual search is for a period of twelve years, and when there are no circumstances whatever to indicate that the search of the registration office should be made for a longer period the transferee need not make such a search—*Mazhar v. Mukhtar*, A.I.R. 1938 All. 64.

188. Proviso : Reasonable care or inquiry :—The Proviso to this section requires that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, should act in good faith. Whether a particular transferee has acted so, must depend on the circumstances of each case—*Abdul Gafur v. Nawab Ali*, A.I.R. 1949 Ass. 17; *Satyanarayanamurthi v. Pydayya*, A.I.R. 1943 Mad. 459; *Chandi v. Anant*, A.I.R. 1943 Oudh 398; *Parvati v. Angamuthu*, A.I.R. 1942 Mad. 730; *Catholic M. P. Convent v. Subbanna*, A.I.R. 1948 Mad. 320; *Khushalchand v. Trimbak*, A.I.R. 1947 Bom. 49. This question is a question of law and requires careful consideration. Some circumstances would *prima facie* arouse suspicion and would call for detailed inquiry, while other circumstances would make only a nominal inquiry sufficient—*Chandi v. Gadadhar*, A.I.R. 1949 Cal. 666. See also *Catholic M. P. Convent v. Subbanna*, *supra*. But see *Nainsukhdas v. Gowardhandas*, A.I.R. 1948 Nag. 110, where it has been held that this question is a question of fact.

A purchaser from the ostensible owner cannot resist the real owner's title unless he can show that he took *reasonable care* to ascertain that the transferring ostensible owner had power to make the transfer

and that he (the purchaser) acted in good faith—*Pateshri v. Nageshar*, 8 A.L.J. 358, 10 I.C. 961 (962); *Mohammad Shafi v. Mohammad Said*, A.I.R. 1930 All. 847 (848); *Rahiman v. Khathoon*, 4 L.W. 193, 35 I.C. 569; *Thungavelu v. Mangathaye*, (1913) M.W.N. 674, 21 I.C. 21 (22); *Kanhu Lal v. Palu Sahu*, 5 P.L.J. 521 (534, 536); *Sheo Gobind v. Anwar Ali*, A.I.R. 1929 Pat. 305 (306); *Ram Charan v. Joy Ram*, 16 I.C. 825 (829), 17 C.W.N. 10; *Kasturi Bibi v. Balliram*, A.I.R. 1923 Nag. 15. It is necessary under this section to prove not merely consideration but also good faith and due inquiry—*Lakshman v. Vasudeo*, A.I.R. 1931 Bom. 227; *U Po v. Edward*, A.I.R. 1934 Rang. 139. See also *Jadam Jampur Bai v. Janki Siddappa*, A.I.R. 1944 Mad. 237.

Where there are certain avenues of inquiry open to the purchaser and the purchaser refuses or omits to make such inquiries, he cannot be allowed to take advantage of this section—*Sheotahal v. Ram Narain*, A.I.R. 1930 All. 422, 124 I.C. 413. But where had the transferee made inquiries he would have found that the transferor, who was in possession, had prior to the issue of the lease to him by the Government been in possession of the property under an earlier lease and that she had actually remained in possession of the document evidencing that earlier lease until the issue of a new lease, the transferee was not guilty of any default such as would deprive him of the benefit of sec. 41—*Chettyar Firm v. Maung Kyaing*, A.I.R. 1929 Rang. 333.

Where however it appeared that in the conveyance it was recited that the purchase was being made by the vendee, a woman with her *stridhan* money and in which her husband was an attesting witness and it was subsequently claimed that the purchase was made benami by the husband, it was held that the person purchasing from the woman, though he purchased from an ostensible owner, did not take reasonable care and make necessary inquiries as a prudent man—*Krishna Kishore v. Sarat Kumari*, 41 C.W.N. 787.

Only those persons are entitled to claim protection under this section who, in spite of necessary enquiry, have not been able to discover who the real owner of the property is, and who have, in full belief that the person making a transfer in their favour is the person really entitled to that property, taken the transfer from him—*Jagmohan v. Indar*, A.I.R. 1929 Oudh 160 (162); *Jamsedji v. Dorabji*, A.I.R. 1934 Bom. 1; *Shahar Banu v. Raj Bahadur*, A.I.R. 1934 Oudh 233; *Ram Charan v. Joy Ram*, 17 C.W.N. 10; *Sadha v. Mangal*, A.I.R. 1933 Oudh 166. No purchaser can protect himself against the claim of a real owner merely by saying that he had no notice of the real owner's title. When he has taken reasonable care to ascertain his vendor's title, then no doubt if there is an equitable interest of which he could by such reasonable care discover no trace, the doctrine of purchase for value without notice holds good—*Zungabai Bhawani v. Appaji*, 9 Bom. L.R. 388. Anybody purchasing a property has to make a reasonable inquiry as to the title of his vendor; much more in a case where he sets up a title of the ostensible owner as against the title of the real owner—*Sheogobind v. Anwar Ali*, A.I.R. 1929 Pat. 305 (307). Where a person takes transfer of a property, though informed of the existence of a registered sale deed in favour of another without probing further to see whether the

transferor had in law the power to make the transfer he cannot get the benefit of sec. 41—*Raghnath Lala v. Mansa Amrit*, 64 Punj. L.R. 230.

Reasonable care is to be expected from every one who claims to have purchased free from a really existing right, equitable or legal, and when the purchaser has failed to exercise it, he cannot claim that the real owner should be called on to prove his good faith and innocence instead—*Zungabai Bhawani v. Appaji*, 9 Bom. L.R. 388.

What is to be deemed “reasonable care” is a question of fact (*Jamma Das v. Uma Shankar*, 36 All. 308 at p. 312) and depends upon the circumstances of each case—*Gopala v. Arasappa*, A.I.R. 1940 Mad. 523. It is one that is expected of an ordinary prudent man of business—*Kanhu Lal v. Palu Sahu*, 5 P.L.J. 521 (534), 57 I.C. 353; *Partap v. Saiyida*, 23 All. 442 (447); *Macneil & Co. v. Saroda*, A.I.R. 1929 Cal. 83 (86); *Gholam Shiddique v. Jogendra*, A.I.R. 1926 Cal. 916; *Cheetiyar Firm v. Kallamma*, A.I.R. 1935 Rang. 423; *D. A. V. College v. Umrao Singh*, A.I.R. 1935 Lah. 410 (412). The ordinary standard of diligence required for ascertaining whether the transferor has power to transfer is calling for the title under which he claims and inspecting the title-deeds. If in the document itself that was produced as the title-deed there was any indication with regard to the existence of some other document then the matter might conceivably be otherwise. It is possible, even in such a case, to hold that if after inspecting the other document a person should come to the conclusion that his transferor had power to transfer and obtains a transfer, such a case may also be covered by sec. 41—*Sethumadhava v. Bacha Bibi*, A.I.R. 1928 Mad. 778 (780, 781).

This section requires reasonable care, not generally, not with regard to every aspect of the transaction, but merely for the purpose of ascertaining that the transferor had the power to make the transfer—*Sethu Madhava v. Bacha Bibi* (supra).

A purchaser who wilfully departs from an inquiry in order to avoid acquiring a knowledge of this vendor's title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted the business in the ordinary way. The words ‘reasonable care’ in this section are to be understood in the above sense—*Manji v. Hoorbai*, 35 Bom. 342 (348), following *Bailey v. Barnes*, [1894] 1 Ch. 25 (35). A transferee cannot claim the protection of this section if it appears that if he had acted diligently and prudently and pushed his inquiries further afield, he could have discovered the true position of his transferor (viz., that he was not the owner but a mere mortgagee) —*Mohammad Shafi v. Mohammad Said*, A.I.R. 1930 All. 847 (848). A transferee cannot be allowed the benefit of the principle contained in this section when the slightest inquiry would have sufficed to acquaint him with the fact that land stood in the real owner's name in the revenue maps and registers—*Maung Hmwe v. Ma Lun*, 4 Bur. L.T. 186, 11 I.C. 855; or when the mortgagee could have ascertained on the slightest inquiry that the property belonged not to the mortgagor alone but to him as well as his other brothers—*Maung Than v. Ma On*, 4 Bur. L.T. 143, 12 I.C. 858. A purchaser of land at

the time of his purchase knew that the property had been previously mortgaged by his vendor and his father, and that the father lived in a house on the land. *Held* that the purchaser was by reason of the mortgage put upon inquiry as to the father's interest in the land and could not therefore claim to be a *bona fide* purchaser for value from the ostensible owner (the son) in whose name the property stood in the revenue registers—*Mahomed Ebrahim v. Maung Ba*, 7 Bur. L.T. 69, 24 I.C. 482 (483). A person who takes a mortgage from one whom he knows to be a sister's son of the last owner ought to take reasonable care to enquire and ascertain as to whether there are any collaterals in existence of the owner—*Ballu Mal v. Ram Kishan*, 43 All. 263 (265). A man who chooses to act upon a Collector's certificate in Madras as evidence of title does so at his own risk, and cannot be said to act with reasonable care and good faith—*Thungavelu v. Mangathaye*, 1913 M.W.N. 674, 21 I.C. 21 (23). Where a person purchased property from one of the four members of a joint family, and it appeared that though the property stood in the vendor's name, a little enquiry on the part of the purchaser would have put him on notice that it really belonged to the joint family, *held* that, the purchaser was not protected by this section—*Rajani Kanta v. Bashiram*, A.I.R. 1929 Cal. 636 (638), 121 I.C. 409. The mere fact that certain property is found entered in the record of rights in the name of one person only who happens to be the *Karta* of the family and that the junior members have allowed the entry to stand, does not justify a transferee, who takes a mortgage from the recorded owner alone, in making no further inquiry. He must inquire as to whether and how far the other members are interested in it. His refusal to inquire into the title-deeds and resting content with the entry in the record-of-rights gives him no protection against the other members—*Kanhu v. Palu Sahu*, 5 P.L.J. 521 (533), 1 P.L.T. 546, 57 I.C. 353. The mere entry of one's name as owner of a property either in the Government records or in private papers does not relieve the purchaser from such owner from the duty of making an enquiry into the title of that owner—*Sheo Gobind v. Anwar, Ali*, 10 P.L.T. 254, 116 I.C. 779, A.I.R. 1929 Pat. 305 (306). A Government official acquired some zemindary property in the district in which he was employed, and he caused that property to be recorded in the Revenue papers in his sons' names. The sons sold the property. It was held that as there were other circumstances which rendered it incumbent on the transferees not to rest satisfied with merely seeing that the names of the transferors were entered in the revenue records, the transferees did not use reasonable care—*Pratap Chand v. Saidiya*, 23 All. 442 (447). Where a purchaser is told that the vendor derives his title under a registered deed and the purchaser does not ask for the production of the original deed he must be deemed to have constructive notice of the contents of the deed—*Yew Sit v. Maung Dawood*, 1 L.B.R. 196. A purchaser who merely relies on mutation of names does not act with reasonable care, for mutation of names by itself creates no proprietary title (*Chokhey Singh v. Jote Singh*, 31 All. 73 P.C.). Mutation is merely a statement of the facts which existed as to possession of the property. Consequently, neither the mutation entry nor the entry in the Record of Rights or revenue papers can supply the place of a title-deed; and a pur-

chaser who acts upon such an entry as evidence of title does so at his own risk—*Md. Sujat v. Chandbi*, A.I.R. 1927 Nag. 41 (42); *Hargovind v. Ambika*, A.I.R. 1934 Oudh 165; *Ram Chalitra v. Shivanandan*, A.I.R. 1934 Pat. 67.

But where during the husband's absence on a pilgrimage, the wife sold a piece of land which had before the husband's departure been mortgaged by her with the husband's consent, and the purchaser who paid off the mortgage satisfied himself by proper inquiries that the wife's name was entered in the *Raja sereshita* as owner, *held* that the husband could not recover the land nor redeem the mortgage—*Niras Purbe v. Tetri Pasin*, 20 C.W.N. 103 (104), 32 I.C. 82. A Hindu husband purchased property in the name of his wife, and held her out as the owner of the property. After her husband's death the wife mortgaged the property, and the mortgagee made enquiries in the village, looked at the kabala and other papers, *viz.*, kabuliats, toujis and counter-foil rent-receipts, and found that they all were given in the wife's name. *Held* that the mortgagee was protected by this section—*Annada Mohan v. Nilphamari Loan Office*, 26 C.W.N. 436 (439), 65 I.C. 245. Where the defendant before purchasing a mahal from the *farzidar* of the plaintiff, made inquiries in the Registration Office and from the rayats of the village, which satisfied him that the *farzidar* was the real owner of the *mahal*, and he also consulted his Mukhtar who got for him copies of the documents wherein the beneficial owner admitted the title of the ostensible owner, *held* that the defendant being a *bona fide* purchaser for value from the ostensible owner, the plaintiff was estopped under this section from setting up his title to the mahal—*Ram Sundar v. Ram Narain*, 48 I.C. 936. Where the purchaser made inquiries from other transferees of the transferor and was told that except the transferor there was no other person who had any interest in the property, and the purchaser further inspected the Municipal Records and made inquiries in the Registration Office, but found nothing which might have put him on further inquiry, *held* that the purchaser had taken reasonable care and was protected by this section—*Md. Shakur Khan v. Shahjahan*, 63 I.C. 125 (126) (All.).

189. **Nature of the inquiry:**—It is impossible to lay down any general rule as to the nature of the inquiry which the intending purchaser should make. It must depend upon the circumstances of each case—*Zungabai v. Appaji*, 9 Bom. L.R. 388 (391); *Manji v. Hoorbai*, 35 Bom. 342, 12 Bom. L.R. 1044. But without laying down any general rule, it may be said that the inquiries must be of such a specific character that the Court can place its finger upon them and say that upon such facts some particular inquiry ought to have been made. Some specific circumstance should be pointed out as the starting point of an inquiry which might be expected to lead to some result. *Ram Coomar v. McQueen*, 11 B.L.R. 46 (54), 18 W.R. 166 (P.C.); *Macneil & Co. v. Saroda Sundari*, A.I.R. 1929 Cal. 83 (86); *Baidya Nath v. Alef Jan*, A.I.R. 1923 Cal. 423; *Chettyar Firm v. Kaliamma*, A.I.R. 1935 Rang. 423, 161 I.C. 221; *Mt. Jasodar v. Mt. Sukurmani*, A.I.R. 1937 Pat. 353; *Natabar v. Nimai*, A.I.R. 1952 Or. 75. Thus, a vendee should not be content with the paper title disclosed by the sale-deed but should also

make inquiries of the person in actual possession as to his title—*Vyan-kappa v. Yamnasami*, 35 Bom. 269 (271), 10 I.C. 817. It is obvious that the first step which the transferee is expected to take is to search the registration office to ascertain what transfers, if any, had been made by the transferor. Where the transferee fails to do so, he cannot claim the benefit of this section—*Khatun Fatima v. Shib Singh*, 1933 A.L.J. 1036, A.I.R. 1933 All. 917 (918). Where the property sold is house property in a town, the benefit of this section cannot be allowed to any transferee who takes a transfer without first undertaking a scrutiny of the relevant registers in the registration office—*Kanhaiya Lal v. Deep Chand*, A.I.R. 1947 Lah. 199, 48 P.L.R. 454.

Extent of inquiry :—It cannot be laid down, as a general rule, that where the transferor was in sole possession for a considerable length of time and was the sole recorded owner, the transferee, who otherwise acts in good faith, is entitled to the protection of this section, if he satisfied himself by inspecting the revenue records. The only test that can be laid down is that the transferee should show that he acted like a reasonable man of business and with ordinary prudence. Such a person would not be satisfied by merely inspecting the revenue records, but would inquire as to how his vendor acquired the property. If the source of his vendor's title appears to be a transfer, he should call for the title deeds; if it appears to be by inheritance, he would naturally inquire as to who were the heirs of the deceased owner, and if he is satisfied that his vendor was the only heir he is entitled to the protection of sec. 41, though it may subsequently turn out that there were other heirs as well—*Fazal v. Md. Kazim*, A.I.R. 1934 All. 193. There can be no inquiry when there is nothing to inquire about. Therefore, further inquiry becomes supererogatory when the transfer is proposed, encouraged or acquiesced in by the very person whose title or interest it was to challenge the transfer—*Sarat Chunder v. Gopal Chunder*, 20 Cal. 296 (308) (P.C.). Where a person is found in possession of property, is recorded as owner, and holds title-deeds of the property, and deals with a third party in respect of it, there is nothing to suggest a want of good faith in such third party in dealing with him in respect of the property and nothing to suggest a want of care in examining the title by reason of the fact that he made no further inquiries as to title—*Khawaja Muhammad Khan v. Muhammad Ibrahim*, 26 All. 490; *Gholam Siddique v. Jogendra*, A.I.R. 1926 Cal. 916. Where the real owners by their conduct or omission allowed the ostensible owners to get their names recorded in the revenue papers to exclusion of the former, which entries remained unchallenged by the true owners throughout, and the transferees from the ostensible owners examined the entries in the revenue papers which contained a detailed description of the property, held that the transferees had acted in good faith—*Mubarakunnissa v. Mahommed Raza*, A.I.R. 1924 All. 384. Where the property stood in the name of the vendor (ostensible owner) in the revenue records, and there was really nothing to put the purchaser on an inquiry, held that the purchaser need not have made any further inquiry as to the vendor's interest in the property—*Mathura Prasad v. Anandi Kunwar*, 21 A.L.J. 498, A.I.R. 1924 All. 63, 74 I.C. 911. One H and his sister R inherited the property of their mother, but the name of H alone was recorded

in the revenue papers and he dealt with the whole of the property as his own. In 1896 he alone mortgaged the property, and afterwards redeemed the mortgage. R had not taken any exception to that mortgage. Twenty years afterwards, he again mortgaged the property to the same mortgagee who satisfied himself that H's name was still in the revenue papers as the recognised owner of the property. R then sued to annul the mortgage so far as her share of the property was concerned and to recover her share. *Held* that the mortgagee was protected by this section—*Mulraj v. Fazal Imam*, A.I.R. 1913 All. 583. Where under a registered anomalous mortgage the mortgagee is entitled to possession after a specified period, he can recover possession from the transferee of the mortgagor even if the mortgage is not entered in the revenue records—*Hira Singh v. Afzal Khan*, A.I.R. 1941 Pesh. 59; see also *Narayan v. Purushottam*, A.I.R. 1931 Nag. 144.

A mere inspection of the revenue records is not a sufficient inquiry, and the transferee who acts on an entry in the village record of rights as evidence of title of his transferor cannot be said to have acted in good faith within the meaning of this section—*Sadiq Hussein v. Co-operative Central Bank*, A.I.R. 1952 Nag. 106; *Har Narain v. Ashiq Husain*, A.I.R. 1942 Oudh 313. Where there are registered deeds of sale, it is not sufficient for a person merely to look at the revenue records—*Dwarkan Das v. Rangi Lal*, A.I.R. 1953 Punj. 289 following the dissentient judgment of Mahajan J in *Shamsher v. Mehr Chand*, A.I.R. 1947 Lah. 147 (F.B.). It may be that in certain circumstances an examination of the revenue records coupled with the fact of possession of the transferor would amount to a sufficient inquiry, but it does not dispense with the duty to make an inquiry in the Sub-Registrar's office which has been imposed upon every one taking a transfer of immoveable property, by Explanation (1) of sec. 3 *ante*—*Khushalchand v. Trimbak*, A.I.R. 1947 Bom. 49.

If the title of the transferors is based upon prior transfers, and they have the custody of the title-deeds showing them as apparent purchasers of property, a transferee from them can rely upon those deeds, and will thereby be protected by this section. If, however, the title of the transferors was by inheritance from their father, it is incumbent on the transferee to use reasonable care in ascertaining whether the transferors were the only persons on whom the inheritance devolved or there were other co-heirs. If the transferors are Mahomedans, that fact ought to put the purchaser on inquiry as to whether there was a female heir in addition to the transferors—*Md. Sujat v. Chandbi*, A.I.R. 1927 Nag. 41 (42). See also *Ballu Mal v. Ram Kishen*, 43 All. 263 cited in Note 188. In case of Mahomedans, the inspection of the *Khewat* alone is not sufficient; because in most cases coming from Mahomedan families the names of mother and sisters (who are also heirs of a deceased Mahomedan) are never entered in the *Khewat*. The purchaser must take further precautions and make a better inquiry into the title of the transferors—*Rasulan v. Nand Lal*, A.I.R. 1930 All. 521 (522).

190. **Good faith**:—The purchaser must not only show that he was a purchaser for value, he must also prove his *good faith*—*Mulji v. Macleod*, 5 Bom. L.R. 991. A transferee who is aware of the fact

that the transferor could not be the real owner of the properties is not protected under this section—*Mollaya v. Krishnaswami*, A.I.R. 1925 Mad. 95 (101); *Gurbaksh Singh v. Nikka Singh*, A.I.R. 1963 S.C. 1917. A mortgagee who lived in the same locality as the mortgagor and had been lending money to the mortgagor's family for a long time and was apparently acquainted with all the circumstances of the family, cannot claim to be a transferee for good faith without notice of the absence of title of the transferor—*Pateshri v. Nageshar*, 8 A.L.J. 358, 10 I.C. 961 (962); affirmed on appeal, A.I.R. 1915 P.C. 103. A purchaser who was intimately connected with the affairs of the transferor, for about 14 years, and who prepared the sale-deed with the assistance of persons who knew everything that ought to be known about the estate of the transferor and knew that the latter had no power of alienation cannot claim the benefit of the provisions of this section—*Hanuman v. Abbas*, A.I.R. 1929 Oudh 193 (202). In the case of a transfer by the uncle to his nephew, the parties must be presumed to have known the real nature of the transaction; therefore the nephew cannot be considered to be a transferee without notice, under this section—*Mengha Ram v. Makhna*, A.I.R. 1941 Lah. 416. A person who purchases property from another, knowing that with respect to it a suit had been filed by a third party against the vendor, cannot be said to have acted in good faith—*Ragho v. Dwarka Das*, A.I.R. 1924 Lah. 738. But when the transferee, however minute his inquiries might have been, would not have found any reason to believe that the transferor was not fully empowered to make the transfer, and in fact no clue existed to suggest that a third person laid any claim to the property, it cannot be said that the transferee was not acting in good faith—*Maung Po v. Bank of Chetland*, A.I.R. 1934 Rang. 139. If P purchases from T a property which has been in possession of D ever since the execution of the deed of sale in favour of T, it cannot be said that P has acted in good faith—*Ramsaran Mahton v. Harihar Prasad*, A.I.R. 1961 Pat. 314. Where a person purchases without any enquiry from a Muslim co-owner on the latter's vague claim to possessory title and the true-owner of the share does not consent to the transfer expressly or impliedly, the transferee is not entitled to protection under this section—*Haji Gulam Ahmed v. K. T. A. Basheer Ahmed*, A.I.R. 1960 Mad. 399.

One S was the landlord of one R, the Mahant of a temple, and shown in the revenue records as the occupancy tenant. R released the occupancy right in favour of S who transferred the land to one T. T made no inquiries as to the title of S. All that he did was to rely on the word of S and R; so was not proved to have acted in good faith—*Narshingdas v. Sohan Lal*, A.I.R. 1952 Punj. 289. See in this connection *Anjuman Islamia v. Latafat Ali*, A.I.R. 1950 All. 109, (a case of *waqf*). See also *Karamshi v. Ratanshi*, A.I.R. 1952 Kutch 55.

Where an ostensible owner transfers a property, to give a valid title to the purchaser as against the real owner, he must establish that he made reasonable inquiries, consideration and good faith alone are not sufficient, nor is an entry in the revenue papers sufficient—*Khwaja Afzal v. Mohamed Saheb*, A.I.R. 1936 Nag. 214. A purchaser or a mortgagee cannot be said to have acted in good faith and with reasonable care simply because he entrusted the inquiry into title to a solici-

tor whom he trusted and only completed the transaction after he was told by his solicitor that everything was right—*Purnendu v. Haunt Mull*, A.I.R. 1940 Cal. 565.

A finding of the absence of negligence is not the same thing as a finding of good faith—*Hakeman v. Badrunnissa*, A.I.R. 1934 Lah. 658. A finding that the transferee did not act in good faith is a finding of fact and must be accepted in second appeal—*Ambabai v. Dani*, A.I.R. 1948 Nag. 367. Whether a transferee took reasonable care to ascertain whether the transferor had power to make transfer is a mixed question of law and fact—*Sarju Kairi v. Panchananda Sharma*, A.I.R. 1959 Assam 15.

191. Extent of the interest transferred :—If the vendor professes to transfer and the purchaser in good faith purchases an absolute interest, he acquires absolute ownership, notwithstanding that his vendor had a lesser interest—*Sethu Madhava v. Bacha Bibi*, A.I.R. 1298 Mad. 778. But in an Allahabad case, the following opinion has been expressed by Niamatullah, J. :—“It is open to question whether, if the vendor possessed lesser interest than what he sold, the vendee's position would be better only because he was ignorant of the real state of his vendor's title. It is likewise open to question whether sec. 41, T. P. Act in terms applies to a case of this kind”—*Sahodra v. Badri Prasad*, A.I.R. 1929 All. 737 (789).

192. Burden of proof :—For the application of sec. 41 to a transfer the alienee must show in the first instance that the owner has held out some other person as the ostensible owner of the property. It is only then that the owner has to show that the alienee had some notice of his true title—*Jadam Jampur Bai v. Janki Siddappa*, A.I.R. 1944 Mad. 237; *Sunder Kuer v. Udey Ram*, A.I.R. 1944 All. 42. Where one man allows another to hold himself out as the real owner of a land, and a third person purchases it for value from the apparent owner, the burden of proving that the third person had actual or constructive notice of the real title is on the person (the real owner) who so allowed the other to hold himself out as the real owner. The fact that the person so held out (i.e., the ostensible owner) was more than a mere *benamidar* and had a lien on the property for payments made by him does not make any difference in the principle of law above enunciated—*Raja of Karvetnagar v. Saravana*, 4 L.W. 200, 35 I.C. 893 (898) following *Ram Coomar v. McQueen*, 18 W.R. 166 (P.C.). It is not enough for the real owner to say that proper inquiry was not made by the transferee; it must be shown that there was something to call attention and invoke an inquiry; it must be shown that there were means of answering the inquiry; it must be shown what the inquiry would have revealed. If this onus is discharged by the real owner, then the burden will lie on the transferee to show that he took reasonable care within the meaning of this section—*Rajani Kanto v. Bashiram*, A.I.R. 1929 Cal. 636 (638). The transferee must prove not only bona fide enquiry but also that the transferor was the ostensible owner with consent of real owner—A.I.R. 1956 Mad. 432.

Where a person has made a gift of land to another person and the

latter transfers it to some other person for consideration, the burden lies on the person challenging the transfer to show that the transferee had notice, either actual or constructive, that he was repudiating the gift made by the donor to the transferor—*M. P. A. K. Firm v. Ma Mya Then*, A.I.R. 1940 Rang. 184. A Hindu husband purchased certain property with his own money in the name of his wife who after his death alienated it. After the widow's death the reversioner put forth his claim to the property : *held*, the purchaser could invoke the provisions of this section to his aid, but the onus was on him to show that he was a purchaser in good faith without knowledge of the real state of affairs—*Chapalabala v. Sanat Kumari*, A.I.R. 1941 Cal. 318 relying on *Annada Mohan v. Nilphamari Loan Office, Ltd.*, 26 C.W.N. 436, 65 I.C. 245.

The transferee cannot be said to have discharged the onus by merely raking out the old records of the Municipality or that of the Police Department—*Kartar Singh v. Mehr Singh*, A.I.R. 1934 Lah. 885. Where the transferee does not go into the witness box and does not adduce any evidence to show that he obtained the transfer on the faith of the entry of the transferor's name in the *Khewat*, he cannot obtain protection of section 41—*Amir Jahan v. Khadim*, A.I.R. 1931 Oudh 253.

The question whether sec. 41 applies to a given set of facts is not a question of fact, but a question of law—*Sadiq Husein v. Co-operative Central Bank*, A.I.R. 1952 Nag. 106.

Pleading :—Where no case of estoppel under this section is set up in the written statement, the case should not be allowed to be put forward at the hearing—*Lal Mohan v. Govind Sahu*, A.I.R. 1940 Pat. 620, 188 I.C. 417.

Distinction between this section and section 115, Evidence Act. See *Chathar v. Kutti Sankaran Nair*, (1957) 2 M.L.J. 603; *Ramjanam v. Beyas*, A.I.R. 1958 Pat. 537.

42. Where a person transfers any immoveable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

Transfer by person having authority to revoke former transfer.

Illustration.

A lets a house to B, and reserves power to revoke the lease if, in the opinion of a specified surveyor, B should make a use of it detrimental to its value. Afterwards A, thinking that such a use has been made, lets the house to C. This operates as a revocation of B's lease subject to the opinion of the surveyor as to B's use of the house having been detrimental to its value.

192A. Principle :—Where a person, who has made a voluntary gift or settlement of an estate, sells the same to another for value, the conveyance operates as a conveyance of the estate which the settlor

had before the voluntary gift or settlement, the Statute 27 Elizabeth, c. 4 putting the settlement out of the way, so that it shall not affect the conveyance which is made to the purchaser. Words showing an intention on the part of the person who made the voluntary gift to convey to the purchaser all the interest or estate that he had are sufficient to avoid such gift—*Judah v. Abdool*, 22 W.R. 60.

43. Where a person *fraudulently or erroneously* represents that he is authorized to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Transfer by unauthorised person who subsequently acquires interest in property transferred.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

Illustration.

A, a Hindu, who has separated from his father B, sells to C three fields, X, Y and Z, representing that A is authorized to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition; but, on B's dying, A as heir, obtains Z. C, not having rescinded the contract of sale, may require A to deliver Z to him.

Amendment :—The words “fraudulently or” have been added by Sec. 13 of the T. P. Amendment Act (XX of 1929). See Note 196 below.

Analogous law :—This section may be compared with sec. 13 of the Specific Relief Act, 1963, which lays down :—“Where a person contracts to sell or let certain immovable property, having.....only an imperfect title, the purchaser or lessee....., has the following rights, namely :—(a) if the vendor or lessor has subsequently to the contract acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest.....”

193. **Principle**—“Feeding the estoppel” :—In cases falling under this section, the estoppel rests on the representation made by a transferor that he is authorised to transfer, which representation subsequently turns out to be erroneous. But where the truth of the matter is known to both parties there can be no estoppel, as held in *Mohori Bibi v. Dharmadas*, 30 Cal. 539, 30 I.A. 114—*Dwarka Prasad v. Nisar Ahmad*, A.I.R. 1925 Oudh 16 (18); *Sitaram v. Tulsiram*, A.I.R. 1951 Nag. 241; *Ganeshdas v. Kandabai*, A.I.R. 1952 Nag. 29; *Deoman v. Atmaram*, A.I.R. 1948 Nag. 122. By the English law of estoppel which is referred to in the case of *Rajapaksi v. Fernando*, (1920) A.C. 892, “where a grantor has purported to grant an interest in land which he did not at the time possess but subsequently acquires, the benefit of his subsequent acquisition goes automatically to the earlier grantee or, as it is usually expressed, feeds the estoppel.” By this doctrine the estoppel is derived from the recitals of title contained in the conveyance, and it is these recitals and these only

which the grantor has to make good, so that if he subsequently acquires the ownership of the property by some other title, the subsequently acquired interest does not feed the estoppel so as to make the original conveyance effective against a third party—*Fernando v. Gunatilaka*, (1921) 2 A.C. 357 (P.C.); see also *Villa v. Petlay*, A.I.R. 1934 Rang. 51. If a man who has no title whatever to property grants it by conveyance which in form would carry the legal estate, and he subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes—*Tilakdhari v. Khedan Lal*, 48 Cal. 1 (P.C.). No party who has made a transfer to another is entitled to say that the transferee has no right to the property. This principle has been stretched so that where a person without owning a property purports to transfer it, he would be bound to make good the transfer if later he acquires that property. This principle is enunciated in sec. 43, Transfer of Property Act—*Shyam Lal v. Sohan Lal*, 50 All. 290, 25 A.L.J. 777, A.I.R. 1928 All. 3 (8), 106 I.C. 255.

The principle of this section is an extension of the doctrine of estoppel—*Kali Sahu v. Girdhari*, 50 I.C. 778 (Pat.). This section is based on the doctrine that subsequently acquired interest feeds the estoppel—*Krishna Chandra v. Rasik Lal*, 21 C.W.N. 218, 23 C.L.J. 501, 33 I.C. 568 (573). The conveyance of a non-existent property, though inoperative as a conveyance, is operative as an executory agreement which would attach to the property the moment it is acquired by the vendor—*Rustom Ali v. Abdul Jabbar*, A.I.R. 1923 Cal. 535, 76 I.C. 499.

194. Scope :—On the principle of this section where a transferor subsequently acquires a lesser interest than he purported to transfer, e.g., merely a charge on the property, the covenants of the deed of transfer will also attach to this acquired interest—*Mohan Singh v. Sewa Ram*, A.I.R. 1924 Oudh 209, 75 I.C. 579. The vendee is not required to make any inquiries in a case to which this section applies, and mere notice of encumbrance on the part of the vendee would not make the transaction of sale any the less a sale free from encumbrances, when the document says so—*Madirazu v. Bommadēvara*, A.I.R. 1946 Mad. 107, (1945) 2 M.L.J. 478.

By virtue of sec. 2 (d), the rule enunciated in this section has no application to a case of compulsory sale, i.e., a sale in execution of a decree—*Alukmonee v. Banee Madhub*, 4 Cal. 677; *Prasanna Kumar v. Sreekanta*, 40 Cal. 173. Therefore, where the judgment-debtor had no transferable right on the date when the execution sale took place, but acquired such right after the sale, held that the auction-purchaser took nothing by the purchase—*Purna Chandra v. Soudamini*, 28 C.L.J. 283, 48 I.C. 335; *Nanak v. Gandu*, A.I.R. 1938 Lah. 360, *Puran Mal v. Shiva Lal*, A.I.R. 1935 All. 234. See also *Mangat Lal v. Ghasi Khan*, A.I.R. 1929 All. 800.

This section did not apply to a case where the heir of the grantor of a *khorphosh* grant was free to exercise his predecessor's option to resume the grant—*Choto Baheru v. Purna*, 19 C.W.N. 1272.

The principle of this section does not apply to auction-sale as the judgment-debtor cannot be deemed to have guaranteed any title in himself when his property is sold in execution of a decree—*Kamta Rai v. Nand*

Kishore, A.I.R. 1952 All. 287. This section applies only when a party in possession of special knowledge makes an incorrect representation to the other party to the contract, whereby the latter is induced to enter into the contract and the person making the representation gets the benefit of it—*Adhilakshmi v. Nallasivam*, A.I.R. 1944 Mad. 530.

The principle of this section applies to Hindu as well as Mahomedan conveyances—*Krishna Chandra v. Rasik*, 21 C.W.N. 218, 33 I.C. 568; *Viraya v. Manumanta*, 14 Mad. 459; *Azizuddin v. Sheikh Budan*, 18 Mad. 492. In an earlier case (*Dooli Chand v. Brij Bhukun*, 6 C.L.R. 528), however, the Privy Council refused to apply the doctrine of estoppel to conveyances of Hindus. But see this case commented on in *Krishna v. Rasik*, 21 C.W.N. 218, 33 I.C. 568 (573). A Hindu lending money on mortgage to a Hindu widow must be supposed to know the elementary principle of Hindu law that a Hindu widow gets a life estate in the property inherited by her from her husband, and such a transferee cannot, therefore, claim the benefit of this section—*Jagernath v. Mt. Dhanpari*, A.I.R. 1934 All. 969.

Minor:—This section can have no application to the case, where a minor has made a mortgage of his property during his minority and a suit is brought to enforce the mortgage against him after he has attained majority. The section is based on the principle of estoppel which cannot be pleaded against a statute (sec. 11, Contract Act), so as to prejudice a minor who enjoys the protection of the law (see *Mohori Bibi v. Dharmadas*, 30 Cal. 539, 30 I.A. 114)—*Ajudhia Prasad v. Chandan Lal*, A.I.R. 1937 All. 610, (F.B.).

'For consideration':—This section does not apply where the transferor transfers without consideration—*Jagannath v. Dibbo*, 31 All. 53. A gift of property in which a transferor has no interest will not be protected under this section if the transferor acquires title to the property after the gift. But if a reversioner who has given his consent to a gift made by a Hindu widow of a part of her husband's property cannot claim that property on the death of the widow though by being a party to the deed of gift he purports to be merely one of the donors. He cannot claim the property, not because of anything contained in section 43 but because his action amounts to an actual election to hold the deed good—*Ganga Bakhsh Singh v. Madho Singh*, A.I.R. 1955 All. 288 (F.B.).

The transferee can repudiate the contract or may elect to ask for damages under the general law. The relief provided in the first para of this section is additional and it enables him to get at the property itself provided the contract subsists on that date—*Ganeshdas v. Kamlabai*, A.I.R. 1952 Nag. 29. This section creates two equities. The first equity is between the transferor and his privies on the one hand and the transferee on the other hand. The other equity is in favour of a *bona fide* purchaser for consideration without notice of the equity in favour of the first transferee. If there is no subsisting equity in favour of the first transferee in the shape of the *option* mentioned in the first para., resort to the second para. becomes unnecessary—*ibid.* The subsequent transferee must be deemed to have notice of the option, if he had knowledge of the previous transaction—*Girija v. Jagannath*, A.I.R. 1952 All. 301.

Any interest which the transferor may acquire:—This section applies if the transferor subsequently acquires any interest in the property sold. If, as a matter of fact, the property never subsequently comes into the hands of the transferor, this section cannot apply—*Ramakrishna v. Anasuyabai*, 26 Bom. L.R. 173, A.I.R. 1924 Bom. 300, 86 I.C. 265.

195. Sections 41 and 43 compared:—Section 43 protects a purchaser for value without notice, and there is no such provision in it as is found in section 41, requiring the transferee to take reasonable care to ascertain the power of his transferor to give a clear title—*Maung Ba v. Maung Po*, 14 Bur.L.R. 329 ; *Ganga Prasad v. Mt. Raghubansa*, A.I.R. 1937 Oudh 127, 165 I.C. 793. Under sec. 43, the transferee's mere belief in an acting upon a representation made by the transferor may be sufficient to pass the subsequently acquired interest, while under sec. 41 mere belief is not sufficient—*Pandari Bangaram v. Karumooray Subba Raju*, 34 Mad. 159 (160), 8 I.C. 388 ; *B. V. Sundariah v. B. R. Ramasastry*, A.I.R. 1955 Mys. 8.

195A. Section 43, T. P. Act and section 115, Evidence Act compared:—The vital difference between the representation referred to in sec. 43 T. P. Act and the representation mentioned in sec. 115, Evidence Act is that while the representation under sec. 43, T. P. Act, is a term of the contract or the transfer, the same is not necessarily so in the case of representation mentioned in sec. 115, Evidence Act.—*Parmanand v. Champa Lal*, A.I.R. 1956 All. 225 (F.B.).

196. Fraudulent or erroneous representation:—The old section spoke of *erroneous* representation only, and no mention was made of *fraudulent* representation. Under the present section, the representation may be *either fraudulent or erroneous*.

A representation is not required to be in any particular form. It can be by word of mouth or by document. A statement in a sale deed that the vendor has not transferred the property to anybody in any manner whatsoever nor has anybody any rights, interest or share therein, is quite enough to show that there was a fraudulent representation, when in fact the vendor had sold it already to a third party—*Ganeshdas v. Kamtabai*, A.I.R. 1952 Nag. 29. Where a person transfers property representing that he has a present interest therein, whereas he has, in fact, only a spes successionis the transferee is entitled to the benefit of sec. 43 if he has taken the transfer on the faith of the representation and for consideration—*Jumma Masjid, Mercara v. Kodimaniandra Deviah*, A.I.R. 1962 S.C. 847.

It is not necessary that the erroneous representation must mislead the transferee. The conduct of the transferor alone is to be considered—*Jainur Ali v. Chafina Bibi*, A.I.R. 1951 Ass. 20, I.L.R. (1950) 2 Ass. 1, per Ram Labaya J. Transferor need not be aware of the erroneousness of the representation made by him—*Jagat Narain v. Laljee*, A.I.R. 1965 All 504.

In order that sec. 43 can apply it is necessary that there should be misrepresentation, fraudulent or erroneous, about the right to transfer the property—*Madirazan v. Bommadevara*, A.I.R. 1946 Mad. 107. Where the surrender by a Hindu widow in favour of the presumptive reversioners

was found invalid as a surrender, but good as an alienation, and there was no erroneous representation by the reversioners to the transferees who were cognizant of the fact if not of law, this section did not apply. In such a case sec. 6, cl. (a) would not bar the operation of sec. 43, if it was otherwise applicable—*Ram Bharosey v. Bhagwandin*, A.I.R. 1943 Oudh 196. See also *Madirazan v. Bommadevara*, supra.

Where a transaction is void *ab initio*, e.g., a mortgage in Oudh by the manager of a Hindu joint family without legal necessity and not in lieu of antecedent debts and where the possibility of such deed being liable to be assailed is clearly indicated in the deed itself, the transferee cannot say that there was fraudulent or erroneous representation on the part of the transferor and the principle of this section does not therefore apply to such a case—*Bijleshari v. Gajadhar*, A.I.R. 1941 Oudh 123, see also *Jaganath v. Mt. Dhanapati*, A.I.R. 1934 All. 969 ; *Shambhoo v. Dhanèshar*, A.I.R. 1927 Oudh 177.

It is not required that the representation should be erroneous and also fraudulent, for fraud is not a necessary ingredient of the law of estoppel. It is sufficient if the representation be simply erroneous—*Bhagwati v. Chaoli*, 55 I.C. 698 (Lah.). It is not essential that the intention of the person whose declaration, act or omission has induced another to act, should have been fraudulent. The main question is whether the representation has caused the person to whom it has been made to act on the faith of it. The existence of estoppel does not depend on the motive, or on the knowledge of the matter, on the part of the person making the representation—*Sarat Chunder v. Gopal Chunder*, 20 Cal. 296 (310) (P.C.). Erroneous representation includes all misrepresentation whether tainted or untainted with fraud—*Radheylal v. Mahèsh Prasad*, 7 All. 864 ; *Sarat Chunder v. Gopal Chunder*, 20 Cal. 296 (P.C.) (overruling *Ganga Sahai v. Hira Singh*, 2 All. 809 and *Vishnu v. Krishnan*, 7 Mad. 3 ; *Cairncross v. Lorimer*, L.R. 2 H.L. 829 ; *Pickard v. Sears*, 6 A. & E. 469 ; *Freeman v. Cooke*, 2 Exch. 654.

If the representation is neither fraudulent nor erroneous, this section has no application—*Nurul Hosein v. Sheo Sahai*, 20 Cal. 1 (7) (P.C.).

Whether the representation was erroneous or not is a question of fact—*Saradamoyi v. Atul Chandra*, 68 I.C. 203 (Cal.).

Where no representation is made, there is no room for the operation of this section—*Krishna Pramada v. Dhirendra*, A.I.R. 1929 P.C. 50.

Under this section, mere erroneous representation will suffice, and the representation need not be intentionally false—*Hattikudur Narain v. Andar Sayad Abbas*, 28 M.L.J. 44, 27 I.C. 785 (786).

The transferee is entitled to the benefit of this section, if he believed in the representation made by the vendor, and was not aware of the true interest of the vendor with reference to the property—*Sundar Lal v. Ghissa*, 1929 A.L.J. 1087, A.I.R. 1929 All. 589 (591), 118 I.C. 705. The benefit of this section cannot be claimed by the transferee if he did not believe in or act upon the representation made by the transferor but was aware of the true interest of the transferor—*Pandiri Bangaram v. Karumoory Subbaraju*, 34 Mad. 159 (260) ; *Mulraj v. Indar*, 48 All. 150,

92 I.C. 471, A.I.R. 1026 All. 102. Thus, where A, who was entitled only to one-third of the family property, mortgaged one-half of the property to C, who *knew* that A was entitled only to one-third and did not bargain and pay for half a share, and subsequently after the death of A's father, A became entitled to a half share *held* that C could enforce his mortgage only against the one-third share—*Pandiri v. Karumoory*, 34 Mad. 159. Although this section says nothing about the *belief* of the transferee in the erroneous representation, still a transferee desiring to take advantage of this section should allege and prove that he took the transfer in good faith believing in and being misled by the erroneous representation made by the transferor—*Hattikudur Narain v. Andar Sayad Abbas*, 28 M.L.J. 44, 27 I.C. 785 (788) (following 34 Mad. 159); *Krishnamachariar v. Thiruvengkatachariar*, 12 L.W. 149, 59 I.C. 275 (276); *Ladu Narain v. Goberdhan*, A.I.R. 1925 Pat. 470. The case of 34 Mad. 159 has also been followed in *Kodi Sankara v. Moiden*, 35 M.L.J. 120, 49 I.C. 147; *Venkata Lakshmi Narasayya v. Meenakshi*, 10 L.W. 221, 52 I.C. 992; and *Chakrapani v. Gayamani*, 48 I.C. 228 (Pat.). A mortgagee of a Deshgat Vatan knew that the property mortgaged to him was the life-interest of the mortgagor in his hereditary office. Subsequent to the mortgage the mortgagor became entitled to an enlarged estate. *Held* that as the mortgagee knew at the time of the transaction that the land was inalienable beyond the life-time of the mortgagor, its subsequent enlargement enabling the Vatarand to alienate it permanently would not enlarge the mortgagee's interest so as to enure beyond the mortgagor's life-time—*Gangabai v. Baswant*, 34 Bom. 175 (182). But the Oudh Court has dissented from this view and holds that there is nothing in this section to the effect that it is necessary for the transferee to show that he *believed in and acted upon* the representation made by the transferor—*Jag Mohun v. Sita Ram*, 20 O.C. 72, 39 I.C. 186 (188) (dissenting from 34 Mad. 159). A Full Bench of the Allahabad High Court held as follows in 1956 : "S. 43, T. P. Act, does not require that the transferee who can take advantage of it should be one to whom not only a fraudulent or erroneous representation about the transferor's authority to transfer the property is made but should also be one who did not have knowledge of the true factual position and had merely acted on the belief of the erroneous or fraudulent representation made to him by the transferor. If, however, both the transferor and transferee knew of the true position, and colluded to enter into a transaction which is invalid in law, the state of knowledge of the transferee becomes material and S. 43 cannot be availed of by him."—*Parma Nand v. Champa Lal*, A.I.R. 1956 All. 225 (F.B.). The Andhra High Court has followed this decision of the Full Bench of the Allahabad High Court in *Vutla Veeraswami v. Ivaturi Durga Venkata Subbarao*, 1956 Andhra W.R. 1115.

If the truth is known to both parties, no question of estoppel can arise. Thus, where there being no legal necessity a mother contracted to sell immoveable property belonging to her infant son, not in her personal capacity but *as the mother and guardian* of the latter, and subsequently on the infant's death inherited the property, *held* that there could be no decree against her for specific performance of the contract for sale—*Rashmoni v. Surya Kanta*, 32 Cal. 382. See also *Bhagwan v. Md. Yunus*, A.I.R. 1934 Oudh 112. Where a Hindu reversioner transfers his

reversionary interest expectant on the death of a Hindu widow, and the present interest of the reversioner (which is a non-entity till the widow's death) is known to both parties, there cannot be said to have been an *erroneous representation*, and this section is inapplicable—*Jagannath v. Dibbo*, 31 All. 53. The transfer is also void under sec. 6.

If the transferee was quite sure that his transferor was fully entitled to the estate as absolute owner under the documents and he believes it to be true and acts upon it, he is entitled to protection even though if he had been more careful he might have found out that that was not a true representation—*Gopi Nath v. Rup Ram*, A.I.R. 1930 All. 786 (790).

Where a Mahomedan husband makes his wife accept certain property in lieu of dower on the understanding that his father has permitted him to transfer it and the wife is not aware that the property does not belong to her husband, the wife is under this section entitled to enforce her claim against her husband when on the death of his father he becomes the owner—*Mt. Umatul v. Mangal Singh*, A.I.R. 1936 Pesh. 103. See also *Jumma Masjid, Mercara v. Kodimaniandra Deviah*, A.I.R. 1925 S.C. 847.

For the application of this section it is not essential that there should be a clear finding that the transferee has believed in and acted upon the erroneous representation—*Waliuddin v. Ram Rakhan*, A.I.R. 1936 Oudh 313, 162 I.C. 451.

197. Application of the rule to sale :—Where a person having a partial interest in certain property transfers a larger interest and subsequently acquires that interest, this section applies and the transferee is entitled to the interest so acquired—*Abdul Kabir v. Jamela Khatoon*, A.I.R. 1951 Pat. 315 ; *Jan Mohammad v. Karm Chand*, A.I.R. 1947 P.C. 99 ; *Shiv Baran v. State of U.P.* 1968 All. W.R. (H.C.) 301. A, holding a certain mahal as a ghatwal, mortgaged it to B by way of a *Zuripeshgi* lease for twenty-one years. Shortly after the granting of the lease, the Zamindar got a decree against A, by which A's ghatwali right was extinguished. In execution of that decree, the Zamindar ousted A and took khas possession of the mahal. Some years afterwards, the Zamindar granted to A, a perpetual mokarari lease of the same mahal. Held that A must, out of his present estate in the mahal, make good the *Zuripeshgi*—*Loot Narain v. Showkee Lal*, 2 C.L.R. 382. Where a person, who had merely a *ghatwali* interest in certain land, mortgaged it on the representation that it was his *jagir*, and he subsequently got a mokarari title to it, held that on a decree for sale upon the mortgage, the mokarari interest of the mortgagor passed to the mortgagee—*Mokhada v. Umesh Chandra*, 7 C.L.J. 381. A Hindu father of a joint family consisting of himself and two minor sons, sold the entire property, representing that it was his self-acquired property. The purchaser sued for possession, and during the pendency of the suit one of the minor sons died. It was found that the sale was not binding on the sons. Held that this section applied, and the purchaser was entitled to a half-share of the property, although at the date of the sale he was entitled to the father's share which was at that time one-third—*Muthuswami v. Sandana*, A.I.R. 1927 Mad. 649. K sold the property of his brother D, who had disappeared for some time before the sale, under the representation that K was the owner of the property. Then D died leaving K his sole heir. Held that the purchaser

was entitled to the aid of this section—*Sunder Lal v. Ghissa*, A.I.R. 1929 All. 589 (591). Where at the time of the sale the vendors had no under-proprietary right, but subsequently they acquired an under-proprietary right, and it was found that the vendors had at the time of sale erroneously but honestly represented that they had authority to transfer the holding, *held* that this section applied, and the under-proprietary right passed to the purchaser—*Balbhadar v. Kusehar*, A.I.R. 1928 Oudh 344 (346). The plaintiff purchased the undivided share of A whose family consisted of A, B and C, and A's share at the time of sale was therefore one-third of the property. Subsequently, by the death of B pending the suit A's share became one-half. *Held* that the plaintiff was entitled to a moiety of the property—*Virayya v. Hanumanta*, 14 Mad. 459. A vendee purchased specific lands from a coparcener of an undivided Hindu family, but in consequence of a partition suit in the family the vendor (coparcener) was allotted lands other than those which he had sold to the vendee. *Held* that the vendee was entitled to whatever was substituted by the decree for partition for the land which he had bought from the coparcener—*Manjaya v. Shanmuga*, 38 Mad. 684; *Sabapathi v. Thandavaroya*, 43 Mad. 309; *Dhandha Sahib v. Md. Sultan*, 44 Mad. 167 (168); *Ram Piari v. Ram Nath*, A.I.R. 1963 All 599. A piece of land was allotted to S under the Punjab Government Tenants Act. S induced his brother J to come and help him to reclaim the land, and promised to give J one-half of whatever he might obtain. J came to his brother S and settled in the land and shared all the expenses and labour of reclaiming the soil. Subsequently, the Government conferred proprietary rights on S. Thereupon J claimed half share of the land. *Held* that J's claim should be allowed—*Nathu v. Allah Ditta*, A.I.R. 1922 Lah. 287. Where a partner in a firm sells the property of the firm in his own right and not on behalf of the other partners or the firm and subsequently after dissolution of the partnership the same property is allotted to him, the case falls within the purview of this section and the vendee's title remains intact—*Peyare Lal v. Mt. Misri*, A.I.R. 1940 All. 453.

Sale by Official Receiver:—A sale by the official receiver is void when no vesting order has been passed, but the subsequent vesting order makes the previous sale valid—*Muthia v. Doraiswami*, A.I.R. 1927 Mad. 1091; *Basava v. Narasimhulu*, A.I.R. 1927 Mad. 1 (F.B.); *Sankaran v. Narasimhulu*, A.I.R. 1927 Mad. 1, (affirming 47 M.L.J. 749).

Exchange:—This section applies to *exchanges*. Thus, A obtained a certain property from B in exchange. B at the time of the exchange had only a half share in that property, but he subsequently purchased the other half. *Held* that as soon as the title of B to the whole property was perfected, the benefit thereof accrued to A—*Bhairab v. Jiban*, 33 C.L.J. 184, 60 I.C. 819.

198. Rule applicable to mortgages:—The section applies to mortgages. Thus, it has been held that any enlargement of the mortgagor's interest in the mortgaged premises usually enures for the benefit of the mortgagee—*Behari Lal v. Indra Narayan*, A.I.R. 1927 Cal. 665 (668); *Zollikofar & Co. v. Official Assignee* A.I.R. 1927 Rang. 100; *Beni v. Natabar*, 33 I.C. 975. Therefore it is open to a mortgagee to enforce his charge on any interest which his mortgagor might subsequently acquire in the

property which the latter had professed to mortgage, notwithstanding that he had no right in it at the time of such mortgage—*Kamala Prasad v. Nathuni Narayan*, A.I.R. 1922 Pat. 347 (348); *Babu Lal v. Nur Mahammad*, A.I.R. 1934 All. 731; *Abdul Ahad v. Brij Narain*, A.I.R. 1935 All. 269, *Hemamoyee v. Akbar Ali*, 41 C.W.N. 1125. But where a mortgage deed conveys some property not then owned by the mortgagor and known as such to the mortgagee, but both of them had reason to believe that such property would shortly be owned by the mortgagor and he actually owns it subsequently, sec. 43 does not apply and the transaction *qua* such property does not amount to a mortgage, but creates a charge on the property subsequently acquired—*Kabul Chand v. Badri Das*, A.I.R. 1938 All. 22, where an undertenure holder mortgages the undertenure after it has been purchased by the tenure holder at a certificate sale and the undertenure is subsequently released, on such release the undertenure cannot be burdened with the mortgage—*Baidyanath Rai v. Sm. Jay Kumari*, A.I.R. 1957 Pat. 706.

Where a person with a defective title purports and intends to mortgage a property, any interest subsequently acquired by him in that property is available in equity to make the mortgage effectual, even though the defect in the title was apparent on the face of the document—*Bhagwati v. Chaoli*, 55 I.C. 698 (Lah.). Where a person, who had a proprietary interest in another share of the property during the life-time of his brother's widow, mortgaged the whole property under the representation that he was authorised to mortgage the latter share also, and after the death of the widow, became the owner of that share, *held* that the mortgage operated on that share under the provisions of this section—*Sarju Prasad v. Bindeshari*, 33 All. 382 (384). Where on the death of the deceased his daughter became the sole life holder of his estate and the grandsons of the deceased, fraudulently representing that they were in possession of the estate and were entitled to mortgage the same, mortgaged it to a certain person, and the daughter brought a suit for setting aside the sale held in execution of the mortgage decree, but died during pendency of the suit and the mortgagors succeeded to the estate, it was held that the mortgage and sale to the extent of their share were good under this section—*Ram Japan v. Mt. Jagesara*, A.I.R. 1939 Pat. 116. Where at the date of a mortgage, the mortgagor had only a non-transferable interest in the property mortgaged, but subsequently acquired transferable interest in it and sold a portion of the mortgaged property to a third party, *held* that the mortgage operated as a valid charge in favour of the mortgagee on the whole property including the portion sold to the third party—*Surendra v. Rajendra*, 27 C.L.J. 289, 43 I.C. 740. See also *Kumcar Bahadur v. Gilsher Khan*, A.I.R. 1937 All. 287. An undischarged insolvent is not "authorised to transfer" any property; consequently a mortgage executed by him is voidable at the option of the Receiver or the Court; but when the property reverts in him after discharge, the mortgage can be enforced against him by the mortgagee by sale of the property—*Rup Narain v. Har Gopal*, A.I.R. 1933 All. 449 (451). Where, after a mortgage, a portion of the mortgaged property was sold by the mortgagor to the mortgagee, and such property was resold by the mortgagee to the mortgagor, the mortgagee would have an equitable right to proceed against the whole property, including the portion sold to him and resold by him

to the mortgagor. So long as the mortgagor had a less extent in his possession, the security was reduced to that extent; but when he subsequently became entitled to the full extent to which he had contracted to give the mortgage, the mortgagee became entitled to proceed against the security to such extent—*Deoli Chand v. Nirban Singh*, 5 Cal. 253. The whole of a certain house was mortgaged, the mortgagor having at the time an interest in only a fractional share in it. The mortgagee sued, and obtained a decree for the sale of the whole house. After that decree was passed and partially executed, the mortgagor, in virtue of a partition, acquired the remaining interest in the house. *Held* that this section applied and that the decree-holder was competent to continue execution of his decree against the mortgagor's after-acquired interest—*Durga Das v. Muhammad*, 1908 A.W.N. 155. A Mahomedan first transferred his property as dower to his wife. He then mortgaged it by way of conditional sale which was subsequently foreclosed. The wife died one year afterwards and the Mahomedan succeeded to the property as heir to his wife. It was held that sec. 43 applied to the case and that the mortgagee was entitled to the property—*Sinclair v. Sitab Khan*, 3 C.P.L.R. 72. Where the plaintiff in a pre-emptive suit, in order to procure funds for the prosecution of his suit, executed a mortgage comprising certain lands of which he was owner and also the property which was the subject-matter of the suit for pre-emption, and the suit was successful, it was held that the mortgage took effect as regards the property which was the subject of the pre-emption suit, from the time when the plaintiff-mortgagor obtained possession by virtue of his decree in the suit—*Gayadin v. Kashi Gir*, 29 All. 163; *Bansidhar v. Sant Lal*, 10 All. 133. Where a person representing himself to be the absolute owner of certain property (to which at that time he had a chance of succeeding) mortgaged it, and subsequently acquired a title to such property by inheritance, *held* that the mortgage was enforceable against the mortgagor. Such a transfer was not a transfer of *spes successionis* forbidden by section 6, because what was purported to be transferred was an estate *in praesenti* and not a mere chance of succession—*Alamanaya Kunigari v. Murukuti*, 29 M.L.J. 733, 29 I.C. 439 (441). See Note 202, *infra*. A Hindu woman executed a mortgage 5 years after the disappearance of her husband, and subsequently he was deemed as dead (after the lapse of 7 years—see sec. 108, Evidence Act) at the date of the suit brought on the mortgage. *Held* that the mortgage was a valid mortgage at the date of suit by operation of this section, although it was not so when it was executed—*Mahadeo v. Har Bukhsh*, 4 O.W.N. 1077, A.I.R. 1928 Oudh 13 (14), 106 I.C. 489. Where a husband executed a mortgage on behalf of his wife under a power of attorney given to him by his wife, but the power of attorney was invalid, and afterwards the husband succeeded to a one-fourth share of the property of his wife on her death, *held* that the power of attorney being invalid the mortgagee could not proceed against the property of the wife. but under sec. 43 T. P. Act he could enforce his mortgage against the one-fourth share which came into the possession of the husband—*Aisha Bibi v. Mahfuzummissa Bibi*, 46 All. 310 (315), 22 A.L.J. 205, 78 I.C. 180, A.I.R. 1924 All. 362. The actual decision in this case is correct, but *quaere*, whether sec. 43 is applicable, there being no *erroneous representation* in the case. If C mortgages his house to B during the pendency of

a suit on a promissory note by A against C and during the subsistence of an attachment before judgment of the house and there is a settlement between B and C that B shall give half share of the house to A free from the mortgage, the purchaser of the house in execution of the mortgage decree obtained by B is bound by the settlement—*Devathi Subbarayudu v. Puvvadi Chinna*, A.I.R. 1960 Andh. Pra. 592.

Where on the death of a person a share of his estate devolves on an undischarged insolvent, a mortgage of that share by the latter is invalid; but when after his discharge the property re-vests in him the principle of this section applies and the mortgagee would be entitled to enforce the mortgage—*Diwan Chand v. Manak Chand*, A.I.R. 1934 Lah. 809, 36 P.L.R. 185; *Rup Narain v. Har Gopal*, A.I.R. 1933 All. 449, 55 All. 503, 143 I.C. 836. If a person entitled to $\frac{1}{3}$ share mortgages $\frac{2}{3}$ share but becomes entitled to the additional $\frac{1}{3}$ after the mortgage decree but before the sale of the mortgaged property, the auction purchaser is entitled to $\frac{2}{3}$ share both under sec. 115 Evidence Act as well as under this section—*Arulayi Nadache v. Jagadeesiah Nadar*, A.I.R. 1964 Mad. 122.

Where the undivided share of one co-sharer was mortgaged and by subsequent partition the mortgaged property was allotted to another co-sharer, and there was a decree for sale of the mortgaged property, and the partition was effected after the mortgage-decree but before actual sale, the mortgaged share could not be sold under the decree as it had ceased to be the property of the mortgagor and had been allotted to another—*Bhup Singh v. Chedda Singh*, 42 All. 596 (599); also *Hem Chunder v. Thakomoni*, 20 Cal. 533; *Amolak v. Chandan*, 24 All. 483; *Pullamma v. Pradosham*, 18 Mad. 316; *Lakshman v. Gopal*, 23 Bom. 385. See also Note 392 under sec. 65. A mortgage by a manager of a Mitakshara family of the whole or a share of the joint family property is void and inoperative and gives the mortgagee no right even against the mortgagor's undivided share. But where the mortgagor's interest has subsequently been separated from that of the other members of the family by partition, his share may become available as security for the mortgage-debt—*Amar Dayal v. Har Prasad*, 5 P.L.J. 605, 58 I.C. 72; *Ram Ratan v. Ganga*, A.I.R. 1923 Oudh 265 (270).

Charge :—The rule of English law as stated in *Holroyd v. Marshall*, (1861) 10 H.L.C. 191 and *Collyer v. Isaacs*, (1881) 19 Ch. D. 342 applies to India. Hence a charge on future property operates upon such property as soon as it comes into existence—*Fatechand v. Parashram*, A.I.R. 1953 Bom. 101. But if any money is paid as earnest for the purchase of a property not belonging to the vendor, the vendee cannot claim any charge on the said property for the return of the earnest after the subsequent acquisition of ownership by the vendor—*Panchanan Pal v. Nirode Kumar Biswas*, A.I.R. 1962 Cal. 12.

199. Rule applicable to leases :—The rule in this section applies also to leases; *Hatti Kudur v. Andar*, 28 M.L.J. 44, 27 I.C. 785. Therefore where a lessor, who, at the time he granted the (*Zuripeshgi*) lease, had an infirm title subsequently got into possession by a valid title, he could be compelled to carry out the contract, having attained a position in which he became able to do the same—*Lootnarain v. Showkee Lal*, 2 C.L.R. 382.

If a person erroneously representing himself as authorised to grant a lease of property grants a lease and subsequently acquires the property, the lessee is entitled to have that property—*Protab Chandra v. Judisthir*, 19 C.W.N. 143, 23 I.C. 69. Thus, where the gaontia of a village granted a lease of bhogra land which purported to be permanent and heritable, and the gaontia was subsequently declared to have proprietary rights in that village, *held* that this section applied so as to create in the lessee a permanent transferable interest, and the descendants of the lessor were not entitled to eject the lessees—*Aditya Prasad v. Paramananda*, 4 P.L.J. 505 (510), 53 I.C. 96. A, B and C were owners of certain property in equal shares. A and C granted a lease of the entire property to E as if B had no interest therein and they themselves were entitled to it to his exclusion. Subsequently B died, making a will under which he left one half of his one-third share to A and the other half to C. *Held* that the provision of this section applied, and the share of B, when it vested in A and C, became available to perfect their title and consequently the title of E in the entire property—*Sulin Mohan v. Raj Krishna*, 25 C.W.N. 420 (422), 60 I.C. 826 (828), 33 C.L.J. 193.

A son granted a permanent tenure at a fixed rate even though his father was alive and undertook not to disturb the grant after his father's death. After his father's death, the son brought a suit for enhancement of rent; *held* that under this section the son was bound by his representation and that the mention of his father was mere emphasis that the former had implied authority to make the grant—*Jyoti Prasad v. Chandra Kanta*, A.I.R. 1937 Pat. 469.

200. "Time during which the contract subsists." :—The option of the transferee can be exercised in respect of an interest acquired by him, only during the time the contract subsists, but not afterwards. If, in case of a sale, the purchaser has repudiated the transaction and recovered the purchase money, or in case of a mortgage, the mortgaged properties have been sold in execution of the mortgage-decree (*Jadu Bans v. Sheojit*, 10 I.C. 443), the relation of transferor and transferee has ceased to exist, and the contract is no longer subsisting. In such a case no claim in respect of property acquired subsequent to the cessation of the contract can be made by the transferee.

The contract can be said to subsist so long as the decree obtained in a suit to enforce a transfer has not been fully satisfied, and until then the transferee is entitled to claim the benefit of any subsequent acquisition of interest in the property by the transferor. The words "at any time during which the contract subsists" are wide enough to cover a case in which the contract (e.g., mortgage) has merged in a decree; the contract must be held to subsist all the same, till the mortgage is satisfied. Therefore, where the interest of the mortgagor came to be enlarged after the date of the decree on the mortgage, and before the decree was satisfied, *held* that the contract had not ceased to subsist, and the mortgagee was entitled to have the added interest sold—*Azizuddin v. Sheikh Budan*, 18 Mad. 492 (495).

The option of the transferee must be enforced immediately on the acquisition of the transferable interest by the transferor—*Surendra v*

Rajendra, 27 C.L.J. 289, 43 I.C. 740. It is enough if the transferee exercises his option to take the subsequent interest; the consent of the transferor is not necessary; no further conveyance is necessary—*Ramaswamy v. Lakshmi*, A.I.R. 1962 Ker. 313 (F.B.).

201. Liability, when attaches and to whom :—The liability imposed by this section on the transferor is not a mere personal liability but is one which can be enforced against all persons claiming under the transferor otherwise than for value without notice—*Chota Bahira v. Purna Chunder*, 19 C.W.N. 1272, 21 C.L.J. 144, 27 I.C. 982 (1987); *Radhey Lal v. Mohesh*, 7 All. 864. This section applies not only as between the original transferor and the original transferee but also binds the privies of the original transferor and can be taken advantage of by the privies of the original transferee. Unless a statute expressly or by necessary implication precludes the application of provisions of law awarding to or imposing civil liabilities on the privies of the person to whom the rights are given or in whom the liabilities are imposed, the privies are entitled or bound as the case may be to the extent to which the original parties are so entitled or bound—*Hatti Kudur Narain Rao v. Andar Sayad Abbas*, 28 M.L.J. 44, 27 I.C. 785 (1986). The right of the transferee to the after-acquired interest may also be enforced against the gratuitous transferees—*Sarat Chunder v. Gopal Chunder*, 20 Cal. 296 (P.C.).

202. Transfers forbidden by law :—The Court cannot, under the guise of sec. 43, uphold a transfer of property, the transfer of which is forbidden by law—*Balbhaddar v. Kusehar*, A.I.R. 1928 Oudh 344 (347); *Kusehar v. Balbhaddar*, A.I.R. 1928 Oudh 153 (154); *Sadhu Saran v. Sheo Prasad*, A.I.R. 1959 Pat. 278. This section does not apply where there is a statutory prohibition to transfer the property on grounds of public policy. In such a case the principle of this section cannot be invoked to compel a person to transfer the property in fraud of the statute. Thus, the interest of a Hindu reversioner is an interest expectant on the death of a qualified owner; it is not a vested interest, but a *spes successionis* or a mere chance of succession, and as such inalienable under sec. 6 (a) of this Act. If, therefore, a reversioner conveys such interest and afterwards acquires the property on the death of the qualified owner, this section will not operate to give effect to the transfer—*Annada Mohan v. Gour Mohan*, 48 Cal. 536 (545, 551), on appeal 50 Cal. 929, 50 I.A. 239. Section 43 should not be so construed as to nullify section 6 (a) by validating a transfer initially void under sec. 6 (a)—*Ramasami v. Ramasami*, 30 Mad. 255 (262); *Official Assignee v. Sampath*, A.I.R. 1933 Mad. 795 (797); *Dwarka v. Nasir Ahmad*, A.I.R. 1925 Oudh 16 (18); *Bindeshwari v. Har Narain*, A.I.R. 1929 Oudh 185 (187). In *Official Assignee v. Sampath*, supra, it was further observed that the illustration to sec. 43 is repugnant to the provisions of sec. 6 (a). But a distinction should be drawn between (1) a transfer which is professedly one of a *mere right*, i.e., a transaction which on the face of it purports to transfer a right of reversion or of expectancy, and (2) a transfer of a *specific property* which the transferor erroneously represents he is authorised to transfer though he may for the time being have merely a reversionary right therein. Transfers of the former class would obviously fall within the purview of sec. 6 (a) and would be void *ab initio*, while those of the latter class

would be governed by sec. 43. Unless this distinction is recognized, sec. 43 and its illustrations would be valueless—*Syed Bismilla v. Manulal*, A.I.R. 1931 Nag. 51 (52). See also *Bansidhar v. Ajudhia*, A.I.R. 1925 Oudh 120 (124). Reviewing the above authorities a very recent Full Bench of the Madras Court has held that where the transferor in fact purports to transfer an expectancy or property, which he had no right to transfer, without making any representation that he had authority to transfer, sec. 43 will not help. Similarly, if both the transferor and transferee knew the truth, the section cannot be invoked by the transferee. The section proceeds on the fundamental assumption that the erroneous or fraudulent representation induced the transferee to part with the consideration without knowing the true facts. A transfer which was made on an erroneous representation may in fact and in effect be transfer of expectancy which is prohibited by statute. That does not prevent the section from operating. It is not concerned with the ultimate effect of the transfer when it was made. It is concerned only with the erroneous representation by the transferor of his authority to transfer when in fact he had none. If it was the intention of the legislature that in all cases of transfer, whether the transfer was made disclosing the true facts or was made with an erroneous representation regarding the authority, no effect should be given to the transfer where the transfer is prohibited under cl. (a) of sec. 6, it would have stated so and created an exception to sec. 43. On the other hand the illustration to the section indicates a contrary intention. Where therefore the transferee from a reversioner was not aware of the truth at the time of the transfer that which was being transferred was only a *spes successionis*, sec. 43 would apply—*Jumma Majid Mercara v. Devaiah*, A.I.R. 1953 Mad. 637 (F.B.) overruling—*Official Assignee v. Sampath*, supra.

Section 43 applies even to cases of heirs who profess to transfer the property itself and not only their right of succession. It is impossible to hold that the illustration to sec. 43 is repugnant to the provisions of sec. 6 and is really wrong. Where an erroneous representation is made by the transferor to the transferee that he is the full owner of the property transferred and is authorized to transfer it and the property transferred is not a mere chance of succession, but immoveable property itself, and the transferee acts upon such erroneous representation then, if the transferor happens later, before the contract of transfer comes to an end, to acquire an interest in that property, no matter whether by private purchase, gift, legacy or by inheritance or otherwise, the previous transfer can at the option of the transferee operate on the interest which has been subsequently acquired, although it did not exist at the time of the transfer. The illustration to sec. 43 is directly applicable to such a case—*Shyam Narain v. Mangal Prasad*, A.I.R. 1935 All. 244, (Sulaiman, C. J. & Rachhpal Singh, J.) followed by the Bombay High Court in *Vittabai v. Malhar Shankar*, A.I.R. 1938 Bom. 228. See also *Vellayammal v. Palaneyandi*, A.I.R. 1933 Mad. 856; *Jagat Narain v. Laljee*, A.I.R. 1965 All. 504.

A contract which is void *ab initio* cannot be validated by the provisions of this section. If the contract purports to transfer property which is inalienable according to law, that contract cannot be given effect to with respect to another property which the transferor may subsequently

acquire—*Mohan Singh v. Sewa Ram*, A.I.R. 1924 Oudh-209 (216). A disqualified proprietor under the Jhansi Encumbered Estates Act (who is incompetent to transfer any property as long as the 'disqualification' lasts) mortgaged his property when his disqualification had not ceased. After the disqualification had ceased, the mortgagee brought a suit for foreclosure relying on the provisions of this section. *Held* that such a mortgage being forbidden by the provisions of the law, this section could not protect a transfer which if permitted would defeat the provisions of the Jhansi Encumbered Estates Act—*Radha Bai v. Kamod Singh*, 30 All 38. Similarly, a purchaser of inam land from the holder of a service inam who was prohibited by sec. 5 of Madras Act VI of 1895 from alienating the property, cannot claim a valid title to it on the ground that it was subsequently enfranchised and a patta for the land was granted to the alienor—*Narahari v. Siva Korithan*, 24 M.L.J. 462, 19 I.C. 881. A mortgage of village service inam lands in a proprietary estate is invalid and inoperative under the Madras Village Service Act (II of 1894) and a subsequent notification of enfranchisement under sec. 17 of that Act would not enure for the benefit of the transferee. No equities can arise out of a transaction which is prohibited by law, and section 43 of the T. P. Act has no application to such a case—*Sannamma v. Radhabhaiji*, 41 Mad. 418 (F.B.); *Batchu Ramayya v. Dara Satchi*, 25 M.L.J. 635, 21 I.C. 600; *Gopala Dasu v. Rami*, 44 Mad. 946 (948); *Ramayya v. Jagannadham*, 39 Mad. 930. A judgment-debtor to whom sec. 325A, C. P. Code, 1882 (Sch. III, para. 11 of the Code of 1908) applies is a person 'disqualified' within the meaning of section 11 of the Contract Act, to the extent stated in sec. 325A, and any transaction entered into by him in contravention of that section is a nullity, incapable of subsequent ratification or of enforcement in equity, and sec. 43, T. P. Act has no application—*Sahu Bai v. Bajat Khan*, 13 N.L.R. 130, 42 I.C. 200. [*Contra*—*Magniram v. Bakubai*, 36 Bom. 510. In this case it was held that after the disability has been removed by the Code, the judgment-debtor is bound to make good the conveyance which he had made during his disability.]

There is no statutory prohibition against the sale of property by an insolvent after insolvency proceedings have been initiated. As far as the parties to the transaction are concerned, they are binding on them—*Peraya v. Kondayya*, A.I.R. 1948 Mad. 430.

203. Bona fide purchaser without notice of the option :—The second paragraph of the section protects the rights of transferees in good faith for consideration who had no notice of the existence of the option to which the first paragraph of the section relates—*Durga Das v. Muhammad*, 1908 A.W.N. 155.

44. Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part-enjoyment of the property, and to enforce a partition of

Transfer by one co-owner.

the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part-enjoyment of the house.

Scope of section :—This section which confers on the transferee the right of joint possession or partition to the extent enjoyed by the transferor, would apply to transferees of all kinds, including mortgagees and lessees—*Muhammad Jafar Khan v. Mazhar-ul-Hasan*, 3 A.L.J. 474. Thus, the lessee of an undivided share in a house acquires in respect of the share leased out to him the rights and liabilities of his lessor as provided by this section, and can maintain a suit for partition, if partition be necessary to give effect to the transfer—*Ibid* ; *Ramasami v. Alagirisami*, 27 Mad. 361 (367). Where one of the co-owners of an estate under management of a common manager appointed under sec. 93 of the Bengal Tenancy Act mortgaged his share which in execution of a decree on the mortgage was purchased by the mortgagee, he thereby became a co-owner under the manager—*Amar v. Shashi*, 31 Cal. 305 (P.C.).

Although this section does not in terms apply to involuntary sales, e.g., sales in execution of decrees, by virtue of cl. (d) of sec. 2, the principle hereof applies thereto as a rule of justice, equity, and good conscience. Hence where a stranger purchases at a court-sale the share of one of the coparceners in a tank enjoyed as part of a dwelling house owned by the joint family, a suit by such a purchaser for joint possession against the other coparceners is not maintainable—*Jagatbandhu v. Iswar Chandra*, A.I.R. 1948 Cal. 61 ; *Puddipeddi Laxminarasamma v. Godi Ranganayakemma*, A.I.R. 1962 Orissa 147.

204. Right of transferee from co-owner :—If a co-sharer is in exclusive possession of any portion of an undivided piece of land not exceeding his own share, he cannot be disturbed in his possession until partition. If instead of remaining himself in possession he transfers the portion of his joint Khata, his transferee will also have same rights and cannot be disposed by the other co-sharers until partition—*Chanan Singh v. Santa Singh*, A.I.R. 1950 Pepsu. 5.

Under this section a usufructuary mortgagee of a share in immovable property acquires his mortgagor's right to joint possession or common or part enjoyment of the property so long as the mortgage subsists. If the mortgagor attempts to exercise any joint possession or common enjoyment of the property, he will be liable to a suit for ejectment at the instance of his mortgagee—*Harnandan v. Md. Kalim*, A.I.R. 1944 Pat. 341.

A person purchasing a share in the tenancy rights is not entitled to a declaration of title to and khash possession of a specified plot of land forming part of the tenancy, where there is no allegation or proof that there was any binding partition between the co-sharers—*Boloram v. Dandiram*, A.I.R. 1950 Ass. 1. A tenant holding under a lease granted by one co-sharer without the concurrence of the others cannot, when the

land is allotted to another co-sharer at a partition made without taking the tenancy into account, resist a claim for khash possession by the latter on the ground that he has acquired a right of occupancy in the land—*Debendra v. Umesh*, 46 C.W.N. 904. In such a case the right of occupancy is transferred by operation of law to those other lands within the allotment of his lessor of which a new holding is created for the tenant in substitution for the old one, *ibid.* The transferee from one of the co-owners can obtain a decree for recovery of possession of the entire property in the possession of a trespasser—*Karuppan v. Ponnarasu*, A.I.R. 1965 Mad. 389.

Where a co-sharer with the consent express or implied of the other co-sharers erects a building on a part of the joint land, there is an implied contract that he shall be allowed to occupy that particular piece of land to the exclusion of the other co-sharers, so long as the property is joint. He is allowed to that extent part enjoyment—*Unrao Singh v. Kacheru Singh*, A.I.R. 1939 All. 415. The provisions of sec. 118, U. P. Land Revenue Act do not affect in any way the provisions of the T. P. Act about the transfer of co-sharers' interest in land with all that is attached to it—*ibid.* If two decree holders out of three in a suit for possession against their tenants transfer their share to the tenants (judgment-debtors) the latter would be entitled to joint possession with the remaining decree holder or his transferee—*Jogindra Singh v. Baldev*, A.I.R. 1965 J. and K. 2.

204A. Right to partition :—The words "subject to the conditions... so transferred" in this section save the principle established by Mitakshara law that the right of an alienee is only to institute a suit for partition to work out his equities subject to the charges and encumbrances affecting the coparcenary property or the interest of the alienor at the time of the transfer. These principles are not in any manner and to any extent affected or altered by sec. 3 of the T. P. Amendment Act, 1929 or by sec. 2 of the principal Act—*Pēramanayakam v. Sivaraman*, A.I.R. 1952 Mad. 419 (F.B.).

The right of partition exists when two parties are in joint possession of land under permanent titles, although their titles may not be identical—*Bhagwat v. Bepin*, 37 Cal. 918 (P.C.). There is no fixed rule of law that a property held in temporary right cannot be partitioned; the only ground on which partition may be allowed or refused is convenience. Thus where the tenancy, although a monthly one was old and the land was in occupation of the tenants for fifty years, the landlords were numerous and scattered and there was little likelihood of their combining to eject the tenant, the mere fact that technically the holding was monthly tenancy should not debar the parties from their lawful right to partition—*Rajani v. Sambhu*, A.I.R. 1929 Cal. 710. A lessee is entitled to have partition, though he is only a lessee for a term of years, and though that partition can only last for the period of his lease—*Ramasami v. Alagirisami*, *supra*.

The mere fact of the parties owning interests which are not co-ordinate in degree, ought not to be a bar to partition. The Court must in each case determine whether the balance of convenience is in favour of allowing partition. In the absence of inconvenience, there can be a

partition between a superior landlord and a subordinate tenure-holder—*Hemadri v. Ramani Kanta*, 24 Cal. 557 (580) (F.B.). In the absence of proof of inconvenience to other co-sharers, a patnidar whose right extends over only a fraction share of one of many mouzahs in the Zemindary, is entitled to maintain a suit for partition—*Uma Sundari v. Benode Lal*, 34 Cal. 1026 (1028), following *Radha Kanta v. Bipro Das*, 1 C.L.J. 40.

This section cannot override the provisions of Hindu Law. Under the Hindu Law, a co-parcener cannot bring a suit for *partial* partition against the other members of the family for the ascertainment and allotment to him of *his portion alone* of the family property; he must bring a suit for partition of the *whole* family property. Section 44 gives to the purchaser of a co-parcener's share the "transferor's right to enforce partition of the same," which means a right to bring a suit for the partition of the whole family property (as is allowed by Hindu law) and not a right to sue for partial partition for allotment of his portion alone—*Venkatarama v. Meera Labai*, 13 Mad. 275; *Manjaya v. Shanmuga*, 38 Mad. 684. He can take the share when partitioned subject to all the liabilities on it in the hands of his vendor—*Kodura v. Magunta*, A.I.R. 1927 Mad. 471 (F.B.), 50 Mad. 535, 100 I.C. 1018.

"*Legally competent in that behalf*":—This qualification has been provided for the reason that in some provinces, in a joint Mitakshara family, a co-parcener cannot transfer his undivided interest in the joint family property.

"*So far as is necessary*":—Under this section not only a transferee of a share but also of any interest therein can sue for partition and the section imposes a limitation, namely, it must be *necessary to give effect to the transfer*—*Hariharayyar v. Ahammadunni*, A.I.R. 1940 Mad. 491, 1940 M.W.N. 59, 191 I.C. 57 relying on *Md. Jafar Khan v. Mazharul Hasan*, 3 A.L.J. 474 and *Ramasami v. Alagirisami*, 27 Mad. 361. Where the mortgage is not usufructuary and the mortgagee is not entitled to possession he is not entitled to sue for partition. Even if the mortgage-deed confers a right on the mortgagee to sue for partition, that would not entitle him to sue for partition if in law he is not entitled to it—*Ibid*.

205. Second Para :—The principle of the second para is deducible from the judgment of Westropp, C. J. :—"We deem it a far safer practice and less likely to lead to serious breaches of peace, to leave a purchaser to a suit for partition, than to place him by force in joint possession with the members of a Hindu family, who may be not only of a different caste from his own, but also different in race and religion."—*Balaji v. Ganes'h*, 5 Bom. 499 (504). See sec. 4 of the Partition Act IV of 1893 which supplements the provisions of the second para above and is in similar terms. Where the plaintiff, who was not a member of the family, purchased an undivided two-third share in huts used as residence by a joint Hindu family, *held* that he could not be given a decree for joint possession, regard being had to the second para of this section. The proper course is either to direct delivery of possession by *partition* in execution proceedings or to leave the purchaser to his remedy by a separate suit for partition—*Girija Kant v. Mohim*, 20 C.W.N. 675 (678), 35 I.C. 294. The object of both sec. 4 (1), Partition Act and the present section is to keep

off strangers who may purchase the undivided share of some co-owner of an immovable property and as far as dwelling houses are concerned, to make it possible for the co-sharer, who has not sold his share, to buy up the stranger purchaser. The whole object therefore is to provide for peaceable enjoyment of the property and to secure privacy—*Dulal Chandra v. Gcsthabehari* A.I.R. 1953 Cal. 259, per Chakravarti, C. J. and G. N. Das, J. The mere grant of a tenancy of the ordinary kind (not a permanent lease) cannot possibly have the effect of making a house, which is otherwise a residential house of the members of the undivided family owning it, cease to be a dwelling house—*ibid.*

The provisions of para. 2 are of a negative character. On proof of a sufficient defence the Court will not forcibly put a stranger transferee in joint possession with the members of the joint family. This does not create a positive right in favour of the members of the joint family. Hence a suit by a member who has still an interest in the dwelling house impleading only the stranger transferee for permanently restraining the latter from taking joint possession is not maintainable—*Jogendra v. Adhar*, A.I.R. 1951 Cal. 412; *Lal Behari v. Gourhari*, A.I.R. 1952 Cal. 253. A purchaser of an undivided share of a dwelling house has certainly a title to a portion of the house, but his remedy lies in a suit for partition unless of course he is pre-empted under sec. 4 of the Partition Act—*Lal Behari v. Gourhari*, *supra*. The fact that certain co-sharers did not exercise the right under this section on a previous occasion, will not debar them from exercising that right on a subsequent occasion upon a new transfer under a deed of a share of the dwelling house, *ibid.*

The expression "dwelling house" embraces "not merely the structure or building, but includes also the adjacent buildings, curtilages, garden, courtyard, orchard and all that is necessary for the convenient occupation of the house, It includes the land on which the structure of the dwelling house stands, and whether a particular plot of land is or is not necessary to the enjoyment of a house is to be determined on the evidence"—per Mukherjee, J. in *Nilkamal v. Kamakshya*, A.I.R. 1928 Cal. 539 (542). See also *Khirode v. Saroda*, 12 C.L.J. 525, 7 I.C. 436 and *Pran Krishna v. Surath*, 45 Cal. 873. Section 4 of the Partition Act, 1893, applies even to a house a portion of which is already separated owing to one member selling his interest in it—*Masitulla v. Umrao*, A.I.R. 1929 All. 414. Even when the major portion of the house is let out to a tenant, the house may be regarded as the dwelling house of an undivided family—*Satyendu Kundu v. Amarnath Ghosh*, A.I.R. 1964 Cal. 52.

The words "dwelling-house belonging to an undivided family" do not imply that all the members of the family should *actually* live in the house. The requirements of this para are satisfied if the house is an undivided house and the members of the family occasionally reside in the house; it is not necessary for the application of this para, that the members should have *constantly* resided in the house nor is it necessary that they should be joint in mess. Thus, where a house belongs to two sisters A and B (who had inherited it from their father) of whom A lives away in her husband's house, and the other sister B sells her undivided share to a stranger, the purchaser is not entitled to joint possession of the house

with A, but is bound to make a partition—*Pakija v. Adhar Chandra*, A.I.R. 1929 Cal. 231 (233).

The expression "share of a dwelling house belonging to an undivided family" is used in para 2 and seem to have been adopted from there in sec. 4 of the Partition Act. IV of 1893 which takes up the law from where the former section leaves it. The expression therefore has the same meaning in the two Acts—*Boto Krishna v. Akhoy Kumar*, A.I.R. 1950 Cal. 41.

"Undivided family" means simply a family not divided *qua* the dwelling house and has not divided it. It does not mean Hindu joint family or even joint family. The members need not be joint in mess. The members of the family may have partitioned all their other joint properties and may have separated in mess and worship, but they would still be an undivided family in relation to the dwelling house so long as they have not divided it amongst themselves, *ibid*. This character of the house will remain so long as the house is not completely alienated to strangers or the house is not divided, *ibid*.

The words "undivided family" are not restricted to mean a family joint in status but include a family divided in status but undivided *qua* the property in question—*Sivaramayya v. Venkata*, A.I.R. 1930 Mad. 561. The word "family" ought to be given a liberal and comprehensive meaning and it includes a group of persons related in blood who live in one house under one head or management. It is not restricted to a body of persons who can trace their descent from their common ancestor, and it is not necessary that they should constantly reside in the dwelling house, nor is it necessary that they should be joint in mess. It is sufficient if the members are undivided *qua* the dwelling house which they own; and it is the ownership of the dwelling house and not its actual occupation which brings the operation of the section into play; and the object of the section is to prevent the transferee of a member of a family who is an outsider from forcing his way into a dwelling house in which other members of his transferor's family have a right to live—*Nilkamal v. Kamakshya*, supra at p. 541. For other cases on the point see this case. As the second para of this section is in terms similar to sec. 4 of the Partition Act, 1893, the decision on these points under the said Act are applicable to the second para of sec. 44—see *Masitulla v. Umrao*, supra.

The words "undivided family" in the second para are of general application; they are not restricted to Hindus but apply to Muhammadans also—*Sultan Begam v. Debi Prasad*, 30 All. 324 (327); *Masitulla v. Umrao*, supra.

A stranger purchased a share of a family dwelling house and being unable to obtain possession thereof instituted a suit for khash possession and obtained an *ex parte* decree, and thereafter his successor-in-interest obtained an order under Or. 21, r. 97, C. P. Code. Thereupon the other co-sharers of the dwelling house instituted a suit for a declaration of their title and for an injunction restraining the purchaser from obtaining kash possession by executing the decree, and invoked the principle of this section: *Held*, assuming that the principle of sec. 44 was applicable in the case of a sale in execution of a decree, the proper stage for applying

for an order of that nature was reached when the purchaser sued for khash possession, and the plaintiffs not having taken any step at the time, they were estopped from obtaining an injunction—*Rajani Kanta v. Sita Kumari*, 46 C.W.N. 407. Upon a transfer to a stranger of an undivided share of a family dwelling house by a co-sharer, the other co-sharer or co-sharers can maintain a suit for injunction restraining the stranger transferee from exercising any act of joint possession in respect of the share transferred—*Paresh Nath v. Kamal Krishna*, 61 C.W.N. 776. If such a transferee gets into possession he is liable to be evicted—*Udaynath Sahu v. Ratnakar Bai*, A.I.R. 1967 Orissa 139. Possession of one co-sharer enures for the benefit of all the co-sharers—*Khetrabasi Parida v. Chaturbhuj Parida*, A.I.R. 1968 Orissa 236.

45. Where immovable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

206. Scope of section :—This section defines only the *quantum* and not the quality of the interest of the joint transferees. It is silent on the question whether the transferee would take as joint tenants or as tenants-in-common.

This section applies to transfers *for consideration*, and its principle is inapplicable to gifts—*Gabriel v. Inas*, 34 Mad. 80.

There is nothing in this section to suggest that it ought to be limited to voluntary transfers. The section applies to involuntary transfers also—*Reazaddi v. Ya Kub*, A.I.R. 1941 Cal. 416.

207. Property acquired by common fund :—If a property is acquired out of a common fund by three brothers, they would be entitled to hold it in shares in proportion to their interests in the common fund—*Parshotam v. Janki*, 29 All. 354 (364), 4 A.L.J. 257. The same rule would apply to a property acquired by the partnership. If any partner of a partnership alleges a specific agreement that the shares were to be unequal, the burden lies upon him to prove his allegation—*Jadobram v. Bulloram*, 26 Cal. 281. As to co-mortgagees see *Pertab v. Nehal*, A.I.R. 1926 All. 676, 96 I.C. 134. Though S. 45 T. P. Act does not in terms apply to involuntary sales, the principle underlying the section applies to such transfers. Thus, where at

a rent sale two of the co-sharer landlords purchased an occupancy raiyati holding, the respective interests acquired by them in the holding would be in proportion to their respective contributions in purchase money and not in proportion to their shares in the superior right—A.I.R. 1956 Cal. 58.

Joint tenancy:—"The principle of joint tenancy", as observed by the Judicial Committee, "appears to be unknown to Hindu law except in the case of a co-parcenary between the members of an undivided family."—*Jogeshwar v. Ram Chandra*, 23 Cal. 670 (679) (P.C.) ; *Gopi v. Mt. Jaldhara*, 33 All. 41 ; *Mt. Jio v. Mt. Rukuram*, A.I.R. 1927 Lah. 126 (127). Joint tenancy is wholly unknown to India. Hence when two persons jointly purchase a property, they must be deemed to acquire a tenancy-in-common. Merely because their shares are not specified in the sale deed, they cannot be regarded as holding the property or claiming title thereto as joint tenants in the sense in which that expression is understood in English law—*Nanak v. Ahmad*, A.I.R. 1946 Lah. 399 (F.B.). Even according to English law a conveyance or an agreement to convey his personal interest by one of the joint tenants operates as a severance—*Jageshwar v. Ram Chandra*, *supra* at p. 679. The mere fact that two brothers lived together and acquired the property by a joint sale-deed will not prove such jointness as would result in the application of law of survivorship, unless it is also proved that they had thrown their acquisitions into the joint-stock so as to constitute a joint Hindu family—*Gouri v. Gopal*, A.I.R. 1934 All. 701.

In India the Court strongly leans against holding any particular grant as a joint grant. The presumption must always be in favour of a tenancy-in-common rather than a joint tenancy. But the Court can come to a contrary conclusion if the presumption is displaced by clear and cogent language to the contrary. Thus where a Mahomedan mother and a daughter purchased certain immovable property each contributing towards the purchase money, and the *habendum* clause in the sale deed clearly provided that the purchasers were to hold the property as joint tenants and not as tenants-in-common: *Held* that the terms of the grant made it perfectly plain that the intention of the purchasers was to hold the property as joint tenants and were sufficient to displace the ordinary presumption in favour of tenancy-in-common—*Md. Jusale v. Fatmabai*, A.I.R. 1948 Bom. 53, 49 Bom. L.R. 505.

208. Para. 2:—In the absence of any specification in the sale-deed of the shares purchased by two persons, it must be held that both purchased equal shares—*Abdullah v. Ahmad*, A.I.R. 1926 All. 817 (818), *Nanak v. Ahmad*, *supra*. See also *Lal Singh v. Mt. Chotey*, A.I.R. 1933 All. 854. If a property is purchased in the name of two brothers, one of whom pays the consideration in full it will be the exclusive property of the brother paying the price in full—*Syed Tufel Ahmad v. Syed Abrar Ahemd*, 1960 M.P.L.J. (Notes) 204. Para 2 may be illustrated by the following case: An estate was divided into several shares and one of them was left as the *ijmali kalam*, and for others separate accounts had been opened with the Collector, and the owners of the *ijmali kalam* having failed to pay their share of the revenue it was put up to sale but could not fetch a price sufficient to cover the sum in arrears and each of the co-sharers paid the entire amount of arrears separately, and the Collector

issued a certificate of sale jointly to them: *Held* that the different shares should be entitled to equal shares in the purchased estate irrespective of their shares in the parent estate. If there is no evidence upon the record to show how the amount was made up by the Collector from the funds which the parties respectively advanced, the presumption ought to be that each of the parties is equally interested in the property purchased—*Debi Pershad v. Aklio*, 4 C.W.N. 465.

The second para applies in *the absence of evidence* as to the interest, etc. If there is no absence of evidence, *e.g.*, if the evidence is available but has not been produced by the parties, the presumption under the second para cannot be made—*Ram Pher v. Ajudhia*, 12 O.L.J. 66, A.I.R. 1925 Oudh 369, 87 I.C. 17. If necessary attempt had been made to prove the different shares of the vendees, and the vendees failed to declare them, then it might have been possible to apply this para.—*Ibid.* Where a property is acquired by a co-parcenar partly with the aid of joint family fund and partly with his own money it cannot be said that the portion of the property which corresponds to the self acquired portion of the fund should be taken as self acquired property—*Mangal Singh v. Harkesh*, A.I.R. 1958 All 42.

46. Where immoveable property is transferred for consideration by persons having distinct interests therein, the transferors are in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interests in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests.

Transfer for consideration by persons having distinct interests.

Illustrations.

(a) A, owning a moiety, and B and C each a quarter share, of mouza Sultanpur, exchange an eighth share of that mouza for a quarter share of mouza Lalpura. There being no agreement to the contrary, A is entitled to an eighth share in Lalpura, and B and C each to a sixteenth share in that mouza.

(b) A, being entitled to a life-interest in mouza Atrali, and B and C to the reversion, sell the mouza for Rs. 1,000. A's life interest is ascertained to be worth Rs. 600, the reversion Rs. 400. A is entitled to receive Rs. 600 out of the purchase-money, B and C to receive Rs. 400.

209. This section is the reverse of sec. 45 which lays down a similar rule of proportion.

Where two persons mortgaged equal shares jointly, most of the consideration being left with the mortgagees as "dehanid" for payment of certain prior unequal debts incurred by them, and the consideration for the mortgage in question was made equal by their taking unequal shares: *held* that each of the mortgagors was responsible for one-half of the liability under each of the debts for which money was made "dehanid"—*Hamid v. Alimulla*, A.I.R. 1937 Oudh 138.

Where property belonging to a joint family of father and four sons

was hypothecated and the hypothecatee brought a suit against the sons after the father's death and the suit was decreed *ex parte* against one son, it being withdrawn against the other three, it was *held* that the decree-holder got one-fifth share of the judgment-debtor in addition to the one-fourth of the one-fifth share of the father. He did not get one-fifth share of the judgment-debtor and one-fifth share of the father—*Bore Gowda v. Ramegowda*, A.I.R. 1954 Mys. 16.

Distinct interests :—The estate of co-widows in Hindu law taking their husband's property by inheritance is one estate subject to the right of survivorship, their interest in the estate is not distinct but joint, and they are in law co-parceners—*Bhugwandeem v. Myna Bibee*, 11 M.L.A. 487; *Gajapathi Nilmani v. Gajapathi Radhamani*, 1 Mad. 290 (P.C.); *Ram Piyari v. Mulchand*, 7 All. 114.

47. Where several co-owners of immoveable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and, where they were unequal, proportionately to the extent of such shares.

Transfer by co-owners of share in common property.

Illustration.

A, the owner of an eight-anna share, and B and C, each the owner of a four-anna share, in mouza Sultanpur, transfer a two-anna share in the mouza to D, without specifying from which of their several shares the transfer is made. To give effect to the transfer one-anna share is taken from the share of A, and half-anna share from each of the shares of B and C.

Note :—In the case of transfers falling under this section, the transfer takes effect not according to the *quantum* of consideration received by each co-owner but according to the extent of the share of each co-owner. This rule was probably enacted to guard against the complications which the former course would entail. For the value of two shares otherwise equal may considerably vary, and if inquiries have to be made as to the value of each share, much unnecessary inconvenience and delay would become inevitable—*Gour's Law of Transfer*, (6th Edn.), Vol. I, p. 509.

210. Enlargement of transferor's share after the date of transfer :—Since a transfer falling under this section takes effect not according to the quantum of consideration taken by each transferor, but according to the extent of the share of each transferor, it follows that if during the time the contract of transfer subsists, the share of a transferor becomes enlarged, the transferee is entitled to the enlarged share on the analogy of the principle enunciated in sec. 43. Thus, where the plaintiff purchased certain property belonging to the family consisting of the transferor, his adopted son and his uncle, and brought the suit for possession of the property so purchased against the said persons, and the adopted son and the uncle contested the suit on the ground of want of legal necessity for the sale, and the uncle died pending the suit : *held* that apart from

the question of necessity, the transfer operated as to one-half of the property, as the transferor's interest in the property increased from one-third to one-half owing to the death of the uncle—*Viraya v. Hasumanta*, 14 Mad. 459. Similarly, a mortgage bond was executed by a Mahomedan woman and her eldest son, on account of a debt due by the deceased husband of the former. Three other children of the deceased were also joined as defendants in a suit on the mortgage, but the decree made the mortgage amount payable on the *responsibility of the shares* of the mortgagors and the suit was otherwise dismissed and no personal decree was passed. Subsequently, before the decree was executed one of the three sons whose shares in the property were exonerated from liability for the debt, died and his share in the mortgaged property devolved upon the co-mortgagors whose shares consequently were increased. It was held that the increased shares of the co-mortgagors were liable to be attached and sold in execution of the decree—*Ajijuddin v. Sheik Budan*, 18 Mad. 492.

48. Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

211. Principle:—This section is a statement of the rule expressed in the maxim *Qui prior est tempore potior est jure* (he who is prior in time is better in law). One who has the advantage in time should also have the advantage in law. When two successive transfers of the same property have been effected by way of mortgage or sale, the later in date must give way to the earlier—*Sirbadh Rai v. Raghunath*, 7 All. 568 (572); *Karamat v. Samiuddin*, 8 All. 409; *Narayan v. Luxuman*, 29 Bom. 42; *Motichand v. Sagun*, 29 Bom. 46.

Scope:—Ordinarily priority of rights created by different transfers is governed by this section. A mortgagee claiming priority will not lose his right unless his conduct was such as to estop him from asserting it—*Khetra Nath v. Harsukdas*, A.I.R. 1927 Cal. 538 (542). When the prior mortgage is not binding (having been effected without the landlord's consent as required by the Central Provinces Tenancy Act) the subsequent mortgage would operate on the entire interest of the mortgagor as if it has not been burdened with a prior mortgage—*Ramkaran v. Kanhaiyalal*, A.I.R. 1937 Nag. 189.

212. Application of principle:—(1) This section applies when there are *completed valid transfers*. The word "transfer" in this section contemplates a complete transfer, and does not include a mere contract for sale or a sale by an unregistered sale-deed, the registration of which is compulsory. If a contract of sale to one person is followed by complete sale to another, the case will be governed by sec. 40 and not by this section. A registered deed of sale shall take effect as *against* (and not *subject to*) a mere contract of sale or an unregistered conveyance (see secs. 48 and 50 of the Registration Act). See also *Waman v. Dhandiba*,

4 Bom. 126 (F.B.); *Chundernath v. Bhoyrab*, 10 Cal. 250; *Ram Autar v. Dhanauri*, 8 All. 540.

(2) The rule is applicable only when the two transfers are *antagonistic* and not where legal effect can be given to one without infringement of the other. Compare the words of the section "and such rights cannot all exist or be exercised to their fullest extent together." Thus, in a case where a property is mortgaged to one and subsequently sold to another, this section will not apply, because the purchaser has obtained only the equity of redemption, an interest which can exist side by side with the mortgage—*Ramchandra v. Krishna*, 9 Mad. 495; *Sobhagchand v. Bhaichand*, 6 Bom. 193 (208). But where usufructuary mortgages of the same property are created in favour of different persons, the two rights cannot co-exist and the subsequent mortgage will give way and the prior mortgage will prevail—*Sirbadh Rai v. Raghunath*, 7 All. 568 (572). Generally speaking, the question of priority between a mortgagee and a subsequent purchaser is governed by this section. The purchaser is not protected by sec. 41 when there is no proof of negligence on the part of the mortgagee—*Sita Ram v. Raj Narain*, A.I.R. 1934 Oudh 283. Where after the registration of a mortgage the mortgagor sold the property to a third person by a registered deed of sale and subsequently the mortgagee paid the consideration money for the mortgage to the mortgagor, the mortgagee's right prevailed over that of the vendor—*Raghunath v. Amir Baksh*, I.L.R. 1 Pat. 281. An agreement to sell land was executed in favour of A. Subsequently mortgage of the same land was executed in favour of B. Later on a sale-deed was executed in favour of A. Held, that the mortgage must have its effect as against the subsequent sale, though the agreement to sell was executed before the mortgage—*Chouth Mal v. Hiralal*, A.I.R. 1950 Aj. 59.

There is no conflict between a validly registered conveyance and an unregistered sale-deed of which registration is compulsory, because the latter is a nullity; and this section need not be invoked to determine their priority.

This section applies in the absence of a special contract or reservation binding the earlier transferees. And so, where a mortgage is executed by a Receiver under an order of Court directing that such mortgage should constitute a first charge, it takes priority over any other mortgage of earlier date—*Sripat v. Naresh*, A.I.R. 1926 Pat. 94; *Giridhari v. Dharendra*, 34 Cal. 427 (441). To the general rule '*qui prior est tempore potior est jure*' there is a notable exception to be found in advances made to save the mortgaged property from loss or destruction. These advances are payable in priority to all other charges of earlier date, and amongst themselves have precedence according to the inverse order of their respective dates—*Ibid*, following Fisher on Mortgages, 4th Edn., p. 958. A mortgage by the parties after the appointment of a Receiver in a partition suit for management and preservation of the properties is however valid and will have priority over a subsequent mortgage by the Receiver under an order of the Court directing the creation of a first charge, when such an order is without jurisdiction—*Bhadrabati v. Jibanmal*, 45 C.W.N. 68—*per* R. C. Mitter and Akram, JJ.

Where co-sharers have been awarded certain sums of money as

owelty on a partition decree, they are entitled to priority over the mortgage of a portion of the property purchased—*Md. Kazim v. Hills*, 35 Cal. 388.

An attaching creditor does not get priority over a mortgage executed after his decree but before attachment of the property in execution thereof—*Hérumbo v. Satish*, 33 Cal. 1175. So an attachment subsequent to the execution of a mortgage but prior to the registration thereof does not affect the mortgage—*Nabadwip v. Lokenath*, A.I.R. 1933 Cal. 212, 36 C.W.N. 733, 59 Cal. 1475, 141 I.C. 358.

A Crown debt, e.g., a fine imposed on conviction of a person, has priority over other unsecured debts—*Pichu v. Secretary of State*, 40 Mad. 767. In an English mortgage the ownership passes to the first mortgagee; so the first mortgagee only has the right of priority over the Crown in respect of the immoveable property so mortgaged. But the Crown has priority so far as the moveable properties are concerned—*Bank of Upper India v. Administrator-General*, 45 Cal. 653. Although rents and profits collected by a Receiver appointed by the Court in a simple mortgage suit can be deemed by the mortgagee in priority to other simple creditors, they cannot be appropriated by the mortgagee in priority over a Crown debt, such as income-tax—*Income-tax Officer v. Indian Insurance & Banking Compn.*, A.I.R. 1954 Mad. 197.

Where a puisne mortgagee obtains a decree without impleading the prior mortgagee and the latter obtains a decree without impleading the puisne mortgagee, both mortgages being simple, and the mortgaged property is sold successively by the mortgagees in execution of their respective decrees, as between the rival purchasers the first purchaser is entitled to hold possession against the subsequent purchasers—*Chinnaswami v. Darmalinga*, A.I.R. 1932 Mad. 566; *Nagendra v. Lakshmi*, A.I.R. 1933 Mad. 583 (F.B.); *Afzar Jehan v. Md. Amir*, A.I.R. 1937 Oudh 478; *Sheo Sahai v. Suraj Baksh*, A.I.R. 1937 Oudh 33; *Swamma v. Surayya*, A.I.R. 1934 Mad. 585; *Guru Prasad v. Tarini*, A.I.R. 1938 Cal. 634. As between two purchasers of a mortgaged property the title to the outstanding equity of redemption is determined by the priority, not of the respective mortgages, but of the respective sales, and the person who first buys the equity of redemption, whether he be the mortgagee himself or a stranger, would be entitled to redeem all the subsisting mortgages and thus acquire an absolute title—*Ramkinkar v. Hareram*, A.I.R. 1933 Cal. 181; see *Gangadhar v. Lakshman*, A.I.R. 1930 Bom. 221, where it has been held that as between competing auction-purchasers the principles governing priority are the same as those which regulate the claim of priority among mortgagees. In a suit for possession by a usufructuary auction-purchaser he is entitled to possession as against a puisne mortgagee whose mortgage is subsequent to that of the former—*Gurmukh v. Sundar Singh*, A.I.R. 1936 Lah. 153. The puisne mortgagee was, however, allowed to redeem in this suit—*Ibid*, at p. 156.

The auction-purchaser in execution of a decree obtained on a prior mortgage without impleading the subsequent mortgagee acquires all the rights of the mortgagor including his rights to possession in cases where both the mortgages are simple if either no suit by the subsequent mort-

gagee is pending or purchase in execution of the prior mortgagee's decree was earlier in point of time. If the first mortgagee is the earlier purchaser the rights of the mortgagor to obtain possession will ultimately vest in him. If the mortgage is not time-barred he can compel the subsequent mortgagee to redeem him, but if it is time-barred he must redeem the subsequent mortgage. Where sale in execution of a decree obtained on the foot of a puisne mortgage takes place during the pendency of the suit on the prior mortgage, apart from the effect of the rule of *lis pendens*, if the second mortgagee is the earlier purchaser, the purchaser in execution of a decree on prior mortgage will have the right to take possession as plaintiff if a suit on his mortgage is not time-barred. If the purchaser from the second mortgagee redeems him the former will retain the property. If the prior mortgage is time-barred the purchaser from him cannot obtain possession—*per Full Bench in Ram Sanahi v. Janki Prasad*, A.I.R. 1931 All. 466 (488), (See also *Lachmi v. Hirday*, A.I.R. 1926 All. 480). But see the dissentient judgment of Mukherjee, J. who has been of opinion that generally it is the first purchaser who gets the property and the question of purchase has nothing to do with the priority or posterity of the mortgage in enforcement of which the property is sold—at p. 488. In this connection see *Bansidhar v. Shiv Singh*, A.I.R. 1933 All. 908 (910-11). So where a third party purchased the mortgaged property in execution of the subsequent mortgagee's mortgage decree and then the prior mortgagee obtained a decree on his mortgage and purchased the property in execution thereof, he was not entitled to a decree for possession, subject to the third party's right to redeem. The prior mortgagee on the basis of his purchase could not also claim the equity of redemption as against the third party. He could, no doubt, fall back upon the first mortgage (but he could not recover possession on its strength as that mortgage being a simple mortgage did not give any right to possession) if 12 years had not elapsed from the date when the mortgage money became payable. He could not compel the third party, who had purchased the property in execution of the subsequent mortgagee's decree, to redeem, as redemption is a legal right and not a liability—*Jagat v. Abdul*, A.I.R. 1935 Cal. 139. See in this connection *Nathmal v. Nilkanth*, 1933 Bom. 25, 34 Bom. L.R. 1519, 141 I.C. 811; *Surendra v. Ahmmad*, A.I.R. 1933 Cal. 912 (913), 60 Cal. 1193, 147 I.C. 808; *Niharmala v. Sarojbandhu*, A.I.R. 1933 Cal. 728 (731).

The rights of persons who have acquired an interest in the mortgaged estate, since the making of the mortgage of which the mortgagee had notice, cannot be defeated or impaired by any subsequent arrangement to which they are not parties—*H. V. Low & Co. v. Pulin*, A.I.R. 1933 Cal. 154.

As between two substituted security rights no question of priority arises, for sec. 48 applies only to successive mortgages in the same property—*Krishnaveni v. Subrahmanyam*, A.I.R. 1938 Mad. 547.

Where an agreement is entered into with the knowledge of a prior agreement, the latter has priority in law over the later agreement. The decisive factor is the priority in date of the agreement and not its terms—*Abdullah v. Ahmad*, A.I.R. 1929 All. 817.

213. "At different times":—Where two deeds relating to the same

property were executed on the same day, it must be proved which was in fact executed first, but if the deeds themselves show an intention either that they shall take effect *pari passu* or even that the later deed shall take effect in priority to the earlier, then it will be presumed that the deeds were executed in such order as to give effect to that intention—*Gartside v. Silkstone & Co.*, 21 Ch. D. 761; *Ramratan v. Bishnu-chand*, 11 C.W.N. 732. If a vendor intending to convey immovable properties executes a sale deed and delivers possession of the said properties to the vendee, the mere omission of the plot numbers in the sale deed is immaterial and a subsequent sale deed in favour of another person in respect of any of the said properties is of no avail—*P. Rammurty v. A. Kalpo Patra*, A.I.R. 1963 Orissa 136.

A deed of sale executed by some out of several vendors at one time and by the rest subsequently, becomes operative as to the share of the vendors first executing the deed, from the date of their execution, if the purchaser elects to treat the sale as complete in regard to their shares. The deed is not altogether void, because some of the vendors executed it subsequently—*Lalit Mohan v. Anil Kumar*, 43 C.W.N. 1036, per Mukherjee and Roxburgh, JJ.

Where two deeds bearing different dates were registered on different days, priority as between them is ascertained with reference to the dates of the deeds and not with reference to the dates on which they were respectively registered; and this priority is not influenced by the fact that the party having the later deed is in possession of the property—*Narayan v. Lakshuman*, 29 Mad. 42; *Santaya v. Narayan*, 8 Bom. 182; *Motichand v. Sagun*, 29 Bom. 46; *Mathura v. Ambika*, 12 A.L.J. 993.

This section must be read subject to sec. 48 of the Registration Act—*Chhagan Lal v. Chunilal*, A.I.R. 1934 Bom. 189. So although a document, so long as it remains unregistered, is not valid, yet as soon as it has been registered, it takes effect from the date of its execution—*Gopal v. Lachmi*, A.I.R. 1926 All. 549. *Prima facie* and apart from notice the priority of mortgages in India depends upon the respective dates of their creation, the earlier in date having precedence—*Lloyds Bank v. P. E. Guzdar & Co.*, A.I.R. 1930 Cal. 22; *Imperial Bank v. U Rai Gyaw, etc., Ltd.*, 51 Cal. 86, 50 I.A. 283, 1 Rang. 637; *Webb v. Macpherson*, 31 Cal. 57, 30 I.A. 238; *Gokul v. Eastern Mortgage & Co.*, 33 Cal. 410, 10 C.W.N. 276. Where a subsequent mortgagee took a mortgage knowing of a previous but unregistered mortgage under the impression that even if the prior mortgagee was able to obtain registration of his deed that would not take precedence over his mortgage, the subsequent mortgage was postponed—*Jowand v. Sawan*, A.I.R. 1933 Lah. 886. If a person about to take a mortgage finds some person in possession, the fact of such possession is sufficient to put the would-be mortgagee on equity and if such person's title is that of a prior mortgagee under a document not compulsorily registrable, the second mortgagee cannot by getting his mortgage registered obtain priority over the first mortgagee—*Bhikhi v. Udit*, 25 All. 366. But where a property which was subject to two unregistered mortgages of different dates was sold in execution of a decree on the later mortgage and purchased by the decree-holder who afterwards sold it by an unregistered deed to another person who again

sold it by a registered deed: *held* that after such sale no suit would lie on the prior unregistered mortgage—*Ishri Prasad v. Gopi Nath*, 34 All. 631. Where the subsequent mortgagee takes the mortgage fully knowing the liabilities created under the first mortgage and undertaking to clear the prior mortgage, even where in a sale by the prior mortgagee the interest had been bought by the mortgagor himself the subsequent mortgagee takes subject to the mortgagor's rights—*Amar Chand v. Sardar Singh*, A.I.R. 1925 Nag. 90 (93).

Mere registration does not render a sale or a mortgage operative from the time of registration, if there is a contract that the operation would be postponed till the actual payment of the full amount of consideration—*Makhan Lal v. Hanuman Bux*, 2 Pat. L.J. 168. Where a property had been mortgaged before a contingent interest under a prior mortgage had become actually vested, the subsequent mortgagee got priority over the prior mortgage—*Mt. Murtazi v. Dildar Ali*, A.I.R. 1930 Oudh 129.

Where a personal decree obtained under O. 34, r. 6, C. P. C., was sought to be executed against a property in the hand of the mortgagor's widow but it had already been mortgaged to another person by the widow, it was held that the decree could not be executed against that property—*Sarojendra v. Binapani*, A.I.R. 1938 Cal. 468.

An equitable mortgage effected by deposit of title deeds is a mortgage in the sense of the Act, consequently the priority sections apply to that kind of mortgage—*Imperial Bank v. U Rai Gyaw*, A.I.R. 1923 P.C. 211 (216). But an oral charge, though prior in time, does not have priority over subsequent mortgages, without notice of the charge, by registered deed—*Chhaganlal v. Chunilal*, A.I.R. 1934 Bom. 189 (190), 36 Bom. L.R. 277, 152 I.C. 267.

For other cases of priority see secs. 78 and 79 and Notes thereunder.

49. Where immoveable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.

214. Two questions may arise under this section:—(1) If the house is destroyed after the contract of sale, but before it is completed by payment of purchase-money; (2) If the house is destroyed after the sale is completed by payment of purchase-money.

(1) If the house is destroyed before the transfer is complete by payment of purchase-money, this section has no application, because it speaks of cases 'where immoveable property is transferred', i.e., actually transferred. A mere contract of transfer confers no interest in the property on the purchaser. See sec. 54, *post*.

(2) After the purchaser has paid the purchase-money, and the owner-

ship has passed to him, he is bound to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller. See sec. 55 (5) (c) *post*. But if the property is insured against loss or damage by fire, and the money payable under the policy is received by the vendor, this section comes in and entitles the purchaser to require the vendor to apply the money in reinstating the property.

215. "Which the transferor actually receives" :—This section does not give the transferee of insured property any direct claim against the insurer, but it provides only for the case where the money payable under the policy has been actually received by the transferor. The vendor is liable for the money *actually* received by him under the policy. It may well happen that after the vendor has sold the property and received full consideration thereof, he may not care to enforce payment of the insurance money from the insurer. In such a case, the purchaser can neither compel the vendor to enforce his claim against the Insurance Company, nor can the purchaser claim the insurance money directly from the company. It is only when the vendor cares to enforce his claim against the Insurance Company and actually receives the money from the company that the purchaser can claim the benefit of this section. The safest course for the purchaser is to get the policy of insurance assigned over to him at the time of purchase.

Where the owner of a mill insures it against fire, and subsequently mortgages it to a third person, and the mill and the premises are destroyed by fire, the the Insurance Company is not liable to indemnify the mortgagee against the loss. The contract is one to indemnify the insured, and not any other person between whom and the company there was not privity of contract—*Chetty Firm v. Motor Union Insurance Co.*, A.I.R. 1923 Rang. 6. But see *Sinnot v. Bowden*, (1912) 2 Ch. 414 where the mortgagee was allowed to get the money from the insurance company for rebuilding.

50. No person shall be chargeable with any rents or profits of any immoveable property which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

Rent bona fide paid to holder under defective title.

Illustration.

A lets a field to B at a rent of Rs. 50. and then transfers the field to C. B, having no notice of the transfer, in good faith pays the rent to A. B is not chargeable with the rent so paid.

Note :—This section is taken almost word for word from section 1 of the Mesne Profits and Improvements Act (IX of 1855) which has been repealed by this Act.

216. Scope :—The language of this section is general. It even applies to a case where there has been no *assignment* by the lessor during the tenancy, but the case is merely one of succession and the rent is paid to

a person who is the ostensible or *de facto* owner—*Kaveriamma v. Lingappa*, 33 Bom. 96 (104). See this case cited in Note 217 below.

But this section has no application to payment of rent made *in advance*. It is a well-known principle of English law that the payment of rent before it becomes due is not a fulfilment of the obligation imposed by a covenant to pay rent, but is in fact an advance to the lessor with an agreement on his part that when the rent becomes due such advance will be treated as a fulfilment of the obligation to pay the rent—*De Nicholls v. Saunders*, (1870) L.R. 5 C.P. 589; *Cooke v. Guerra*, (1871) L.R. 7 C.P. 132; *Ketha Bhat v. Chotey Lal*, A.I.R. 1960 Raj 19. A payment of rent in advance is in effect *a loan to the landlord* to be applied thereafter in discharge of the tenant's obligation to pay rent as it accrues due, but it is not in itself a fulfilment of an obligation to pay rent, in as much as the obligation has not arisen at the time of the payment. As against the landlord and his legal personal representatives, a tenant who pays rent in advance is secure, because as the rent becomes due, the previous advance becomes actual payment. But if the landlord should assign his rights, the assignee will, by giving notice to the tenant, before the proper rent-day, to pay rent to him, become entitled to the rent then falling due—*Tiloke Chand v. Beattie & Co.*, A.I.R. 1926 Cal. 204; *Ram Lal v. Mahadeo*, 3 P.L.T. 128, 63 I.C. 587 (588); *Pale Zabaing Rural Co-operative Society v. Maung Thu Daw*, A.I.R. 1931 Rang. 292; *Kiran Chandra v. Dutt & Co.*, A.I.R. 1925 Cal. 251 (253); *Govind v. Gopal Rao*, 14 C.P.L.R. 65; *Official Assignee v. Abdul*, A.I.R. 1928 Sind 95 (96); *Rameshwar v. Buttokristo*, A.I.R. 1934 Pat. 653. If, however, the transferee has *notice*, actual or constructive, of the agreement between the landlord and tenant under which the tenant paid a large sum as rent in advance, the transferee is not entitled to realise the rent over again from the tenant—*Tiloke Chand v. Beattie & Co.*, A.I.R. 1927 Cal. 270 (273); *Kiran Chandra v. Dutt & Co.*, *supra*; *Nand Kishore v. Anwar*, 30 All. 82 (at. p. 83).

But this section applies where the rent is realised in advance from the tenant *as a condition* of his entering into the premises. Thus, where the mortgagor of certain mortgaged premises let them to a tenant after receiving 5 months' rent in advance as a condition precedent to such letting, and subsequently a Receiver appointed in the mortgage-suit relating to those premises sued for recovery of the said rent: *held* that the lessee having paid the rent in advance only as a part of his entering into the contract of hiring the premises, could not be compelled to pay it over again to the Receiver—*Toon Chan v. P. C. Sen*, 7 Bur.L.T. 139, 24 I.C. 693 (694).

In a recent case Harris C. J. and Sinha J. of the Calcutta High Court have held that sec. 50 contemplates payment of rent in good faith for the same tenancy to a wrong person. Thus where a sub-tenant paid rent to the tenant who was his immediate landlord in respect of the sub-tenancy without the knowledge that he had become a statutory tenant directly under the landlord, such payment could not be relied upon by him as a payment to the landlord in respect of the statutory tenancy—*Narendra v. Great Eastern Hotel, Ltd.*, A.I.R. 1951 Cal. 394.

217. Rents paid in good faith :—This section speaks of good faith twice; first with regard to payment actually made, and secondly as to the title of the person to whom it is made. When the purchaser of the landlord's interest gave notice of his title to the tenant after the commencement of his tenancy, payment of rent made by the tenant to the vendor who inducted him on the land was protected by this section—*Sattu Lal v. Kritanta Kumar*, 42 C.W.N. 378. But where a tenant knew of the dispute between two rival claimants to the title of landlord, but chose one of them and paid rent to him, the payment cannot be said to be *bona fide* and this section does not cover the case—*Gambheriya v. Sakharam*, A.I.R. 1927 Nag. 237. Similarly where the tenant of a mortgagor has been paying rent to the mortgagee in accordance with the terms of the mortgage deed, but subsequently pays rent to a purchaser at the Court sale of the mortgaged property without making any enquiry whether the mortgage has in fact been satisfied and merely relying on the words of the said purchaser that the mortgage has been satisfied, the tenant cannot be said to have acted in good faith within the meaning of this section—*Butto Kristo v. Gobindaram*, A.I.R. 1939 Pat. 540. Where a person continues payment to a person having defective title, after he came to know the title of the real owner, he acts in bad faith and no inference can be made in his favour as to previous payments—*Md. Azim v. Pateshwari Prasad*, A.I.R. 1943 Oudh 105.

Payment made without notice of transfer :—If, after transfer of his right, title and interest in any estate, the proprietor receives rent from a tenant which is due to his transferee, he is liable to account to that person for monies so received, but the law affords protection to the tenant making such a payment by providing that the receipt of the transferor shall afford full indemnity to the tenant making such payment of rent without notice of the transfer—*Alimudden v. Heeralal*, 23 Cal. 87. 101 (F.B.). Payments made by tenants to a mortgagor after the mortgage but before they have any notice of it, will be valid against the mortgagee—*Kiran Chandra v. Dutt & Co.*, A.I.R. 1925 Cal. 251. If the purchaser omits to give notice of his title to the tenants, and the tenants misled by the want of such information continue to pay their rents to the former proprietor, the purchaser must bear the consequences of his neglect—*Collector v. Hursoondery*, 1864 W.R. (Act X Rulings) p. 6.

Payment to ostensible owner :—In a suit for mesne profits or rent brought by the real owner of land against a tenant, it is a good defence for the latter to aver that he had, without notice of any adverse claim, paid over the rent or profits to one, of whom he in good faith had held the property, although the latter had really no right to it. Thus, if on the death of the landlord his interest devolves upon his sister but rent is realised by the widow after taking possession of the property and mutuating her name as owner, the sister cannot claim the rent already realised by the widow to whom rent was paid by the tenant in good faith—*Kaveriamma v. Lingappa*, 33 Bom. 96 (103, 104).

218. Payment made after notice of transfer :—It is immaterial whether the tenant gets notice from the transferor or from the transferee. In either case, he cannot escape liability. Thus, the tenant cannot successfully plead that he has paid the rent *bona fide* to the assignor, if he

has received notice of the assignment from the assignee—*Pope v. Biggs*, (1829) 9 B. & C. 245 ; *Peary Lal v. Madhoji*, 17 C.L.J. 372, 19 I.C. 865 (868). Similarly, if the tenant gets notice of the transfer from the transferor (and not from the transferee), any payment of rent made by the tenant to the transferor thereafter is not a valid payment made in good faith, and the transferee is entitled to claim the same from the tenant—*Nabin Chandra v. Surendra*, 7 C.W.N. 454. Payments made by the tenant either in collusion with his grantor or after receiving notice of the right of a third party are not protected under the section—*Moss v. Gallimore*, 1 Doug. 279 ; *Pope v. Biggs*, 9 B. & C. 245 ; *Cook v. Guerra*, L.R. 7 C.P. 132.

219. Procedure :—Where the tenant alleges that the rent for the year in question has been paid to the previous landlord (the vendor of the plaintiff), the suit for rent can be framed alternatively against the tenant and his previous landlord. Where in such a case the Court finds that the tenant has in fact paid the rent to the previous landlord in good faith, the plaintiff is entitled to a decree against the previous landlord alone for the amount paid to him, the tenant being discharged—*Madan Mohan v. Holloway*, 12 Cal. 555.

51. When the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market-value thereof, irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

This section is almost the same as sec. 2 of the Mesne Profits and Improvements Act (IX of 1855), which has been repealed by this Act.

In England, similar provisions are to be found in the Improvement of Land Act 1864 (27 & 28 Vict. c. 114), and the Settled Land Act 1882 (45 & 46 Vict. c. 38).

This section may be compared with section 82 of the Bengal Tenancy Act (VIII of 1885) which deals with compensation for raiyat's improvements.

220. Principle :—This section is based upon the principle that he who will have equity must do equity. "A constructive trust may arise

where a person, who is only a part owner, acting *bona fide*, permanently benefits an estate by repairs or improvements; for a lien or trust may arise in his favour in respect of the sum he has expended in such repairs or improvements (*Lake v. Gibson*, 1 Eq. Ca. Ab. 290). Although a person expending money by mistake upon the property of another has no equity against the owner who is ignorant of and did not encourage him in his expenditure (*Nicholson v. Hooper*, 4 My. & Cr. 186) yet if it were necessary for the true owner to proceed in equity he would only be entitled to its assistance according to the ordinary rule by doing equity and making compensation for the expenditure, so far of course, and only so far, as the expenditure was necessary and has proved permanently beneficial. But a person will have no equity who lays out money on the property of another with full knowledge of the state of the title (*Rennie v. Young*, 2 DeG. J. & S. 136; *Ramsden v. Dyson*, L.R. 1 H.L. 129; *Price v. Neault*, 12 App. Cas. 110); or who lays out money unnecessarily or improperly"—Snell's *Equity*, pp. 148, 149.

Where a person in *bona fide* belief of his title to the land spends money upon it and makes improvements and the true owner stands by, then he is estopped from asserting his title to the land as against the person making improvements in such *bona fide* belief. Thus where A, who has purchased a property in his own name for the benefit of B with the mutual understanding that B would repay the purchase money with interest to A, stands by and acquiesces in the improvements made by B in the house and does not conduct himself as a real owner, he is estopped from subsequently asserting his ownership and denying the title of B. Similarly the alienee from A purchasing the property with notice of B's title is also estopped from denying B's title—*Venkataswami v. Muniappa*, A.I.R. 1950 Mad. 53.

The principle of this section is an exception to the maxim "*Quicquid inaedificator solo solo cedit*". And unless the equitable grounds mentioned in this section are made out, the moment the improvements are made they belong to the owner of the land by operation of law—*Dharma Das v. Amulya*, 33 Cal. 1119 (1130); *Maung Aung v. Ma Nyun*, A.I.R. 1928 Rang. 141 (142).

221. Application of this section:—This section applies to both Hindus and Mahomedans, since there is no rule of Hindu or Mahomedan law which precludes persons from claiming the benefit of the equitable principle embodied in this section—*Durgozi v. Fakeer Sahib*, 30 Mad. 197 (199).

This section does not apply to every person who is in possession of property. It does not apply to a trespasser; *Topanmal v. Chanchal-mal*, A.I.R. 1940 Sind 77. See also *Murlidhar v. Parmanand*, A.I.R. 1932 Bom. 190. A trespasser makes improvements at his own risk. Where however he acts *bona fide* upon a claim of title and the true owner stands by and allows him to construct the house, he is upon ejectment entitled to remove the materials of the house. This section does not apply and he cannot claim compensation—*Krishna Prasad v. Adyanath*, A.I.R. 1944 Pat. 77. A suit for possession of land by an owner after demolition of certain constructions on the ground that the defendants had, in building a house on his land encroached upon the plaintiff's

land is a pure and simple action for ejectment of a trespasser. In such a case, the Court has no power to grant a decree for damages instead of a decree for possession to the owner of the land—*Bhillso Pandey v. Mt. Sheoraji*, A.I.R. 1950 All. 535.

This section applies to a transferee who has succeeded in proving that he believed in good faith that he was absolutely entitled to the property over which he made the improvement—*Motichand v. British India Corporation*, A.I.R. 1932 All. 210. This section cannot be taken advantage of by a person to whom sec. 52 applies—*Ibid.* Where in a suit for possession of land and certain rooms it was found that the defendants were near relations of the plaintiff and they were allowed to occupy the premises and land as early as 1893 under an unregistered lease, and subsequently they spent substantial sums of money on improving the building without any protest from the plaintiff and there was nothing to show that they did not do so in good faith, the equitable principle of this section was extended to the case and a conditional decree was passed on payment of the amount, the amount spent by the defendants in improvements—*Karam Singh v. Budh Sen*, A.I.R. 1938 All. 342. See also *Badal v. Debendra*, A.I.R. 1933 Cal. 612; *Sadhu Singh v. Dist. Board Gurudaspur*, A.I.R. 1960 Punj. 172.

This section does not apply in terms as between a landlord and a tenant—*Shanmugha Desika v. Anantha Krishnaswami*, A.I.R. 1939 Mad. 247; *Subhan v. Madhorao*, A.I.R. 1952 Nag. 398. But although this section does not apply to a lease but only to transfer of proprietary rights [see *Mohammad Ali v. Kanai Lal*, A.I.R. 1935 Cal. 625; *Rajrup v. Gopee*, *infra*] compensation was allowed to a person who entered into possession on a verbal agreement to lease on the analogy of this section—*Naina v. Mahanath*, A.I.R. 1938 Pat. 435, (1938) as indicated in *Badal v. Debendra*, *supra*. Where the defendants were not holding the land under a perpetual lease, nor did they claim an absolute title to the lands, then in a suit by the plaintiff to evict the defendants, the latter were not entitled to claim under this section any compensation for improvements made by them on the land—*Ponnia v. Ponnia*, A.I.R. 1947 Mad. 282; *Bastacolla Colliery v. Bandhu Beldar*, A.I.R. 1960 Pat. 344 (F.B.). The lessee can remove his structures and materials—*Ibid.*

In view of sec. 2 (d), this section cannot apply to a transfer in execution of a decree, and the word 'transferee' does not include an auction-purchaser of the property at Court sale—*Nannu Mal v. Ram Chander*, A.I.R. 1931 All. 277 (283) (F.B.). As under this section the evictee himself must be the improver, an auction-purchaser, if dispossessed cannot claim compensation for improvement made by the judgment-debtor—*Nagendra Bala v. Panchanan*, A.I.R. 1934 Cal. 290. Where the auction-purchaser himself made the improvements in good faith, he was held to be entitled to the value of the improvement on being evicted from the property owing to some defect or irregularity in the proceeding leading up to the sale although this section was inapplicable in the case of a Court sale—*Mothheensa v. Apsa Bibi*, 38 Mad. 194, 21 M.L.J. 969, 12 I.C. 444.

Where a Hindu widow grants a permanent lease and the lessee makes improvements on the land although believing that she has a right to grant a permanent lease, he is not entitled to be compensated for the improvements when he is evicted by the reversioner on the widow's death—*Rajrup v. Gopi*, A.I.R. 1925 All. 261. But where the purchaser from a Hindu widow causes permanent improvements to be made whereby the jama of the property is increased, the increased rent that is properly attributable to the improvements can be set off against the mesne profits, even though it was not actually executed by the person in possession at the moment when the decree for possession was made—*Raja Rai v. Ram Ratan*, A.I.R. 1922 P.C. 91. See also *Narayanaswami v. Rama Ayyar*, A.I.R. 1930 P.C. 297; *Kidar Nath v. Muthu Lal*, 40 Cal. 555 (P.C.).

This section applies even though the transferor himself is the evictor. The words "the person having a better title" should not be interpreted to mean a person other than the transferor. There is no reason to cut down the operation of the section in this way—*Harilal v. Gordhan*, A.I.R. 1927 Bom. 611 (612).

This section does not apply unless the transferee is evicted by a person having a *better* title. Therefore where a mortgaged property is sold to the defendant who has no notice of the mortgage, and who makes improvements on the property, and then the mortgagee brings a suit for sale on his mortgage, section 51 does not apply as it cannot be said that the defendant is liable to be evicted by a person having a better title, the mortgagee bringing a suit on his mortgage not being treated as a person having a better title than the defendant. Nor can it be said that the defendant is liable to be evicted from the premises by the institution of the suit, (because the mortgagee can only bring the mortgaged property to sale but cannot evict the defendant), although he may ultimately be evicted at the instance of the auction-purchaser. Section 51 cannot therefore in terms apply to this case, but the rule of equity on which this section is based may be applied, and the Court will order the plaintiff to pay the costs of improvement to the defendant as a condition precedent to his bringing the mortgaged property to sale—*Kalyan Das v. Jan Bibi*, A.I.R. 1929 All. 12 (14).

Persons entitled to the benefit of this section :—In order to entitle a person to the benefit of this section (*i.e.*, to the improvements made by him or to their value) three things are necessary. These are discussed below in detail :—

222. Firstly, he must be a "transferee" :—The improvements to the property must have been made by a transferee who believed in good faith that he was absolutely entitled to the property. Such a belief, even if negligent, would entitle the transferee to compensation provided it is not dishonest. A trespasser is not entitled to the benefit of the section—*Sidde Gowda v. Sidda Naika*, A.I.R. 1952 Mys. 117; *Panchu v. Daniel*, A.I.R. 1951 Aj. 18. A trespasser making improvements by way of raising certain construction, upon the land he has encroached, does so at his own risk. He cannot claim compensation under the sec-

tion, *ibid.* In India, if a trespasser not being a transferee plants trees or makes improvements over the land of another believing in good faith that he is entitled to do so, then so long as he is not evicted, he must be held to be entitled to enjoy the usufruct of the trees or the improvements, and the owner of the land is not entitled to claim the price thereof. He may no doubt, claim compensation for use and occupation of the land. He may also claim that the trees or other improvements be removed and the land be restored to him in the condition in which it was—*Panna Lal v. Gobardhan*, A.I.R. 1949 All. 757. An assignee of a plot of land on assignment by the Government is not a transferee under sec. 51—*Ijjabba Beary v. Ijjinabha*, A.I.R. 1964 Mys. 64.

A mere stranger or a trespasser, or a person having no status in respect of the immoveable property is not entitled to the benefit of this section—*Thakoor Chunder v. Ramdhone*, 6 W.R. 228; *Mudhoo Sudan v. Juddooputty*, 9 W.R. 115; *Topanmal v. Chanchalmal*, A.I.R. 1940 Sind 77. Thus, if a Hindu son (governed by the Dayabhaga School) had made improvements and substantial additions to ancestral buildings standing on ancestral lands belonging to his father, the father would be under no legal obligation to pay for them as a condition precedent to a decree for recovery of possession, and he would be entitled to a decree for ejectment even though the additions and improvements were effected with his knowledge—*Dharma Das v. Amulya*, 33 Cal. 1119 (1130). No one can, by merely trespassing on another's land and constructing costly buildings on it, claim a right to retain possession or to compel the owner to pay compensation—*Ganga Din v. Jagat Tewari*, 12 A.L.J. 1026, 25 I.C. 198; *Creet v. Gangraj*, A.I.R. 1937 Cal. 129. So also, an assignee from the trespasser is not protected by this section—*Souza v. Gulam Moidin*, 13 M.L.J. 214. See also N. 221 supra.

A person claiming title on the basis of an oral will and certain Karamnamas executed in his favour is not a "transferee" within the meaning of this section—*Murlidhar v. Parmanand*, A.I.R. 1932 Bom. 190, 34 Bom. L.R. 1641. But a transfer of immoveable property by oral sale is within this section. The fact that to make such a transfer valid, the property of certain value must be conveyed by a registered instrument in writing does not affect the fact. So a person to whom immoveable property of the value of Rs. 100 or upwards has been transferred or purported to have been transferred by an oral sale is a transferee and is entitled to the benefit of this section provided he believed in good faith that he was absolutely entitled to the property in question—*Topanmal v. Chanchalmal*, A.I.R. 1940 Sind 77 (79, 81). But see *contra Madan Gopal v. Sundaran*, A.I.R. 1940 Rang. 172.

It is immaterial whether the transfer is *valid* or not. In either case the transferee can claim compensation for his improvements—*Ramanathan v. Ramasami*, 30 M.L.J. 1, 32 I.C. 5; *Ramanathan v. Ranganathan*, 40 Mad. 1184 (in this case the transfer was by an unregistered deed of exchange). Therefore, if a person claiming under a purchase which is invalid under Mahomedan Law and making improvements on the purchased property in the *bona fide* belief that he is absolutely

entitled thereto, is sought to be evicted by a person having a better title, he is entitled, on his being so evicted, to require such person to pay the value of the improvements—*Durgozi v. Fakeer Sahib*, 30 Mad. 197 (200). Where a person entitled only to a life-estate sold the property absolutely to the vendees, *held* that although the sale was invalid, the plaintiff was entitled to recover the land on payment of the value of the improvements *bona fide* effected on the land by the vendees—*Nanjamma v. Nacharammal*, 17 M.L.J. 622. But see *Ram Prosad v. Chhajju*, A.I.R. 1964 All. 300 where it has been held that a purchaser of immoveable property valued at more than Rs. 100 under an oral agreement of sale is not a transferee and hence cannot claim the benefit of sec. 51; see also, *Sm. Parbati Devi v. Kashmirilal Sarma*, A.I.R. 1959 Cal. 69.

A mortgagee who has purchased the mortgaged property at a sale held in execution of the decree upon his mortgage, ceases to be a mortgagee and becomes the owner, and cannot claim the value of improvements effected by him after his purchase, from a second mortgagee who brings the property to sale—*Rangayya v. Parthasarathi*, 20 Mad. 120 (123).

223. Secondly, he must believe himself to be absolutely entitled to the property :—

“For if a stranger builds on my land *knowing it to be mine*, there is no principle of equity which would prevent my claiming the land with the benefit of all expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights. It follows as a corollary from these rules, that if my *tenant* builds on lands which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking possession of the land and buildings when the tenancy has determined. He knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end”—*per* Lord Cranwoth, L.C. in *Ramsden v. Dyson*, (1866) L.R. 1 H.L. 129 (141). “If a tenant, being in possession of land and knowing the nature and extent of his interest, lays out money upon it in the hope or expectation of an extended term or an allowance for expenditure, then if such hope or expectation has not been created or encouraged by the landlord, the tenant has no claim which any Court of law or equity can enforce”—*per* Lord Kingsdown in *Ibid* (at p. 171). When both parties are conversant with the true state of facts, it is absurd to refer to the doctrine of estoppel. That is, when the title of the true owner is brought to the knowledge of the persons making the improvements, there is no ground for invoking the doctrine of estoppel and acquiescence—*Ranchodlal v. Secy. of State*, 35 Bom. 182 (187, 188). Where a husband with his costs constructs a building on his wife's land knowing it to be his wife's the latter is entitled to the building. The husband in such a case does not intend to reserve any right in the structures—*K. K. Das v. Amina Khatun*, A.I.R. 1940 Cal. 356.

The main principle of this section is that a person must show that he believed that he was entitled to the land in such a way that he is not to be disturbed, whether it is a sale or a permanent lease he claims under—

Subba Rao v. Veeranjanyaswami, A.I.R. 1930 Mad. 298 (301). Though an alienation by the guardian of a minor is not warranted by law, the alienee may be entitled to the benefit of this section if the circumstances justify that he must have *bona fide* believed that he was absolutely entitled to the property and made improvements—*Kasim Ali v. Ratna Manikka*, A.I.R. 1938 Mad. 677. But where the lessee had taken a permanent lease by the exercise of undue influence from a widow who was the mother guardian of the minor, the rent reserved was ridiculously inadequate, the terms of the lease were wholly one-sided, the lease also gave no right to the lessor except the right to sue for arrears of rent, and above all the lease conferred no benefit on the minor lessor, on a suit by the lessor on attaining majority for avoidance of the lease, it was held that the lessee could not have believed in good faith that he was absolutely entitled to the property leased to him—*Sidh Nath v. Har Narain*, A.I.R. 1937 Oudh 446.

A person who is aware of the imperfection of his title or who knows that his title is terminable some day or other is not entitled to the benefit of this section—*Onkar Mal v. Secretary of State*, 56 I.C. 813 (Pat.). A person who purchases or takes a permanent lease from a Hindu widow, fully knowing that she is in possession of the property as a Hindu widow having only a life-interest, cannot claim the value of the improvements made by him upon the property—*Raj Kishore v. Jaint Singh*, 36 All. 387 (395); *Gopi v. Mt. Raftroop*, A.I.R. 1925 All. 190. See also 44 All. 665 and 47 All. 430 cited in Note 224, *infra*. A person who plants trees and makes improvements on another's land, knowing that he has no valid title to it, cannot claim the value of the improvements—*Munna v. Suklal*, A.I.R. 1924 Nag. 142 (145). A person who never had any title and was in possession by permission of the real owner cannot believe himself to be absolutely entitled to the property—*Murlidhar v. Parmanand*, A.I.R. 1932 Bom. 190. For, there is no equity in favour of a person who with full knowledge of the state of his title spends money upon the property while he knows that it belongs to another, or who incurs expenditure which is either unnecessary or improper. The test is, whether the person has acted in the *bona fide* belief that he is entitled to the property—*Sitla v. Samiuddin*, 4 O.L.J. 514, 42 I.C. 428; *Shyam v. Ganesh*, A.I.R. 1930 Pat. 20.

Thus, this section does not give a *lessee* or a *tenant* a claim to compensation because the lessee or tenant certainly knows that his lease or tenancy is terminable, and cannot possibly believe in good faith that he is *absolutely* entitled to the property—*Nundo Kumar v. Bonomali*, 29 Cal. 871 (884); *Narasayya v. Raja of Venkatagiri*, 37 Mad. 1 (12); *Ismail Khan v. Jaigun*, 27 Cal. 570 (586); *Sheik Husain v. Govardhandas*, 20 Bom. 1; *Beni Ram v. Kundan Lal*, 21 All. 496 (502) (P.C.); *Bhubaneshwar v. Lal Bahadur*, 51 I.C. 380; *Bonomali v. Nihal Singh*, 48 I.C. 354 (Nag.); *Madan Gopal v. Sundaran*—A.I.R. 1940 Rang. 172. Compensation for improvements can be claimed by a lessee under this section only on showing that he believed in good faith that he had a permanent right in the demised premises and in such faith made the improvements—*Chandi Charan v. Ashutosh*, 40 C.W.N. 52. This view was expressed by way of obiter. The Patna High Court has held that

where a monthly tenant, wrongly believing that he was a permanent tenant, constructs structures there is no scope for the application of sec. 51 and this seems to be the correct view—*Hiralal Rewani v. Bastocolla Colliery Co. Ltd.*, A.I.R. 1957 Pat. 331. Where a tenant knowing that he has no occupancy rights makes improvements in the land without any hope or expectation created or encouraged by the landlord, he cannot claim any compensation on eviction—*Narasayya v. Rajah of Venkatagiri*, 37 Mad. 1 (14). So also, a tenant who is under a mistaken belief that he has a much longer period of tenure than he actually has, does not come under the protection of this section; he must believe that he is *absolutely* entitled to the land within the meaning of this section so as to entitle him to compensation for improvements—*Jugmohandas v. Pallonjee*, 22 Bom. 1. Where an agreement to sell the mortgaged property to the mortgagee is executed by two out of three coparceners, and the mortgagee is aware of the existence of the third brother, the mortgagee cannot be said to have believed in good faith that he was entitled to the whole of the property—*Ramappa v. Yellappa*, 52 Bom. 307, 30 Bom. L.R. 427, 109 I.C. 532, A.I.R. 1928 Bom. 150 (152). But where a person believed in good faith that he has in the property the absolute interest of a permanent tenant and in such faith created a permanent building on the site, he would be entitled to compensation if it should be ultimately held that he had no permanent interest and must surrender the land—*Ismail Kani v. Nazarali*, 27 Mad. 211 (221); *Ismail v. Jaigun*, 27 Cal. 570 (584); *Raja Rudra Partab v. Devi Prasad*, 8 O.C. 13. A transfer by a Hindu father and manager of joint family, though without necessity, is a valid transfer, until it is avoided by the son, and so long as it is not avoided, the transferee is absolute owner and may believe himself to be absolutely entitled to the property. It makes no difference that he failed to satisfy himself at the time of the sale that it was necessary for the family. If the transferee makes any improvements during the time the sale is not avoided, he can claim the value of improvements if the son afterwards brings a suit to recover the property—*Lachmi Prasad v. Lachmi Narain*, A.I.R. 1928 All. 41 (43).

Similarly, a mortgagee is not entitled to the benefit of this section and cannot claim the crops grown by him on the land of his mortgagor—*Ramalinga v. Samippa*, 13 Mad. 15 (16). A mortgagee cannot believe himself to be absolutely entitled to the mortgaged property. And therefore a purchaser from the assignees of the original mortgagee is not a person who can delude himself into such belief, and is therefore not entitled to the benefit of his improvements, although he may have a claim for the cost of repairs as distinct from improvements—*Parashar v. Ganu*, 5 Bom. L.R. 643. Where the properties of a minor were mortgaged by the certificated guardian without obtaining the permission of the District Judge and so the mortgage was voidable at the option of the minor under sec. 30, Guardians and Wards Act, the mortgagee is not, on the mortgage being set aside, entitled to compensation for improvements effected by him, because he could not have believed that he was absolutely entitled to the property: not even under sec. 63 or 72—*Bechu v. Bhabhuti*, A.I.R. 1931 All. 201 (202). Even sec. 63A will not help him, because it is doubtful whether that section applies

to a mortgagee holding under a voidable mortgage. So also, a mortgagor who retains possession of the mortgaged property after the time has expired for payment of the money due on account of the mortgage, is fully acquainted with the imperfection of his title; and on a sale of the property he is not entitled to the emblements raised by him on it—*Land Mortgage Bank v. Vishnu*, 2 Bom. 670.

A mortgagee by conditional sale cannot acquire a title to the property without going through certain formalities. If, without going through those formalities, he assumed on the expiry of the term of his mortgage that he had become the absolute owner of the property, it cannot be said that he believed in good faith that he was absolutely entitled to the property—*Gopi Lal v. Abdul Hamid*, A.I.R. 1928 All. 381 (384).

But long possession by the occupant may sometimes give rise to the belief that he is absolutely entitled to the property. Thus, equitable relief was given to a person who had been in occupation of the land for a period of 25 years—*Yeshwadabai v. Ramchandra*, 18 Bom. 66 (83). Though under the ordinary law, a mortgagee cannot claim payment for improvements effected without the consent of the mortgagor, yet where the mortgagor did not redeem the mortgage at the end of the term, and the mortgagee (under the mortgage by conditional sale) has for 30 years *bona fide* believed himself to be the proprietor and dealt with the property as such, not knowing that he should take any steps to convert his mortgage by conditional sale into an absolute sale, *held* that the mortgagee was entitled to compensation for improvements—*Ladha Mal v. Jaganath*, 123 P.R. 1888; *Ram Kuar v. Partab Singh*, 58 P.R. 1919, 51 I.C. 689.

It has been pointed out in an Allahabad case that the language of this section is never meant to apply to the case of a mortgagor and mortgagee. A specific rule of law has been enacted in sec. 63 for the purpose of guidance of the Courts where the mortgagor and mortgagee are concerned. Under that section, when the mortgaged property receives an accession and that accession takes place at the expenses of the mortgagee, certain rights and liabilities follow. Therefore, the question as to compensation to be given at the time of redemption to the mortgagee for improvements effected on the mortgaged property is governed by sec. 63 and not by sec. 51—*Gopi Lal v. Abdul Hamid*, A.I.R. 1928 All. 381 (383). It should be noted that the new section 63A now makes specific provisions for improvements made by a mortgagee, and reference should be made to sec. 63A rather than to sec. 63.

224. Thirdly, he must believe in 'good faith':—An improvement made by a person not believing *bona fide* that he is entitled to make it, does not entitle him to compensation—*Manohari v. Mahammad*, 33 All. 752. To claim compensation for the improvement, honest belief in ownership is necessary—*Kari Goundan v. Raghava*, 1 L.W. 410, 23 I.C. 520. The foundation of a person's right to compensation for improvements lies in the *bona fide* belief that he has a title. If he has not such a *bona belief*, he is a mere trespasser. He spends his money at his own risk and can claim no compensation—*Furزند Ali v. Aka Ali*, 3 C.L.R. 195; *Panchulal v. P. William Sawayer*, A.I.R. 1955 Ajmer 23. If a person

has made improvements in good faith as a *bona fide* occupant of the land and in the belief that the land is his own, he may be entitled in equity to recover the value of the improvements—*Dharma Das v. Amulya*, 33 Cal. 1119 (1129); *Natesa Therani v. Dist. Board Tanjore*, A.I.R. 1926 Mad. 314. Where the grantee of a piece of land under an order of the Tahsildar paid the assessment in respect of the piece and spent money in putting the land in good use without knowing that there was an appeal decreed against him, it was held that the grantee effected his improvements *bona fide* within this section and was, therefore, entitled to the value thereof—*Chennapragada v. Secretary of State*, A.I.R. 1925 Mad. 963. But a person holding under a lease of a non-permanent character cannot ask the lessor to pull down the structures built thereon by him on his eviction and pay the price thereof under this section, when the structures were built by the lessee with the full knowledge that he had a lease only for life—*Chandi Charan v. Ashutosh*, 40 C.W.N. 52, 164, I.C. 837.

Where apart from there being no evidence as to the kind of structures erected, it is not possible to hold that the plaintiffs in good faith believed that they were absolutely entitled to the land, this section has no application—*Vithoba v. Sholapur Municipality*, A.I.R. 1947 Bom. 241. A person deliberately entering into and doing works in the property for his own purposes with a view to start and establish a false claim for title thereto, is not entitled to the value of the improvements—*Khanku v. Narayana*, A.I.R. 1952 Tr.-Coch. 195. A licensee making constructions over *sir* land without belief in good faith that he is absolutely entitled to the property, is not entitled to compensation—*Pheku v. Harish*, A.I.R. 1953 All. 406.

The words "good faith" are defined in the General Clauses Act (1897), sec. 3 (20) as follows: "A thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not." This definition does not apply to the Transfer of Property Act, because this Act was enacted prior to the General Clauses Act. In sec. 52 of the Indian Penal Code, good faith has been defined as follows: "Nothing shall be deemed to have been done in good faith which is not done with due care and attention." But if this definition is imported into sec. 51 of the T. P. Act, it will make the section entirely unworkable. For, if a transferee from a Mitakshara father has taken a transfer with due care and attention, he is not at all liable to be evicted at the instance of the son. Therefore, the words "good faith" should have a meaning which is somewhat between the two definitions quoted above; but it is not possible to lay down a general rule in discussing a particular case—*Lachmi Prosad v. Lachmi Narain*, A.I.R. 1928 All. 41 (44, 45). See also *Monahar v. Brajamohan*, A.I.R. 1952 Or. 239. The Calcutta High Court holds that a belief in good faith under this section means not only acting honestly and fairly but includes *due inquiry*; so, where a person consciously avoids making an inquiry, though he may be said to have a belief in the matter, it would not be a belief in *good faith*—*Abhoy Churn v. Attarmoni*, 13 C.W.N. 931 (936), 3 I.C. 415. The belief in good faith includes not only acting honestly, but includes *due inquiry*—*Mt. Subratan v. Shabbir Ali*, A.I.R. 1940 Oudh 266. What constitutes good faith is a question of fact to be inferred from the circumstances of each

case—*ibid* relying on *Narayanaswami v. Rama Ayyar*, A.I.R. 1930 P.C. 297. An alienee from a Hindu widow knows that she has only a life interest; consequently he has to make enquiries as to whether the widow had any right to make the transfer, and whether there was any necessity for the transfer; and in the absence of such enquiry he cannot be taken to have believed in good faith that he was absolutely entitled to the property, in order to claim compensation for improvements under this section—*Hans Raj v. Somni*, A.I.R. 1922 All. 194; *Rajrup v. Gopi*, A.I.R. 1925 All. 261; *Suleman v. Venkataraju*, A.I.R. 1925 Mad. 670; *Jogeshar v. Jankibai*, A.I.R. 1926 Nag. 384. The defendant purchased certain property from some Hindu females having a limited power of disposition over it, and made certain improvements on the property. In answer to the claim of the reversioners (plaintiffs), the defendant alleged that the alienation was made for legal necessity, but it was found that there was no necessity and that the defendant was fully aware of the family affairs of the females and of the fact that the females could not sell it under certain circumstances, and that he wilfully abstained from making any inquiries on the subject. *Held* that the defendant (even though he purchased for consideration) was not entitled to the cost of improvements, as it could not be said that he believed in good faith that the vendors conveyed a good title in respect of the property—*Nanjappa v. Peruma*, 32 Mad. 530 (531), 4 I.C. 18; *Etizad Husain v. Beni Bahadur*, 5 O.L.J. 1, 45 I.C. 242. If an alienee from a Hindu widow incurs expenditure on the reconstruction of a house after notice by the next reversioner claiming to be entitled to the house as reversioner, the alienee cannot be said to have acted in good faith—*Ramaji Batanji v. Manohar Chintaman*, A.I.R. 1961 Bom. 169. But under certain circumstances, the alienee from a Hindu widow may believe himself to be absolutely entitled to the property. Thus, a Hindu widow sold a property in 1906 to G, and in 1910 adopted a son. The adopted son brought a suit in 1912 to challenge an alienation made by the widow, other than the alienation to G. In 1918, G made some improvements on the property. In 1922, the adopted son brought a suit to set aside the sale of 1906. *Held* that since in 1912 the adopted son had brought a suit to set aside another alienation made by the widow, *but had not challenged the sale to G*, and even thereafter for several years had taken no steps to set aside the sale, G must have believed in good faith that he was absolutely entitled to the property purchased by him, when he made the improvements in 1918. He was therefore entitled to the benefit of sec. 51—*Gangadhar v. Rachappa*, 31 Bom.L.R. 453, A.I.R. 1929 Bom. 246 (248). If the person making the improvement knows that he has no title to the property, he cannot demand payment for the improvement—*Maddarappa v. Chandramona*, A.I.R. 1965 S.C. 1812. If a property owned by three co-sharers is sold by two of them on the representation that each is entitled to 8 as. share and the purchaser erects structure on the entire property with notice of the title of the remaining co-sharer he cannot demand the value of the improvement from the remaining co-sharer in a suit for partition instituted by the latter—*Daya Ram v. Shyama Sundari*, A.I.R. 1955 S.C. 1049.

But absence of good faith cannot necessarily be inferred from the mere fact of *negligence* in investigating the title, for a purchaser may have notice of facts showing a defect in the title of his vendor, and yet

purchase the property honestly believing that he was buying good title. To hold otherwise would be to exclude a very large class of cases from a rule which is obviously based on considerations of justice—*Nanjappa v. Peruma*, 32 Mad. 530 (531). A person who acts honestly can be said to act in good faith, even though he may have been to some extent negligent in inquiring into the seller's authority to sell the property—*Harilal v. Gordhan*, A.I.R. 1927 Bom. 611 (613). Ordinarily, good faith required by this section does not mean anything more than an honest belief in the validity of one's own title—*Moitheensa v. Apsa*, 36 Mad. 194. Even negligent belief will amount to honest belief for the purpose of this section. Therefore, though the negligence of the buyer from the guardian of a minor in making due and sufficient inquiries affects his title to immoveable property, still it does not follow that the purchaser did not believe in good faith that he was the full owner when he effected the improvements on the property purchased—*Narayana v. Sarkaranarayana*, 1 L.W. 369, 24 I.C. 940; *Harilal v. Gordhan*, A.I.R. 1927 Bom. 611 (613); *Sahabuddin v. Vohidbux*, 56 I.C. 492 (Sind). A person who acts under a mistake of law may still act in good faith within the meaning of this section—*Durgozi v. Fakeer Sahib*, 30 Mad. 197 (199); *Sahabuddin v. Vohidbux*, 56 I.C. 492. *Bona fides* is not incompatible with ignorance of law, nor is it incompatible with a certain degree of negligence. The degree of negligence is a matter to be determined according to the circumstances of each case—*Rama Aiyar v. Narayanasami*, A.I.R. 1926 Mad. 609 (613).

The question whether the transferee of immoveable property does or does not believe in good faith that he is absolutely entitled thereto is a question of fact to be inferred from the circumstances of the case—*Durgozi v. Fakeer Sahib*, 30 Mad. 197 (199); *Rama Aiyar v. Narayanasami* supra. It is always a question of fact whether a transferee believes or not that he is absolutely entitled to the property. It is not in every case of a transfer by a qualified owner, alleging circumstances which would enable him to give absolute title, that the transferee should be treated as believing that he holds absolutely the property in good faith. On the other hand, a man loses his property because of a defect in it, and yet is supposed to believe in good faith that he is absolute owner of it. It is always a question of fact whether a particular man holds a particular belief—*Lachmi Prasad v. Lachmi Narain*, A.I.R. 1928 All. 41 (44). Where in case of a sale by the father of a joint family (acting on behalf of himself and as the guardian of his minor son) alleging legal necessity, it was found that the transferee paid full consideration, and the sale was to some extent supported by necessity; held that the transferee had sufficient justification for holding the belief in good faith that he was absolutely entitled to the property purchased—*Lachmi Prasad*, supra. The mere fact that a mortgagee by conditional sale has spent money over the property in making improvements ought not to lead the Court to infer that he acted in good faith and believed himself to be absolutely entitled to the property. "If we were to hold that in every case of mortgage by conditional sale, where the mortgagee spends money on improvements, he must be deemed to have acted in good faith and in the belief that he was the absolute owner of the property, we shall be legislating and not arriving at a finding of fact on which the law has

to be applied"—*Gopi Lal v. Abdul Hamid*, A.I.R. 1928 All. 381 (385). A person who is *fraudulently* in possession of property cannot be deemed to believe in *good faith* that he is absolutely entitled to the property. Consequently he cannot be allowed any compensation for the sums spent by him in improving the property—*Sadashiv v. Dhakubai*, 5 Bom. 450. Where the title is obviously founded on possession which was originally gained by trespass, it can hardly be said that the person entering upon the land as a trespasser can *bona fide* believe that he is absolutely entitled thereto—*Secretary of State v. Dugappa*, A.I.R. 1926 Mad. 921. A mortgagee who is not entitled to possession but who somehow or other comes into possession of the mortgaged property and makes improvements thereon, cannot claim the benefit of this section—*Rangayya v. Parthasarathi*, 20 Mad. 120 (124). Where a Hindu widow sold her husband's property at a very low price without any legal necessity, and the purchaser knew of the voidable nature of the transaction, he could not be deemed to have believed in good faith that he was absolutely entitled to the property, and consequently he was not protected by this section—*Muddusami v. Bhaskara Lakshmi*, 29 M.L.J. 357, 30 I.C. 853 (855). But where a person, *bona fide* thinking that he is the heir of a deceased person, spends money in freeing the estate from debts which if he were the real heir he would be bound to pay before he could secure possession, he is entitled to recover the amount paid by him from the person who is subsequently found to be entitled to the estate—*Sitla v. Somiuddin*, 4 O.L.J. 514, 42 I.C. 428. A person who purchased a big plot of land was put in possession of a larger area than he purchased. Without knowing of the mistake he made valuable improvements on the excess area, and the vendor took no steps at that time to prevent it. He later sued to eject the vendee from such excess area. *Held* that sec. 51 applied and the vendee was entitled to compensation—*Natesa Thevan v. District Board*, A.I.R. 1926 Mad. 314. Where the defendant encroached upon the plaintiff's land, believing in good faith that it belonged to him as forming part of his adjoining land, cleared it of jungle and rendered it fit for cultivation at his expense, *held* that the defendant was entitled to compensation for the improvements before he could be ejected by the plaintiff—*Bhupendra v. Peari*, 40 I.C. 646. Where the grantee of land under an order of the Tahsildar paid the assessment in respect of the land and spent money in putting the land to good use, without knowing that there had been an appeal from the Tahsildar's order and that on appeal the grant of the land to him had been cancelled, *held* that the grantee effected his improvements in good faith believing that he was absolutely entitled to the land—*Narayanamoorthy v. Secy. of State*, A.I.R. 1925 Mad. 963. A party to a litigation is not entitled to compensation for improvements made by him *pendente lite* with full knowledge of the risks he runs in doing so—*Velusami v. Bommach*, 25 M.L.J. 324, 21 I.C. 219. Where the defendant purchased the property with notice of a prior contract of sale between the vendor and the plaintiff, and without making inquiries from the plaintiff, he was not entitled to the value of the improvements effected by him on the property—*Haradhan v. Bhagabati*, 41 Cal. 852 (865).

225. Owner's knowledge—Estoppel:—The main point to be remembered in applying the rule of equitable estoppel is that the person making

the improvement had an honest belief in his right to do so—*Shyam v. Ganesh*, A.I.R. 1930 Pat. 20. If it is shown that the real owner knew that the occupants were spending money upon the improvement of the land, and knew also that they were doing so in the belief that they had a good title, and that nevertheless the real owner stood by and allowed the occupants to proceed with their expenditure, he ought not to be entitled to a decree for ejectment without indemnifying them for their outlay—*Nundoo Kumar v. Banomali*, 29 Cal. 871 (884); *Ismail v. Jaigun*, 27 Cal. 570 (584); *Yeshwadabai v. Ramchandra*, 18 Bom. 66 (83). If a stranger begins to build on land supposing it to be his own, and the real owner perceiving his mistake abstains from setting him right and leaves him to persevere in his error, a Court of Equity will not afterwards allow the real owner to assert his title to the land—*Ramsden v. Dyson*, (1864) L.R. 1 H.L. 129. "If a man, under a verbal agreement with a landlord for a certain interest in land, or *under an expectation created or encouraged* by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation"—*per Lord Kingsdown in Ibid.* (at p. 170). Where a person with actual or constructive knowledge of the facts induces another by his words or conduct to believe that he acquiesces in or ratifies a transaction, and that other in reliance on such belief alters his position, such person is estopped from repudiating the transaction to the prejudice of that other—*Dharma Das v. Amulya Dhan*, 33 Cal. 1119 (1129) following *Duke of Leeds v. Earl of Amherst*, (1846) 2 Phillips 117. See also *Municipal Corporation of Bombay v. Secretary of State*, 29 Bom. 580 (609, 610). Where the purchaser from a limited owner made improvements on the property and the true owner stood aside and abstained from asserting his rights, an equitable right will arise in favour of the purchaser in respect of those improvements—*Etizad Hussain v. Beni Bahadur*, 5 O.L.J. 1, 45 I.C. 242. Where a mortgagor who has obtained a decree for redemption does not execute it, but allows the property to remain in the hands of the mortgagee for a considerable time, and the latter during the period makes more improvements, *held* that the conduct of the mortgagor amounts to estoppel, and the mortgagee's right to the value of the improvements cannot be denied—*Krishna v. Srinivasa*, 20 Mad. 124 (126).

But if the person making the improvements knows that he is not absolutely entitled to the land, the mere knowledge or silence on the part of the owner will not amount to estoppel. Thus, if a tenant (who knows that he is not absolutely entitled to the land) erects permanent structures upon the land let to him, to the knowledge of and without interference by the lessor, it will not suffice to raise any equitable right in the tenant so as to restrain the landlord from suing in ejectment. The doctrine of estoppel is applicable only where the owner of the land seeing his tenant erecting buildings upon it *encourages* or acquiesces in the act, and *purposely* abstains from interference with the view of claiming the building when it is erected—*Beni Ram v. Kundan Lal*, 21 All. 496 (502, 503) (P.C.); *Narasayya v. Rajah of Venkatagiri*, 37 Mad. 1 (13). Where the landlord stood by in silence and the tenant spent a large sum of money

in the construction of a building and a well in the premises, but there were special circumstances in the case from which the Court was able to draw the inference that the landlord by his conduct afforded hope and encouragement to the tenant that he would be allowed to remain in peaceful possession or at least would not be ejected without a reasonable return for the expenditure incurred by him, *held* that the landlord had no right to eject the tenant without paying a reasonable compensation for the improvements—*Dattatraya v. Shridhar*, 17 Bom. 736 (741) (explained in 37 Mad. 1 at p. 13). Where the tenant was not ignorant of his own limited rights and spent money in building the premises under no mistaken belief as to such rights, the mere silence on the part of the landlord could not deprive him of his right to take back his property from his tenant with all the improvements imprudently made by the latter—*Naunihal v. Rameshar*, 16 All. 328; *Shanmugha v. Anantha Krishnaswami*, A.I.R. 1939 Mad. 247 (249). The principle upon which the doctrine of acquiescence is based is that a man who acts in such a way as would make it *fraudulent* for him to set up his legal rights will be deprived of those rights. But where his acquiescence or other conduct does not amount to a fraud, actual or constructive, he cannot be deprived of his legal rights—*Naunihal v. Rameshar*, 16 All. 328.

A fortiori, where the landlord did not even know of the erection of the buildings by the tenant, while they were being constructed and did not even become aware of the existence of the buildings after they had been erected, the plea of acquiescence and estoppel must fail—*Ismail v. Jaigun*, 27 Cal. 570 (585). In order that the tenant might avail himself of the plea of acquiescence and estoppel, it is necessary for the tenant to show that in spending money for the erection of the buildings of a permanent character he was acting in an honest belief that he had a permanent right in the land and that the landlord knowing that he was acting in that belief stood by and allowed him to go on with the construction of the buildings—*Razemini v. Manik*, A.I.R. 1924 Cal. 156.

A railway company partly trespassed upon the Crown lands and partly entered into a license which was to be subsequently turned into a contract for allowing the erection of telegraph poles and the company was under no mistaken belief as to its rights to the Crown lands nor was such mistaken belief known to the Crown who could not be said to have encouraged the construction of the telegraph line : *held* by the Privy Council that there was nothing on which to ground any estoppel against the Crown—*Canadian Pacific Ry. Co. v. King*, A.I.R. 1932 P.C. 108.

A person who makes improvements on property belonging to a religious trust in the belief that he has a permanent tenancy, cannot claim compensation under this section, nor can any conduct on the part of the trustee operate so as to create any equitable estoppel against the trust—*Shanmugha v. Anantha Krishna*, *supra*. Transferee *lis pendens* cannot claim any compensation for improvements he might have made on the property—*Shanu Ram v. Basheshar Bath*, (1966) 68 Punj. L.R. 44.

226. Improvements :—For a definition of “improvement” see section 76 of the Bengal Tenancy Act. In the absence of statutory law relating to fixtures, the question has to be decided upon general principles

of equity, justice and good conscience. The English law, so far as it is applicable to the conditions of this country, supply the said rules—*Waghela v. Masludin*, 11 Bom. 551 (P.C.) at p. 561; *Panna Lal v. Gobardhan*, A.I.R. 1949 All. 757. The rules of English law relating to fixtures, however, do not apply in India as not being suitable to the conditions of this country—*Chunder Paramanick v. Ramdhone*, 6 W.R. 228 (F.B.); *Ismail v. Nazar Ali*, 27 Mad. 211; *Mofiz v. Rasik*, 37 Cal. 815.

The making of constructions over *sir* land cannot be said to be an improvement of the land as *sir* land, the constructions being of no use to the proprietor of the land who would presumably use it for the purpose of cultivation—*Pheku v. Harish*, A.I.R. 1953 All. 406.

Spending small sums every year for the usual levelling and manuring of the lands for the purpose of husbandman-like cultivation thereof is not an improvement within the meaning of this section—*Sudala Muthu v. Sankara Narayana*, 1 L.W. 371, 24 I.C. 879.

Expenditure incurred for the *repair* and up-keep of a house is not expenditure incurred for the purpose of improvements—*Meenatchi v. Manicka*, 1 L.W. 360, 24 I.C. 918 (1920). Thus, putting up a staircase in an old house is nothing more than an ordinary repair, and is not an improvement, so as to entitle the alienee to recover the cost of it—*Sidramappa v. Shidappa*, A.I.R. 1929 Bom. 230.

A plaintiff who seeks the benefit of the improvements made by the transferee must pay Court-fee on the value of the improvements—*Sir Madhaorao v. Keshao Gajanan*, A.I.R. 1941 Nag. 304.

227. Relief of the person making the improvements :—Under the terms of this section, the transferee has a right to require the persons seeking his eviction either to have the present value of the improvements estimated and paid or secured to him or to sell their interest in the property to him at the market value irrespective of the value of such improvements. The *option to decide* which of these two courses they will adopt rests with the *persons seeking the eviction*—*Ramanathan v. Ranganathan*, 40 Mad. 1134 (1144, 1160); *Rama Aiyar v. Narayanasami*, A.I.R. 1926 Mad. 609 (614); *Narayana v. Ganesh*, A.I.R. 1926 Bom. 599; *Moti Chand v. British India Corporation*, A.I.R. 1932 All. 210; *Coller v. Baron*, 2 N.L.R. 34. Where it is found that the owner's circumstances are too poor to permit him to pay for the value of the improvements, the Court is justified in requiring him to sell his interest in the property to the transferee, without giving him the option of recovering the property by payment of the value of the improvements—*Lachmi Prasad v. Lachmi Narain*, A.I.R. 1928 All. 41 (45).

Two persons exchanged lands and an application for mutation of names was dismissed owing to the absence of one of the parties. Such party believing in good faith to be the owner of the land erected a building thereon. The other party executed a sale deed in favour of the party who had built. Thereupon a collateral of the vendor applied for pre-emption: *held*, that he was entitled to do so on payment of the full sale value of the land and the cost of the building—*Quim v. Ghulam Din*, A.I.R. 1933 Lah. 540.

In some cases, the transferee has not been allowed the cost of his improvements, but has been allowed merely to *remove the materials* of the building he has erected. Thus, in a Madras case, where a permanent lease was granted by the trustee of a religious trust, the lease was held to be invalid, and the lessee who had built a house on the leased land was not entitled to any compensation before his eviction, but was merely allowed to remove the materials of his house—*Venkatappier v. Ramaswami*, 1919 M.W.N. 548, 52 I.C. 517 (519). A Hindu widow mortgaged a property with possession, without any legal necessity, and the mortgagee proceeded to build a house on the land. The mortgagor died, and her co-widow, on whom the land devolved by survivorship, sued for possession. Held that the mortgagee was not entitled to claim the cost of the improvements (see Note 244), but he was allowed to remove the materials of the house—*Hans Raj v. Sonni*, 44 All. 665 (668). This case has been criticised by the Rangoon High Court on the ground that if a person, who has not been allowed to claim the benefit of sec. 51, is nevertheless permitted to remove the materials of the house built by him, it would make the provisions of sec. 51 nugatory, for he will practically get the benefit which he has been declared not to be entitled to—*Maung Aung v. Ma Nyun*, A.I.R. 1928 Rang. 141 (142). But this is not so, for the materials of the house are worth much less than the house itself, and all the expenses of building the house are lost to him. The rule in *Ramsden v. Dyson*, (1865) 1 H.L. 129 is subject in India to the exception that a party building on the land of another is allowed to remove the building. The right does not, of course, exist when the action is *mala fide* and tortious. But when there is acquiescence and a *bona fide* belief on the part of the person building that he had title, then if it should appear that the person building has no title and was misled by the acquiescence, he is entitled to remove what he has built so long as he substantially returns the land in the state it was—*Abdul Razak v. Seth Nandlal*, A.I.R. 1936 Nag. 506 (511).

The person making the improvements has no lien on the land for the value of the improvements. Even if it is assumed that he has a lien on the land, still he is not entitled to remain on the land until he is reimbursed; and the owner of the land is entitled to a decree for ejectment—*Dharma Das v. Amulya Dhon*, 33 Cal. 1119 (1130).

228. Compensation for improvements :—The real issue in assessing the value of improvements for the purpose of payment of compensation is whether the improvements have or have not enhanced the value of the property in the market, and if there is an enhancement the extent of such enhancement. The amount of expenditure made has occasionally very little to do with that issue—*Sidde Gowda v. Sidda Naika*, A.I.R. 1952 Mys. 117. A party is entitled to compensation for improvements in proportion to the extent to which the value of the estate has been permanently increased—*Kunhi v. Kunkan*, 19 Mad. 384. Compensation can be claimed only for such improvements as are in the land in a reasonably good condition—*Gubbins v. Creed*, 2 Sch. & Lef. 225; *Krishna v. Srinivasa*, 20 Mad. 124 (128). The real question in such a case is, have the improvements enhanced the market value of the property?—*Kidar Nath v. Mathu Lal*, 40 Cal. 555 (P.C.).

Where a person claimed compensation for improvements effected by

him but did not produce any accounts of the income he derived from the property during the period of his possession and there was nothing on record to show the present value of the improvements, *held* that under such circumstances he was not entitled to any compensation—*Asu Ram v. Bulaki Das*, A.I.R. 1937 Lah. 500.

Who can claim compensation:—The value of improvements can be claimed under this section by the transferee who makes the improvements or by his heir. But if the improvements are made by the transferor, the transferee or his heir cannot claim compensation as against a person who seeks to recover the property as a reversioner of the transferor—*Meenatchi v. Manicka*, 1 L.W. 360, 24 I.C. 918 (920).

Where trees were planted on the land by the donees, the collaterals of the donees were not entitled to claim compensation—*Harnaman v. Dasandhi*, 1 Lah. 210, 56 I.C. 733, 112 P.L.R. 1920.

229. Value of improvements :—In estimating the value of the improvements a good deal must necessarily be left to conjecture. In all valuations, judicial or otherwise, there must be room for inferences and inclinations of opinion which being more or less conjectural are difficult to reduce to exact reasoning or to explain to others. In such cases, there is more than ordinary room for guess-work ; and it would be very unfair to require an exact exposition of reasons for the conclusions arrived at—*Secretary of State v. Charlesworth*, 26 Bom. 1 (21) (P.C.). In awarding compensation, the Court has to consider how far the property has been improved in market value, and not merely consider the amount expended—*Gangadhar v. Rachappa*, A.I.R. 1929 Bom. 246 (249) ; *Sardar Mahomed Tahir v. Mian Pirbux*, A.I.R. 1932 Sind 42 (46). The value at the date of eviction has to be awarded—*Ramji Batanji v. Manohar Chintaman*, A.I.R. 1961 Bom. 169.

In the case of trees, the improvements for which compensation is payable is not the capitalized value of the produce of trees for the period of the life of those trees, but the work of planting, protecting and maintaining the trees—*Kunhi v. Kunkan*, 19 Mad. 384 ; *Shangunni v. Veerappa*, 18 Mad. 407.

Under this section, the compensation should be estimated with reference to the market value at the time of eviction. In a decree for redemption, however, the final adjustment of the amount of compensation must be made with reference to the state of things at the time of actual redemption—*Krishna v. Srinivasa*, 20 Mad. 124 (126). This view has been approved by the Supreme Court in *Narayan Rao v. Basavarayappa* A.I.R. 1956 S.C. 727. There in a suit for redemption the defendant was a bonafide purchaser for value without notice of the mortgage. A preliminary decree was passed by the trial court on 30.6.45, directing the plaintiff either to pay to the defendant the cost of improvement and take possession of the property or to sell the property to the defendant. Plaintiff elected on 25.7.45 to take possession on payment of cost of improvement. The form of the decree was approved by the Supreme Court. The dispute before the Supreme Court related to the amount to be paid by the plaintiff for the improvement. The trial court valued the improvement at Rs. 7,986, being the cost of the improvement or 30.6.45 the date of the

preliminary decree. The Supreme Court valued it at Rs. 19,000 being the sale price of the improvement on the date of dispossession, namely 1.7.48. The Supreme Court held that a Court "should assess the valuation of the improvement as at a date as near as possible to the date of actual eviction rather than the date of election". The Supreme Court further observed, "In cases of this kind it is not the actual cost of improvement which concludes the matter. The principle...is what is the worth of the improvement...as a vendible subject." Even after a redemption-decree has been passed, the mortgagee can in execution-proceedings claim a revaluation if he can show that since the passing of the decree the value of the improvements has increased—*Ramuni v. Shanku*, 10 Mad. 367. So also, the mortgagor would be entitled to obtain a reduction of the amount mentioned in the decree, if he can prove that any part of the improvements assessed therein has, since the passing of the decree, ceased to exist—*Krishna v. Srinivasa*, 20 Mad. 124 (126).

230. Para 3 :—Growing crops :—Where the mortgagor has deposited in Court the whole money due on his mortgage, the decree should not be subjected to the condition that the defendant (usufructuary mortgagee) is not to be evicted till the crops he had sown are cut; but he is entitled to the crops sown by him and to free ingress and egress to gather and carry them—*Deo Dat v. Ram Autar*, 8 All 502.

As to the meaning of the "growing crops" see Note 18.

52. During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court, and on such terms as it may impose.

52. During the *pendency* in any Court having authority "within the limits of India excluding the State of Jammu and Kashmir" "or established beyond such limits" by the *Central Government of any* * * suit or proceeding *which is not collusive and* in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Explanation.—For the purposes of this section, the pendency of a suit or proceeding

shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

Amendment :—The following amendments have been made by sec. 14 of the Transfer of Property Amendment Act (XX of 1929):—

- (a) For the words "active prosecution" the word "pendency" has been substituted; see Note 231.
- (b) For the words "a contentious suit or proceeding" the words "any suit or proceeding which is not collusive" have been substituted; see Note 242.
- (c) The Explanation has been added; see Notes 237 and 238.

By the Government of India (Adaptation of Indian Laws) Order, 1937, which came into operation on the 1st April, 1937, the expression "the Central Government or the Crown Representative" was substituted for "the Governor-General in Council". Then by A.L.O. 1948 the words "or the Crown Representative" were omitted. Then the words "within the limits of India excluding the States of Jammu and Kashmir" have been substituted for other words by the Part B States (Laws) Act III of 1951 read with A.L.O. 1948 and A.L.O. 1950.

231. The reasons for the amendment of 1929 is to obviate the difficulties created by the words 'active prosecution' and 'contentious'.

As to the contentious nature of a suit and its active prosecution before amendment see *Madhoram v. Kirtya Nand*, A.I.R. 1944 P.C. 96.

231A. Amended section, whether retrospective :—It was held by the Nagpur High Court that the amended section 52 had no retrospective effect—*Harlal v. Lala Prasad*, A.I.R. 1931 Nag. 138, 133 I.C. 395. But it is to be noted that this section is not among those sections which have been specifically provided in sec. 63 of the Amending Act XX of 1929 as not to have retrospective effect. So by the terms of the said sec. 63 anything already done before 1st April 1930 in any proceeding pending in a Court on that date is only saved. Otherwise the amended section, it is submitted with respect, has a retrospective effect. In a recent case the Bombay High Court has held that sec. 52 is retrospective in its

operation—*Leelachand v. Veshnu Ganesh*, A.I.R. 1945 Bom. 409, 47 Bom.L.R. 330. The Privy Council has however held that when the mortgage came into existence before the amendment of 1929 came into force the doctrine of *lis pendens* applicable to the case is that enacted in sec. 52 before the amendment—*Madho Ram v. Kritya Nand*, A.I.R. 1944 P.C. 96, 49 C.W.N. 75, (1944) 2 M.L.J. 343. For a general discussion of this question see Note 1A.

232. Principle of section :—The principle of this section will be found in the judgment of Lord Justice Turner in the leading case of *Bellamy v. Sabine*, 1 DeG. & J. 566. The doctrine is intended to prevent one party to a suit making an assignment inconsistent with the rights which may be established in the suit and which might require a further party to be impleaded in order to make effectual the Court's decree—*Tilake Chand v. Beattie & Co.*, 29 C.W.N. 953, A.I.R. 1926 Cal. 204 (211), 94 I.C. 538. See also *Faiz Hussain v. Prag Narain*, 34 I.A. 102 (105), 29 All. 339, 11 C.W.N. 561, 5 C.L.J. 563; *Achut v. Shivajirao*, A.I.R. 1937 Bom. 244 (252-253), 39 Bom.L.R. 224, 170 I.C. 172; see also *Krishnabai v. Savalram*, A.I.R. 1927 Bom. 93 (95), 51 Bom. 37, 100 I.C. 582. The basis of the doctrine of *lis pendens* is that the parties to a suit cannot be allowed to shorten the arms of the Court in dealing with the suit by transfers to a third party—*Gangubai v. Pagubai*, A.I.R. 1939 Bom. 403, 41 Bom.L.R. 815, 185 I.C. 81. The broad purpose of this section is to maintain the *status quo* unaffected by the act of any party to the litigation pending its determination. The applicability of the section does not depend on matters of proof or strength or weakness of the case of one side or the other in *bona fide* proceedings. The Court is in error where it lays stress on the fact that the agreement on which the suit is based has not been registered—*Gouri Dutt v. Sukur Mohammad*, A.I.R. 1948 P.C. 147, 75 I.A. 175, 52 C.W.N. 840.

Doctrines of equity, not provided for in the Act, should not be imported into its construction—*Gendmal v. Laxman*, A.I.R. 1945 Nag. 86, I.L.R. 1944 Nag. 852.

The doctrine upon which the section is based is that it would plainly be impossible that any action or suit could be brought to a successful termination if alienation *pendente lite* were permitted to prevail. During a litigation nothing new should be introduced—*pendente lite nihil innovetur*. The correct mode of stating the doctrine is that "*pendente lite* neither party to the litigation can alienate the property in dispute so as to affect his opponent"—*Hiranya Bhusan v. Gouri Dutt*, A.I.R. 1943 Cal. 227, 76 C.L.J. 191.

To a certain extent the principle underlying this section has been embodied in Or. 21, r. 102, C. P. Code, and it is not permissible to travel beyond that provision and rely upon the analogy of sec. 52, T. P. Act—*Kanagasabai v. Poornathammal*, A.I.R. 1947 Mad. 458, (1947) 2 M.L.J. 97.

Where a person intermeddles with outstanding disputes, he does so at his peril, and if he chooses to stand by and let his right slide, he cannot afterwards claim to be given the benefit of his laches and placed in a better position than his transferor to the detriment of others who have acquired rights in pending proceedings—*Jaharmal v. Ramdas*, A.I.R. 1937 Nag. 161, 168 I.C. 1003.

The doctrine of *lis pendens* cannot prevail over the rule of *res judicata* in case the latter rule applies—*Official Assignee v. Jagabandhu*, A.I.R. 1934 Cal. 552, 38 C.W.N. 492, 61 Cal. 494, 150 I.C. 321; *Digambarrao v. Rangrao*, A.I.R. 1949 Bom. 367. Once a judgment is duly pronounced by Court of competent jurisdiction in a suit in which the doctrine of *lis pendens* applies, that decision is *res judicata* and binds not only the parties thereto but also the transferees *pendente lite* from them, *ibid.*

This section for the purposes of Indian Courts contains the entire law on the subject of *lis pendens*—*Shyam Lal v. Sohan Lal*, A.I.R. 1928 All. 3 (9), 50 All. 290, 106 I.C. 255.

Section 52 is not intended for the protection of transferors. So far as they themselves are concerned they are bound by their own transfers—*Ibid.* The effect of s. 52 is not to wipe out a sale *pendente lite* altogether but to subordinate it to the rights based on the decree in the suit. As between the parties to the transaction it is perfectly valid—*Nagubai v. B. Shamu Rao*, A.I.R. 1956 S.C. 593. A transfer *pendente lite* can be recognised for the purpose of a consolidation proceeding—*Barjor v. Dy. Director of Consolidation, Kanpur*, 1968 All. L.J. 177; see also *Subramania Iyer v. T. D. Ramaswami Pillai*, A.I.R. 1959 Mad. 225.

Essentials of this section :—

- (i) There must be pendency of a suit or proceeding.
- (ii) The litigation must be pending in a competent Court.
- (iii) The suit or proceeding must not be collusive.
- (iv) A right to immoveable property must be in dispute.
- (v) A right to immoveable property must be directly and specifically in question.
- (vi) The property in dispute must be transferred or otherwise dealt with by any party to the litigation.
- (vii) The alienation must affect the rights of the other party.

See *Krishnappa v. Shivappa*, 31 Bom. 393, and *Hiranya v. Gouri* A.I.R. 1943 Cal. 227, 76 C.L.J. 191.

232A. Application of the section :—A receiver in insolvency is not affected by the doctrine of *lis pendens* unless he is made a party to the suit—*Mokshagunam v. Ramakrishna*, A.I.R. 1922 Mad. 335, 42 M.L.J. 426, 70 I.C. 357. The Official Receiver is not the legal representative of the insolvent. The devolution in favour of the Official Receiver under sec. 28 (2) of the Provincial Insolvency Act being a devolution by law, the present section has no application—*Official Receiver v. Sait Jessa-singh*, A.I.R. 1951 Mad. 687, (1951) 1 M.L.J. 200. But a sale of the insolvent's property by the Official Receiver is a private sale and not a sale by operation of law and therefore is governed by sec. 52—*Kulandaivelu v. Soubhagayammal*, A.I.R. 1945 Mad. 350, (1945) 1 M.L.J. 261. This section does not apply to an assignment by a person who is not a party to the suit at the time of the assignment—*Ammayya v. Narayana*, A.I.R. 1925 Mad. 487, 86 I.C. 187. As to the scope of this section see *Lakshmanan v. Kamal*, A.I.R. 1959 Ker. 67.

A *pendente lite* transferee is no doubt bound by the decree so far as it goes against his transferor, but it is quite a different thing to say that such a transferee should be treated for all purposes as if he was a party to the suit—*Shyam Lal v. Sohan Lal*, A.I.R. 1928 All. 3 (5), 50 All. 290, 106 I.C. 255.

Where during the pendency of a mortgage suit or a proceeding consequential upon a decree passed in such suit, the mortgagor in the ordinary course of management of his property grants a lease of the mortgaged property in whole or in part for any adequate rent, the lease is not obnoxious to the provisions of this section. The lessee holds the property subject to the rights of the mortgagee-decree-holder—*Ram Dayal v. Ashgar*, A.I.R. 1930 All. 289, 126 I.C. 28. See the new sec. 65A. Similarly, the mortgagee in possession has a right under sec. 76, cl. (a) to lease the mortgaged lands in the ordinary raiyati right during the period of his possession even after the institution of a suit for redemption. Such rights are not taken away by sec. 52 and such leases are not affected by this section—*Pramatha v. Sashi Bhusan*, A.I.R. 1937 Cal. 763, I.L.R. (1937) 2 Cal. 181. Where the mortgagee leases out the mortgaged property to the mortgagor, who creates a sub-lease after the passing of the final decree in the mortgage suit by the mortgagee, the sub-lease is not hit by *lis pendens* because the sub-lessee's possession must be regarded as the tenant's possession—*Amritlal v. Chintaman*, 1959 M.P.C. 317. Where after executing a security bond in favour of the Court, the property given as security is alienated, the rule of *lis pendens* operates, and the transferee becomes bound by the judgment or decree passed in the case—*Jugannatha v. Ram Chandra*, A.I.R. 1936 Mad. 589.

The doctrine of *lis pendens* does affect the proceedings in earlier instituted suits. If they are affected or rendered ineffective by subsequent proceedings, the reason must be not *lis pendens* but something else. Consequently, a sale in execution of a mortgage-decree pending a subsequent suit challenging the validity of that decree is not hit by the doctrine of *lis pendens*—*Annappurna v. Sarat Chandra*, A.I.R. 1942 Cal. 394, 46 C.W.N. 355.

A *bona fide* purchaser of property from a husband during the pendency of a collusive maintenance suit against the latter by his wife is not affected by the charge subsequently created in favour of the wife on such property—*Earamma v. Nathegowda*, A.I.R. 1954 Mys. 26.

A transfer *pendente lite* is not absolutely prohibited, i.e., it is not void or illegal—*Gobardhan v. Sukhamoy*, *infra*.

The doctrine of *lis pendens* does not apply to movables—*Official Receiver v. Lalchand*, A.I.R. 1943 Mad. 94, 1942 M.W.N. 470.

Principles underlying this section applied to Travancore-Cochin, though the Act did not, *Narayanan v. Sankaran*, A.I.R. 1951 Tr.-Coch 187.

233. Application of section to execution and revenue sales :—Reading the plain language of this section with that of section 2, (d) it is quite clear that the Legislature did not intend that any sale in execu-

tion of a decree or order of a Court of competent jurisdiction should be affected by the provisions of this section. But still it is now settled law that the doctrine of *lis pendens* as laid down in this section (though not the section itself) applies as well to involuntary as to voluntary transfers; and therefore a purchaser of a property at an execution sale during the pendency of a suit in respect of the same property is affected by the doctrine of *lis pendens*. See *Parvati v. Kishan Singh*, 6 Bom. 567; *Byramji v. Chunilal*, 27 Bom. 266; *Bhaskar v. Shankar*, 26 Bom. L.R. 418, 80 I.C. 453, A.I.R. 1924 Bom. 467; *Sukhdeo v. Jamna*, 23 All. 60; *Jharoo v. Raj Chunder*, 12 Cal. 299; *Nilakant v. Suresh Chandra*, 12 Cal. 414 (P.C.); *Gobind Chunder v. Guru Churn*, 15 Cal. 94; *Mati Lal v. Preo Lall*, 13 C.W.N. 226 (233); *Motilal v. Karrabuldin*, 25 Cal. 179 (P.C.); *Maharaj Bahadur v. Surendra Narain*, 19 C.W.N. 152; *Harshanker v. Sheo Gobind*, 26 Cal. 966; *Deno Nath v. Shama Bibi*, 28 Cal. 23; *Kunhi v. Ahmed*, 14 Mad. 491; *Vythnadayyan v. Subramanya*, 12 Mad. 439; *Krishnaya v. Mallaya*, 41 Mad. 458 (462); *Vedachari v. Narasimha*, 45 M.L.J. 825, A.I.R. 1924 Mad. 307; *Pethu Ayar v. Sankarabayana*, 40 Mad. 955; *Venkatrama v. Rangiah*, 46 M.L.J. 258, A.I.R. 1924 Mad. 449; *Thammayya v. Ramanna*, 51 M.L.J. 475, A.I.R. 1926 Mad. 1161; *Tinoodhan v. Tirulokya*, 17 C.W.N. 413, 18 I.C. 177; *Ramdulari v. Upendra*, 4 Pat. 619; *Mathura Prasad v. Dasai*, 1 Pat. 287, 65 I.C. 325; *K. Y. Chettiar Firm v. Jamila*, 7 Rang. 734, A.I.R. 1930 Rang. 132 (135), 121 I.C. 792; *Sohan Lal v. Jotsingh*, 16 O.C. 148, 20 I.C. 458; *Kunja Behari v. Ram Sahai*, 2 O.L.J. 327, 30 I.C. 213; *Satgur v. Nund Kumar*, 4 O.L.J. 135, 40 I.C. 146; *Qudratulla v. Gulgandi*, A.I.R. 1925 Oudh 496, 29 O.C. 37, 89 I.C. 570; *Abid Hussain v. Munno Bibi*, 2 Luck. 496, A.I.R. 1927 Oudh 261 (263), 102 I.C. 72; *Naba Krishna v. Mohit Kali*, 9 I.C. 840 (Cal.); *Ghulam Mahammad v. Sansar*, A.I.R. 1933 Lah. 171, 141 I.C. 448; *Mulk Raj v. Nanak*, A.I.R. 1933 Lah. 10, 140 I.C. 534; *Emdad v. Haran*, A.I.R. 1936 Cal. 590; *Ram Sanehi v. Janki Prasad*, A.I.R. 1931 All. 466 (480) (F.B.), (1931) A.L.J. 729, 134 I.C. 1; *Gharbhoya v. Desdatta*, A.I.R. 1937 Nag. 400, 172 I.C. 389; *Ganga Prasad v. Mt. Raghubansa*, A.I.R. 1937 Oudh 127, 165 I.C. 793; *Amritlal v. Kantilal*, A.I.R. 1931 Bom. 280 (282-83), 133 I.C. 244; *Renuka Bala v. Nagendra Nath*, 43 C.W.N. 666, A.I.R. 1939 Cal. 655, 184 I.C. 518; *Shivashankarappa v. Shivappa*, A.I.R. 1943 Bom. 27, 44 Bom. L.R. 874; *Mahimuddin v. Panu Sahani*, A.I.R. 1952 Or. 64; *Sheolal v. Balkrishna*, A.I.R. 1949 Nag. 114, I.L.R. 1948 Nag. 573; *Krishna v. Ousepp*, A.I.R. 1952 Tr.Coch. 102; *Sarat v. Chintamani*, A.I.R. 1948 Pat. 111, 13 Cut. L.T. 49; *Subba Rao v. Venkateshacharlu*, A.I.R. 1949 Mad. 207, (1948) 2 M.L.J. 128; *Gobardhan v. Sukhamay*, A.I.R. 1951 Cal. 481, I.L.R. (1949) 2 Cal. 378; *Md. Saddiq v. Ghasi Ram*, A.I.R. 1946 Lah. 322 (F.B.), 48 P.L.R. 505; *Thakurai Bhup Narain Singh v. Nawab Singh*, A.I.R. 1957 Pat. 729; *Samarendra Nath Sinha v. Krishan Kumar Nag*, A.I.R. 1967 S.C. 1440; *Kedarnath v. Ganeshram*, 1969 S.C. 787. A court sale in execution of a money decree held subsequent to the institution of a mortgage suit is hit by *lis pendens*—*People's Co-operative Bank Ltd. v. Parvathy Ayyana Pillai*, A.I.R. 1959 Ker. 133.

But the principle on which the doctrine of *lis pendens* rests is applicable as between the opponents with regard to alienations made by one of them during the pendency of the suit. The doctrine cannot be

applied as between parties to a suit who are arrayed upon the same side and between whom there is no dispute to be adjudicated. The auction-purchaser in a mortgage suit is a representative of the decree-holder and for purposes of the doctrine is arrayed in the same camp with the decree-holder and the purchase by him is not affected by another decree obtained by the decree-holder in a suit which was pending at the time of the purchase—*Rajkishore v. Sultan Jehan*, A.I.R. 1953 Pat. 58.

This section embodies a general rule of *lis pendens* to avoid multiplicity of suits and the principle applies to execution proceedings, whether the section itself applies or not—*Velayadha v. Co-operative Rural Society*, A.I.R. 1934 Mad. 40, 57 Mad. 426, 148 I.C. 1098. So, where in proceedings under Rule 14 of the Rules framed under the Co-operative Societies Act II of 1912 the award is passed and such award is put before the Civil Court for execution and the Court directs sale of the mortgaged property, any purchase during such proceedings falls under the rule of *lis pendens*—*Ibid*.

The proceedings before a revenue Court may also operate as *lis pendens*—*Jairam v. Maifujali*, A.I.R. 1948 Nag. 283, I.L.R. 1948 Nag. 324; *Nata Padhan v. Banchha Baral*, A.I.R. 1968 Orissa, 36. The auction-purchaser of a share of an estate sold for arrears of revenue under sec. 13 of the Bengal Revenue Sale Act (XI of 1859) may be affected by the doctrine of *lis pendens* if he makes the purchase during the pendency of a litigation to enforce a mortgage upon that property—*Bhawani Koer v. Mathura Prosad*, 7 C.L.J. 1. Where a sale takes place during the pendency of a suit on a mortgage, the purchaser is bound by the result of the suit under the doctrine of *lis pendens*. The purchaser under the revenue sale is therefore bound by the sale in the mortgage suit and cannot resist such a purchaser's claim to possession of the property under sec. 162 U. P. Land Revenue Act III of 1901, the revenue sale of the defaulter's immovable property would concern only the right, title and interest of the defaulter—*Ram. Narain v. Salig Ram*, A.I.R. 1952 All. 298. The principle of *lis pendens* applies to a case where a person purchases a share of an estate sold for arrears of revenue, at a time when execution proceedings in a suit to enforce an existing mortgage on the property are pending. In such a case, the purchaser at revenue sale will be deemed to have purchased the mortgagor's equity of redemption, and if he fails to redeem the mortgage before the mortgage-sale is confirmed, his right to redemption of the property as well as title to the property is lost—*Har Shankar v. Sheo Gobind*, 26 Cal. 966; *Mahomed Tayeb v. Hem Chandra*, 10 C.L.J. 590, 4 I.C. 334; *Prem Chand v. Purnima*, 15 Cal. 546; *Mathura v. Dasai*, 1 Pat. 287. But the doctrine of *lis pendens* cannot be extended so as to affect a revenue sale proper—*Kesavan v. Raman*, A.I.R. 1952 Tr.-Coch. 230; *Raman v. Lakshmi*, A.I.R. 1952 Tr.-Coch. 96. A sale held for arrears of revenue is valid and will extinguish prior encumbrances. Pending suits or decree based on mortgages or other charges created by a landholder would not, in any way, affect a revenue sale—*Krishan v. Kumaraswami*, A.I.R. 1952 Tr.-Coch. 61; *Neelakantaru v. Govinda*, A.I.R. 1954 Tr.-Coch. 122. The doctrine of *lis pendens* does not affect sales under the Revenue Recovery Act—*Jayaram Mudaliar v. Ayyaswami*

Mudaliar, (1969) 2 M.L.J. 209. Pending a suit for specific performance of a contract for sale of immoveable property, the property cannot be sold in execution so as to defeat the plaintiff's claim—*Bhaskar v. Shankar*, 26 Bom. L.R. 418, 80 I.C. 453, A.I.R. 1924 Bom. 467. During the pendency of a mortgagee's suit for sale of the mortgaged property, a third person obtained a money decree against the mortgagor and had the mortgaged property sold. *Held* that in the absence of fraud, the sale in execution under the money decree was a sale *pendente lite* as regards the mortgage-suit, and as the auction-purchaser bought only the equity of redemption, his title to the land would be subject to the rights of the mortgagee—*Abdul Majid v. Abdul Majid*, 4 Bur. L.T. 44, 9 I.C. 772; *Tinoodhan v. Tirulokya*, 17 C.W.N. 413, 18 I.C. 177; *Chaman Lal v. Kamaruddin*, A.I.R. 1922 Pat. 655, 3 F.L.T. 757, 67 I.C. 262; *Qudratulla v. Gulgandi*, 29 O.C. 37, 89 I.C. 570, 12 O.L.J. 346, A.I.R. 1925 Oudh 496. Where the first mortgagee obtained a decree for sale on the foot of his mortgage without impleading the second mortgagee, and after the decree but before the sale the second mortgagee sued and obtained a decree for sale and then brought the property to sale, *held* that the sale under the first mortgagee's decree being pending the second mortgagee's suit, the rights of the purchaser under that sale are subject to the rights obtained under the second mortgagee's decree and sale thereunder—*Venkatasubbarayudu v. Nagamma*, 59 M.L.J. 39, 31 L.W. 520, A.I.R. 1930 Mad. 570 (572), 127 I.C. 228. So also, where the property was sold for arrears of income-tax under the Madras Revenue Recovery Act during the pendency of execution proceedings on a mortgage-decree passed in respect of the same property, *held* that the doctrine of *lis pendens* applied, and the purchaser at the revenue sale acquired only the equity of redemption in respect of the defaulter's share in the mortgaged property. If therefore he did not take steps to prevent the subsequent sale held under the mortgage-decree, his right to redeem the property was extinguished—*Kadir Mohideen v. Muthu Krishna*, 26 Mad. 230. K brought a suit against P to recover possession of land. Whilst this suit was pending, the right, title and interest of P in the land were sold in execution of a decree against him at the instance of a judgment-creditor, and purchased by G. K's suit for possession was decreed, and G instituted a suit against K to eject him and obtain possession of the land. *Held* that the doctrine of *lis pendens* applied, and G was not entitled to recover the land—*Gobind Chunder v. Guru Churn*, 15 Cal. 94 (99).

The doctrine of *lis pendens* applies also to a sale held by order of a Magistrate under sec. 88 Cr. P. Code. So, where during the pendency of a suit in a Civil Court, the suit-property was attached and sold by the Magistrate under sec. 88, Cr. P. Code, and subsequently the Civil Court decreed the suit, *held* that the decree-holder could recover the property from the purchaser in the criminal proceeding—*Narayan v. Gobind*, 31 Bom. L.R. 345, A.I.R. 1929 Bom. 200 (201), 116 I.C. 271. Where during the pendency of a mortgage suit the mortgaged properties are sold for realizing the abkari dues, forest dues or dues other than the land revenue, the purchaser will not get such right as in the sale for arrears of land revenue and the doctrine of *lis pendens* will apply—*Korlapati v. Medida*, A.I.R. 1926 Mad. 1161,

51 M.L.J. 475, 98 I.C. 201. But the Rangoon High Court has held in a case of municipal taxes that the doctrine of *lis pendens* did not apply as it would be a dangerous extension of the doctrine to hold that neither the Government nor a local body could recover its taxes or rates from a defaulter so long as a law-suit was pending between the defaulter and some of his other creditors (though in this case it was a mortgage suit)—*Abdur Rauf v. Chettyar Firm*, A.I.R. 1929 Rang. 175, 7 Rang. 113, 117 I.C. 575. A sale by the defendant during the pendency of a suit even though pursuant to an agreement to sell prior to the institution of the suit is hit by *lis pendens*—*Dakshinamurthi v. Sitharamayya*, (1958) 1 Andhra W. R. 85.

233A. Mortgage suits :—It has been decided by the Allahabad High Court that where a sale in execution of a decree obtained on foot of a puisne mortgage takes place during the pendency of a suit on the prior mortgage, it is affected by the rule of *lis pendens*, so as to make the purchaser's right subject to the result of the prior mortgagee's suit—*Ram Sanehi v. Janki Prasad*, A.I.R. 1931 All. 466 (473, 489), (1931) A.L.J. 729, 134 I.C. 1. But the dissentient view of Mukherji, J., seems to be the correct one. He is of opinion that where a transfer takes place as a result of an auction sale, held during the pendency of a prior mortgagee's suit, in execution of a subsequent mortgagee's decree, the principle of *lis pendens* will not apply. If, however, both the subsequent mortgagee and mortgagor be parties to the prior mortgagee's suit, the auction purchaser in the subsequent mortgagee's suit will be bound by the result of the prior mortgagee's suit, but not on the principle of *lis pendens*, but because the subsequent mortgagee and all who are parties to his suit claim under titles inferior to that of the prior mortgagee—at p. 487. The same view has been taken by the Madras High Court where it has been held that a sale in pursuance of a mortgage decree, the mortgage having been executed before the institution of the suit, is not affected by the doctrine of *lis pendens*—*Chinnaswami v. Darmalinga*, A.I.R. 1932 Mad. 566, 139 I.C. 309; *Sripathi Rangiah v. Batkari Maisamma*, A.I.R. 1958 Andh. Pr. 722; *Jayarama Mudaliar v. Ayyaswami Mudaliar*, (1969) 2 M.L.J. 209. But see *Tatya Lagamanna Desai v. Yogabai*, A.I.R. 1962 Bom. 191. Where a mortgage-decree has been passed for sale of some of the mortgaged properties and subsequently a suit for declaration that the decree is not binding is instituted and the properties are sold during pendency of the suit, the sale is not hit by the doctrine of *lis pendens*—*Annapurna v. Sarat Chandra*, 46 C.W.N. 355 following *Chinnaswami v. Darmalinga*, *supra*. As between the mortgagee on the one hand and the person who purchases the equity of redemption pending the mortgage suit on the other, the right of redemption is subject to the rights of the mortgagee decree-holder. But where such person purchases the rights of the mortgagee and thus steps into the shoes of the mortgagee decree-holder, as between him and another person who is no party to the mortgage suit, his right to the equity of redemption must be deemed to have stood intact and is not affected by the doctrine of *lis penuens*—*Amulya Krishna v. Raruli Pioneer Co-operative Bank*, 70 C.L.J. 397, A.I.R. 1940 Cal. 150, 187 I.C. 416.

Both the mortgages being simple mortgages, in the suit by the second mortgagee the first mortgagee was, but in the suit by the first mortgagee the second mortgagee was not, made a party. During the pendency of the suit of the second mortgagee, the first mortgagee obtained a decree in his suit, purchased the mortgaged properties himself in execution and having got possession settled the lands with Defendant 2. In a suit by the second mortgagee who after the decree purchased the property in execution but failed to obtain possession, it was held that the purchase and the subsequent settlement by the first mortgagee was affected by the rule of *lis pendens*—*Md. Juman v. Akali*, (1943) 17 C.W.N. 682. After the passing of the mortgage decree A, one of the co-mortgagors judgment-debtors sold his share in the mortgaged property to B. During the execution proceedings A died, but his legal representatives were not brought on the record and in the execution proceedings against the other co-mortgagor judgment-debtors the mortgaged property was sold. Held that B as the purchaser of A's share was affected by the mortgage decree by reason of this section; but he could not be in a worse position than A himself would have been. As the execution sale was void and did not affect A's share in the mortgaged property B was not affected even by the doctrine of *lis pendens*—*Lzelachand v. Vishnu Ganesh*, A.I.R. 1945 Bom. 409, 47 Bom. L.R. 330. While a suit on a mortgage was pending, the landlord obtained a rent-decree and put it in execution after the preliminary but before the final decree in the mortgage suit. The landlord purchased the holding in execution, but owing to failure to serve a notice under sec. 212 (2) of the Orissa Tenancy Act, 1913 on one of the co-sharers what passed to him was only the right, title and interest of the judgment-debtor. Held that the landlord's purchase was subject to the mortgage-decree which was passed subsequently—*Udayanarayan v. Radhashyam*, A.I.R. 1950 Or. 36, I.L.R. (1949) 1 Cut. 559.

The principle of *lis pendens* is applicable even to Court sales, and a purchaser of mortgaged property in Court sale held after the mortgage suit was filed is bound by the mortgagee's decree as at the sale he purchases the right, title and interest of the mortgagor and cannot claim a better right than the mortgagor—*Lalit Mohan v. Hardat Rai*, A.I.R. 1939 Lah. 146 (147), 41 P.L.R. 629. A purchaser at a mortgage sale purchases the rights of both the mortgagor and mortgagee as they stood on the date of the mortgage. Where therefore a mortgage is executed before the institution of a suit for enforcing a charge of maintenance on the mortgaged property and the mortgage sale takes place during the pendency of such suit, the purchaser at such sale is not hit by the doctrine of *lis pendens*—*Renuka Bala v. Nagendra Nath*, A.I.R. 1939 Cal. 655 (656), 43 C.W.N. 666, 184 I.C. 518. The purchaser could not be said to be representative of the judgment-debtor in the proper sense of the term which alone would make him liable by the decree passed in the pending suit—*Ibid.* A sale in execution of a mortgage-decree will not be hit by the doctrine of *lis pendens*, if the mortgage has taken place long before the institution of the suit, even though the sale might have taken place during the pendency of that suit—*Sheikh Bikala v. Sheikh Ali*, A.I.R. 1950 Or. 210, I.L.R. 1950 Cut. 486.

See also *Gendmal v. Laxman*, A.I.R. 1945 Nag. 86, I.L.R. 1944 Nag. 852.

A suit to enforce a mortgage on 'immoveable property is a suit in which a right to immoveable property is directly and specifically in question within the meaning of section 52 and a transfer of the mortgaged property during the pendency of such suit is affected by the doctrine of *lis pendens*—*Parvati v. Govindaraja*, A.I.R. 1924 Mad. 359, 45 M.L.J. 682, 76 I.C. 896; *Ram Charan v. Parmeshwar*, A.I.R. 1933 All. 201, 55 All. 235, 144 I.C. 70; *Sahib Chandra v. Lachmi Narain*, A.I.R. 1929 P.C. 243, 51 All. 696, 56 I.A. 339, 33 C.W.N. 1091, 119 I.C. 612. This doctrine was applied by the Allahabad High Court in a case where the purchase was made in an execution sale—*Sital v. Md. M. Yar Khan*, A.I.R. 1934 All. 972, 149 I.C. 187. If a preliminary decree in respect of two plots along with other property has been passed in favour of the mortgagee, sec. 52 applies to the subsequent mortgage of the same plots—*Radhey Lal v. Ram Lal*, A.I.R. 1935 Oudh 49, 152 I.C. 1018.

Where a subsequent mortgagee, who in execution of a decree for sale on the foot of his mortgage has purchased the mortgaged property, brings a suit for possession against a transferee *pendente lite* who redeemed certain prior mortgages, the mortgagee decree-holder is entitled to an unconditional decree for possession of the property. The transferee *pendente lite* cannot rely on his transfer and claim re-imbursement with respect to the earlier mortgages redeemed by him—*Har Prasad v. Sita Ram*, A.I.R. 1940 All. 141, 187 I.C. 332.

Where a person purchased property at an auction sale in execution of Government dues while a mortgage suit was pending and where the property was sold in execution of the final decree for sale, the doctrine of *lis pendens* applied and the purchaser at the first auction sale had no longer any right of redemption—*Dodey Ram v. Mt. Gulkando*, A.I.R. 1929 All. 601, 118 I.C. 660.

A mortgagee who has purchased the mortgaged property in execution of his mortgage decree is entitled to avoid a lease on the ground that it was granted by the mortgagor during the pendency of the mortgage suit. Purchaser in execution of a money decree however has no such right—*Nisar v. Sundar*, A.I.R. 1927 All. 657, 25 A.L.J. 1025, 104 I.C. 292. Sec. 52 of the T. P. Act prevents the mortgagor from creating any lease during the pendency of a mortgage suit so as to affect rights of the mortgagee or the purchaser at the sale in execution of the mortgage decree—*Ramdas v. Fakira Pandu*, A.I.R. 1959 Bom. 19. But where during the pendency of a mortgage suit the mortgagor executed a lease of the mortgaged properties in favour of a third person, the mortgaged properties were sold to the mortgagee at a private sale and the entire decretal amount was paid out of the sale consideration, the lease was not invalid under this section inasmuch as execution of the lease did not affect the rights of any party to the mortgage suit—*Ram Chander v. Maharaj Kunwar*, I.L.R. 1939 All. 809, 1939 A.L.J. 692, A.I.R. 1939 All. 611. B. purchased a property which was subject to three mortgages and thereafter cleared two of the mortgages. In

the meantime the mortgagee of the third mortgage, who instituted a suit for sale even before B's purchase, obtained a decree, in execution of which, the property was purchased by the assignee of the mortgagee. C, an assignee of the mortgagee's assignee, sought to take delivery of possession from B, who asked the court to direct C to pay the amount which he had to pay to clear the two mortgages. Held that B was not entitled to such direction by reason of *lis pendens*—*M. Raghavan Pillai v. Thamman Thommi*, A.I.R. 1957 Ker. 121. Where a mortgage comprises not only the land but also future crops and the final decree on the mortgage declares a charge on such future crops, a lease of the property granted after the final decree is subject to the charge and any transfer of such crops or the right to raise them during the litigation will be affected by the principles embodied in sec. 52—*Korlapalli v. Sethraje*, A.I.R. 1936 Mad. 942, 71 M.L.J. 638, 165 I.C. 951.

Charge :—Though a charge does not create any interest in the property, it none the less amounts to a right to the property within the meaning of this section, and therefore a claim to have a charge on certain property in a suit attracts the doctrine of *lis pendens*—*Hiranya v. Gouri*, A.I.R. 1943 Cal. 227, 76 C.L.J. 191; *Govindun Sankaran v. Sankaran Achuthan*, A.I.R. 1955 Trav. Cochin 234; *Nagubai v. B. Shama Rao*, A.I.R. 1965 S.C. 593.

Where in execution of the personal liability clause of a decree as well as a charge liability for payment of money the property is attached and sold, a purchaser prior to the auction sale but after the date of the decree having no notice of the charge at the time of his purchase will be affected by the doctrine of *lis pendens* inasmuch as no complete satisfaction or discharge of even a declaratory charge decree can be predicted so long as the possibility of the enforcement of the charge by way of a separate suit remains—*Rajagopala v. Abdul Shukkoor*, A.I.R. 1950 Mad. 396, (1950) 1 M.L.J. 83.

A purchaser of properties subject to a charge created by a compromise decree the satisfaction or discharge of which has not been obtained or has not become barred by limitation does not get any assistance from the Proviso to sec. 100 even though he is a purchaser for value without notice of the charge. So long as the decree is not satisfied and is kept alive, the purchase is hit by the rule of *lis pendens* irrespective of whether the purchase is a *bona fide* transaction or not—*Arunachalam v. Lingiah*, A.I.R. 1953 Mad. 71. If a charge is created by a decree for maintenance and the decree-holder purchases the property charged in execution of his decree, such purchase shall prevail over a prior purchase in execution of a money-decree during the pendency of the suit for maintenance, because the prior purchase is hit by *lis pendens*—*Shyam Narain v. Khubla Mahito*, A.I.R. 1968 Pat. 238.

234. Sale by mortgagee under power :—This section does not apply to a suit for redemption brought by the mortgagor who has given to the mortgagee under the mortgage an express power of sale. Therefore, a private sale of the mortgaged property by the mortgagee in exercise of such power is not affected by the doctrine of *lis pendens*, and is valid though made during the pendency of a redemption suit filed by the

mortgagor—*Ramkrishna v. Official Assignee*, 45 Mad. 774 (776), 43 M.L.J. 566, A.I.R. 1922 Mad. 390, 69 I.C. 407.

235. Pre-emption suits :—The doctrine of *lis pendens* applies to a suit for pre-emption, and the vendee cannot defeat the pre-emptor's right by transferring the property pending the suit for pre-emption—*Ram Shankar v. Nanik Prosad*, 17 O.C. 150, 24 I.C. 32; *Bhagwan v. Nanak Chand*, 49 All. 516, A.I.R. 1927 All. 336 (337), 25 A.L.J. 479; *Ghasitey v. Govind*, 30 All. 467 (469); *Bhagirathi v. Rajkishore*, 1930 A.L.J. 766, A.I.R. 1930 All. 354 (355), 122 I.C. 887; *Kubra Bibi v. Khudaija*, 20 O.C. 13, 38 I.C. 582 (584); *Hazara v. Bube Khan*, A.I.R. 1922 Lah. 403; *Fazal Karim v. Md. Karim*, A.I.R. 1942 Pesh. 43 (45); see also *Krishnabai v. Madhukar*, A.I.R. 1946 Nag. 367, I.L.R. 1946 Nag. 758; *Chanan Singh v. Waryam Singh*, A.I.R. 1947 Lah. 175, 226 I.C. 434. But when a sale has taken place to a stranger, the vendee's acquisition by gift of a share in the village pending a co-sharer's suit for pre-emption defeats that co-sharer's claim for pre-emption. The decisive date as regards the rights of the co-sharer to pre-empt is the date of the decree—*Hans Nath v. Ragho Prasad*, A.I.R. 1932 P.C. 57 (60), 54 All. 189, 59 I.A. 138, 136 I.C. 402. See also *Madho Singh v. Sikinner*, A.I.R. 1941 Lah. 433 (F.B.), 43 P.L.R. 581.

Where pending a suit for pre-emption the vendee sold the property to one having an *equal right* to pre-empt as the plaintiff, the right of the plaintiff, was not affected by the sale—*Ghasitey v. Govind*, supra. But in a later Allahabad case, it has been held that in such a case, the proper procedure is to divide the property among the plaintiff (pre-emptor) and the vendee's vendee—*Bachan Singh v. Bijai*, 48 All. 221, 24 A.L.J. 130, A.I.R. 1926 All. 180 (181), 90 I.C. 238. In this case, some of the pre-emptors dropped out in the course of the suit. The Lahore High Court, however, is of opinion that the doctrine of *lis pendens* does not affect the validity of a sale effected by the vendee during the pendency of a pre-emption suit to a person possessing a right of pre-emption equal to that of the pre-emptor; nor can the property be divided equally between the pre-emptor and the vendee's vendee—*Mool Chand v. Ganga*, 11 Lah. 258 (F.B.), 31 P.L.R. 342, A.I.R. 1930 Lah. 356 (357). See *Salamat v. Nur Mahomed*, A.I.R. 1934 Oudh 303, 9 Luck. 475, 149 I.C. 258; *Bishan Singh v. Khazun Singh*, A.I.R. 1958 S.C. 838; *Nabir Ganai v. Md. Ismail Ganai*, A.I.R. 1960 J. & K. 112.

The doctrine of *lis pendens* applies to a case where before the institution of the suit for pre-emption an agreement to sell the property has been executed by the purchaser in favour of another prospective pre-emptor with an equal right of pre-emption and subsequent to the institution of the suit, in pursuance of the agreement a sale-deed has been executed and registered in the latter's favour, after the expiry of the period of limitation for a suit to enforce his own pre-emptive right. The sale in favour of the latter cannot defeat the plaintiff's suit—*Md. Saddiq v. Ghasi Ram*, A.I.R. 1946 Lah. 322 (F.B.), 48 P.L.R. 505.

Where the purchaser in a sale sought to be pre-empted has re-transferred the property to another person having a right of pre-emption either equal or superior to that of the plaintiff who sues to pre-empt

the sale, if the re-transfer has taken place before the institution of the suit, the transferee can resist the suit on the strength of his own pre-emptive right, regardless altogether of the consideration whether the transfer in his favour was made in recognition of his superior pre-emptive right or could otherwise be regarded as having been made in recognition of such right. In such a case it would be immaterial whether the transfer took the form of a sale, a gift or an exchange—*Wazir Ali v. Zahir Ahmad*, A.I.R. 1949 E.P. 193 (F.B.), 51 P.L.R. 39. It is settled law that unless a transfer *pendente lite* can be held to be a transfer in recognition of a subsisting pre-emptive right, the rule of *lis pendens* applies and the transferee takes the property subject to the result of the suit during the pendency whereof it took place—*ibid.*

If, pending the suit for pre-emption the vendee sells the property to a person having right of pre-emption superior to that of the plaintiff, the doctrine of *lis pendens* will not apply, and the purchaser having a preferential right of pre-emption is entitled to retain the property purchased by him—*Malik Singh v. Shiam Lal*, 1929 A.L.J. 537, A.I.R. 1929 All. 440 (442), 118 I.C. 43; *Bhag v. Ujagar*, 32 P.L.R. 283, A.I.R. 1931 Lah. 435. If, however, at the time of the original sale by the vendor to the vendee, the person having a preferential right of pre-emption did not come forward to assert his right within the period of limitation, and then after a suit for pre-emption was brought by another person, the vendee sold the property to the person having the preferential right, held that the superior pre-emptor, having *waived* and lost his right, was not entitled to retain the property as against the inferior pre-emptor (plaintiff)—*Asa Singh v. Naubat*, 19 A.L.J. 143, 61 I.C. 34; *Rama Shankar v. Nanik*, *supra*; *Kamta Prasad v. Ram Jag*, 36 All. 60 (62); *Kubra Bibi v. Khudaija*, *supra*.

Even the resale of the property by the vendee to the vendor after the institution of the suit for pre-emption cannot defeat the plaintiff's right of pre-emption—*Kedar Nath v. Bankey Behary*, 11 I.C. 645 (646) (All.); *Rajai v. Irbhan*, 3 I.C. 923, 5 N.L.R. 136; *Bhikhi Mal v. Debi Sahai*, 47 All. 923, A.I.R. 1926 All. 179 (180), 23 A.L.J. 615, 89 I.C. 219; *Durga Prasad v. Gangadin*, 88 I.C. 202, A.I.R. 1925 All. 502; *Kahar Singh v. Jahangir*, 47 All. 625, A.I.R. 1925 All. 487 (488), 88 I.C. 761.

Where the plaintiff files a suit to enforce an agreement to reconvey and during the pendency of the suit the defendant purchases the right, title and interest of the plaintiff under the agreement to reconvey in execution of a money decree against the plaintiff, the purchase is not hit by sec. 52; consequently the plaintiff cannot continue the suit any further—*Jogesh Chandra v. Tarulata*, 60 C.W.N. 1089.

235A. Contribution suits :—Where a person purchases another man's property by private sale during the pendency of a contribution suit against such person in which a simple money decree without reference to any charge was passed, the purchaser is not affected by the doctrine of *lis pendens* and is not subject to the decree passed in the suit—*Bhagwan v. Akbar*, A.I.R. 1936 Pat. 571 (572), 165 I.C. 567. But where on a mortgage-decree against two properties jointly mortgaged, one was sold, the sale proceeds of which sufficed to satisfy the whole

debt, and a person who had acquired before the sale a share in that property in execution of a simple money-decree against the mortgagor, sued for contribution from the other property and ultimately obtained a decree in his favour, and where that other property was sold away to another during the pendency of the contribution suit, *held* that the doctrine of *lis pendens* applied, and that the purchaser could take that other property only subject to the right of contribution decreed against it—*Baldeo Sahai v. Baij Nath*, 13 All. 371.

236. "Pendency" :—The words "active prosecution" have been substituted by the word "pendency"; consequently, the cases which turned upon the construction of the former expression are no longer of any importance. A right acquired before the commencement of a suit is not affected by the rule of *lis pendens* even though the remedy for the enforcement of that right may be sought during the pendency of that suit—*Seikh Bikala v. Sheikh Ali*, A.I.R. 1950 Or. 210, I.L.R. 1950 Cut. 486.

237. When "pendency" of suit begins :—Under the Explanation newly added, the pendency of a suit or proceeding begins from the presentation of the plaint or the institution of the proceedings.

Where instead of rejecting the plaint on account of insufficiency of stamp the Court receives the deficit Court-fee and grants time to the plaintiff to make good the deficiency, the plaint must be deemed to have been presented when it was first received by the Court. Hence the principle of *lis pendens* will affect an attachment made after the date when the plaint was received by the Court—*Shivasankarappa v. Shivappa*, A.I.R. 1943 Bom. 27, 44 Bom. L.R. 874. But if a plaint is presented with insufficient Court-fee, and is returned by the Court, and then the plaintiff re-presents it after paying the proper Court-fee, and then the plaint is registered as admitted *on the later date*, it is this later date which must be taken as the date of institution of the suit. A transfer of property made between the date of original presentation and this later date is not affected by *lis pendens* as no suit was pending at that time—*Mohendra v. Parameshwar*, 60 I.C. 439 (440); *Govinda Pillai v. Aiyappan Krishnan*, A.I.R. 1957 Ker. 10, where the plaint was returned for presentation in proper court and transfer took place before such presentation. So, where a redemption suit was filed in a wrong Court before a final decree was passed in the mortgage suit and the plaint was then presented in the proper Court when the final decree had already been passed, it could not be held to be ineffective on account of the institution of the subsequent redemption suit—*Mustafai Begam v. Raghuraj*, A.I.R. 1937 All. 108, I.L.R. 1937 All. 544, 169 I.C. 577. In case of a pauper suit, the active prosecution (*i.e.*, the pendency of the suit) is deemed to commence as soon as the application for leave to *sue in forma pauperis* is made to the Court. Therefore, where after such an application was made by the plaintiff, but before it was granted, the defendant mortgaged part of the property in dispute, and the plaintiff's suit was subsequently, after contest, decreed, *held* that this section applied, and the mortgage could not be enforced against the plaintiff—*Ambika Partap v. Dwarka Parshad*, 30 All. 95 (102); *Maddukuri v. Yenuca*, A.I.R. 1936

Mad. 853, 71 M.L.J. 301, 164 I.C. 1066. Similarly, where a son has filed an application for leave to sue *in forma pauperis* praying for partition of the joint family property against his father, the rule of *lis pendens* would operate from the date of the application for leave and from that date the plaintiff must be deemed to have become separated from his father, and a mortgage executed after the aforesaid application is not binding on his share in the joint family property—*Puthumadammal v. Guru Nanjappa*, A.I.R. 1939 Mad. 275, 1939 M.W.N. 311, 184 I.C. 824; see also *Rama v. Venkatusubbayya*, A.I.R. 1937 Mad. 274, 46 M.L.W. 309, 173 I.C. 347; *Bimala Bala v. Sanat Kumar*, 65 C.W.N. 701. But where the application is dismissed no rights in respect of the property arise in his favour and hence sec. 52 does not apply—*Mt. Sahaudra v. Radha Ballabhji*, A.I.R. 1938 Nag. 30 (34, 35), 176 I.C. 67.

Where the application for amendment of plaint was made after alienation, the order on it related back to the date of the application—*Nallakumara v. Pappayi Ammal*, A.I.R. 1945 Mad. 219, 1945 M.W.N. 127.

The presentation in Court of an award obtained by the plaintiff empowering him to sell certain property mortgaged to him in satisfaction of his debt was held equivalent to the presentation of a plaint for the specific performance of the contract of mortgage; the proceedings consequent thereon constituted a *lis pendens* during which a mere money-decree-holder could not, by bringing the property to sale, defeat the object of the plaintiff's application to the Court—*Pranjiban v. Biju*, 4 Bom. 34.

Under the old section, the doctrine of *lis pendens* did not apply unless the suit was "contentious," and the Courts had to consider from what point of time the suit became contentious. The present section has omitted that ambiguous word, and therefore the decisions bearing on the construction of the word "contentious" need not be considered. It was held in some earlier cases that a suit became contentious only from the date when the summons was served on the defendant, and therefore *lis pendens* did not begin until such summons was served. See *Radhashyam v. Shibu*, 15 Cal. 647; *Parsotam v. Sanchilal*, 21 All. 408; *Abhoy v. Annamalai*, 12 Mad. 180; *Krishna Kamini v. Dinamani*, 31 Cal. 658. But the Privy Council overruled these decisions remarking that it would be dangerous to hold that *lis pendens* did not begin until the summons was served on the opposite party, especially in a country where evasion of service is not a matter of any difficulty. The doctrine of *lis pendens* would apply even where the transfer took place before service of summons—*Faiyaz Husain v. Prag Narain*, 29 All. 339, 345 (P.C.); *Krishnappa v. Shivappa*, 31 Bom. 393; *Jogendra v. Fulkumari*, 27 Cal. 77 (83); *Ghasitey v. Gobind*, 30 All. 467 (468). This section becomes operative from the very moment of the institution of a *bona fide* suit which is not in any way collusive—*Shafiqullah v. Samiullah*, 52 All. 139, A.I.R. 1929 All. 943 (945). The *Explanation* now lays down in express terms that, the *lis* commences from the presentation of the plaint. The question of "active prosecution," as it stood before the amendment was a question of fact and was not allowed to be raised before the Privy Council when it was not raised in the Courts below—

Parameshwari Din v. Ram Charan, 41 C.W.N. 1130 (P.C.). Where a transfer is executed on the date of the filing of the suit, the transfer is not hit by *lis pendens* unless the plaintiff succeeds in proving that the deed was executed earlier than the filing of the plaint—*Madhan Philip v. Ithak*, A.I.R. 1960 Ker. 98.

238. How long does "pendency" of suit continue :—The principle of *lis pendens* extends right up to the conclusion of the litigation including the appellate stages and the execution proceedings—*Md. Hanif v. Khairat Ali*, A.I.R. 1941 Pat. 577 (580), 20 Pat. 346, 192 I.C. 451. See also *Ghanshyam v. Ragho*, A.I.R. 1931 Pat. 64, 10 Pat. 234, 130 I.C. 257; *Motichand v. British India Corporation*, A.I.R. 1932 All. 210, 1932 A.L.J. 54, 136 I.C. 78. Therefore, this section applies to transfers made during the pendency of execution proceedings—*Shivjitram v. Waman*, 22 Bom. 939; *Thakur Prasad v. Gaya*, 20 All. 349; *Har Shankar v. Shew Govind*, 26 Cal. 966; *Abid Hussain v. Munno Bibi*, 2 Luck. 496, 102 I.C. 72, A.I.R. 1927 Oudh 261 (263); *Wazir Husain v. Beni Madho*, 7 O.W.N. 676, A.I.R. 1930 Oudh 362; *Aravamudhu v. Abiramavalli*, A.I.R. 1934 Mad. 353, 66 M.L.J. 566, 150 I.C. 930. This is now made clear by the Explanation which lays down that the pendency of a suit continues until *complete satisfaction* of the decree has been obtained. The ruling in *Bhoje Mahadev v. Gangabai*, 37 Bom. 621, that the *lis* ends with the decree is no longer correct. See also *Kulandaivelu v. Sowbhagyammal*, A.I.R. 1945 Mad. 350, (1945) 1 M.L.J. 261.

The doctrine of *lis pendens* applies to a transfer made during the pendency of an appeal—*Radhika v. Radhamoni*, 7 Mad. 96 (98); *Moti Chand v. British India Corporation*, *infra*.

So also, the doctrine of *lis pendens* applies to an assignment made after the passing of the decree and before the filing of the appeal—*Govindappa v. Hanumanthappa*, 38 Mad. 36 (39). In such a case, the suit is regarded as pending till the decision of the Appellate Court. The decree of the Appellate Court is the "final decree" in the case, and the proceedings in the Appellate Court must be treated as a continuation of the proceedings in the original Court. It is not open to a defeated suitor to file an appeal immediately, as he has to obtain copies of decree and judgment, and he ought not to suffer for the delay imposed by law. There is no reason why this delay should prejudice him in this respect any more than the delays due to adjournment or stay of proceedings—*Settappa v. Muthia Goundan*, 31 Mad. 268 (270); *Dino Nath v. Shama Bibi*, 28 Cal. 23 (26, 27), 4 C.W.N. 740.

In the case of a mortgage-suit, a decree under O. 34, r. 4, C. P. Code is, on the face of it, not a final decree but a decree *nisi*. The suit does not terminate with the decree *nisi* but continues till the making of the order absolute (final decree) for sale. So, a purchase is to be considered *pendente lite*, if it is made between the date of a decree *nisi* and the passing of an order absolute (final decree) for sale—*Parsotam v. Chhedda*, 29 All. 76 (80); *Chunnimal v. Abdul Ali*, 23 All. 331 (334); *Dhiraj v. Dinanath*, 6 N.L.R. 140, 8 I.C. 288 (290); *Lachiram v. Bholu*, 82 I.C. 452, A.I.R. 1925 Nag. 132 (134); *Motichand v. British India Corpn.*, A.I.R. 1932 All. 210, 136 I.C. 78. It has been further held that

in a suit for sale on a mortgage, the proceedings for the purpose of *lis pendens* must be taken to continue till the property is actually sold—*Ramasami v. Govinda*, 31 M.L.J. 839, 38 I.C. 1 (4); *Bepin v. Priyabrata*, 26 C.W.N. 36; *Marina v. Chaganti*, A.I.R. 1925 Mad. 1039, 87 I.C. 714; *Unreported Calcutta Case* (referred to in 23 All. 331 at p. 335). The same principle applies in respect of maintenance suits in which the decree declares the maintenance claim a charge on the properties—*Abdul v. Seethalakshmi*, A.I.R. 1931 Mad. 120, 130 I.C. 666. The doctrine of *lis pendens* is applicable during proceedings to realise the mortgage-money after the decree for sale or after the sale—*Bhawani v. Mathura*, 7 C.L.J. 1; *Braja Nath v. Jogeswar*, 9 C.L.J. 346, 1 I.C. 62; *Surjiram v. Barhamdeo*, 2 C.L.J. 288; *Mahomed Tayab v. Hem Chandra*, 10 C.L.J. 590, 4 I.C. 731; *Ghanshyam Das v. Ragho*, 10 Pat. 234, A.I.R. 1931 Pat. 64 (67). The *lis pendens* continues till the final decree is made and the mortgagee or auction-purchaser, as the case may be, is placed in possession—*Sami Nath v. Thakur Prasad*, A.I.R. 1927 All. 309 (310). But the doctrine of *lis pendens* does not apply to a proceeding under O. 34, r. 6, because it is not a proceeding in which any right to immovable property is directly or specifically in question, the decree passed in such proceeding being a mere money-decree—*Badri Singh v. Hazari Singh*, 7 O.W.N. 123, A.I.R. 1930 Oudh 93 (95). In a suit for foreclosure, the *lis* does not terminate with the passing of the preliminary decree under O. 34, r. 2, which is only a decree *nisi* and does not end the litigation; and therefore a transfer of the mortgaged property, made after the passing of the preliminary decree but before it is made final or before an application is made for the final decree, is subject to the doctrine of *lis pendens*—*Parsotam v. Chheddalal*, 29 All. 76 (80); *Premasukh Das v. Peerkhan*, 23 N.L.R. 86, A.I.R. 1926 Nag. 21 (22); *Ram Charan v. Parmeshwar*, 55 All. 235, A.I.R. 1933 All. 201 (202). The law is now clearly stated in the Explanation which lays down that the pendency of a suit continues until the suit has been disposed of by a final decree or order and complete satisfaction of the decree or order has been obtained. See *Moti Chand v. B. I. Corporation*, 1932 A.L.J. 54, A.I.R. 1952 All. 210.

Similarly, in a suit for account, *lis pendens* does not terminate with the passing of the decree for account, for the decree does not practically put an end to the suit—*Gocool v. Administrator-General*, 5 Cal. 726.

Negligence in executing decree :—It was held under the old section that the party relying upon the rule in this section must not be guilty of laches or negligence, and that one element of 'active prosecution' of a suit was that there must be no negligent intermission in its continuance. Therefore, where nothing was done in a suit after the decree during the 7 years which elapsed between the date of the decree and the date of the transfer, held that the suit in which the decree was passed could not affect that title of the purchaser as a *lis pendens*, and the transferee took the property unaffected by the decree-holder's equitable lien created by the decree—*Venkatesh v. Maruti*, 12 Bom. 217. In another case also, where within four years after the passing of the decree no execution proceedings were taken, and the judgment-debtor thereafter sold a portion of the property, it was held that it could not be

said that the purchase was made during the active prosecution of a suit or proceeding—*Bhoje Mahadev v. Gangabai*, 37 Bom. 621, 21 I.C. 54. So also, where there was a delay of two years in executing a decree for specific performance, it was held that there was no active prosecution on the part of the decree-holder—*Haralal v. Lala Prasad*, A.I.R. 1931 Nag. 138 (140), 133 I.C. 395; *Lakshman v. Rama Chandra*, 34 Bom. L.R. 117, A.I.R. 1932 Bom. 301. Under the present section, by reason of the omission of the words “active prosecution” the question of negligence has become immaterial; and the Explanation extends time of *lis pendens* up to the date of satisfaction of the decree.

Transfer during claim suit :—A suit under O. XXI, r. 63 being only a continuation of the claim proceedings, an alienation of property made during the continuation of the proceedings originated by the claim petition till the disposal of the claim suit, must be deemed an alienation *pendente lite*, and the alienee takes his alienation subject to the result of the claim suit or appeal—*Krishnappa Chetty v. Abdul Khader*, 38 Mad. 535 (541), 26 M.L.J. 449, 25 I.C. 1; *Khairulla v. Sett Dhanrupmal*, A.I.R. 1925 Nag. 82, 80 I.C. 905; *Ma Ma v. Maung Nya*, A.I.R. 1937 Rang. 473; *Mt. Anundei v. Lala Ram*, A.I.R. 1939 Oudh 178 (179), 14 Luck. 543, 1939 O.W.N. 408. A proceeding under sec. 144, Code of Civil Procedure is a continuation of the suit in which the original decree (subsequently reserved) was passed—*Manikchand v. Gangadhar*, A.I.R. 1961 Bom. 288. If on appeal from an order passed under Or. 21, r. 90, the sale in execution of a mortgage decree is set aside but in the meantime the auction purchaser sells away the property, the sale is hit by *lis pendens*—*Ramathal v. Nagarathinammal*, (1967) 1 Mad. L.J. 260. The *lis* continues between the date of dismissal under Or. 9 r. 2, C.P.C. and the date of its restoration—*Krishnaji v. Anusayabai*, A.I.R. 1959 Bom. 475.

“Or discharge” :—The Explanation says that the pendency of a suit continues until satisfaction or discharge of the decree has been obtained. The words “or discharge” provide for the case of discharge of a decree by the relinquishment by the decree-holder of his decretal rights—*Report of the Select Committee* (1929).

When “pendency of suit” ends :—When a suit is decreed, and a sale takes place in execution of the decree, the *lis* ends there, and does not continue up to the date of *confirmation* of sale, because the confirmation relates back to the date of sale. Therefore, where a female brought a suit for maintenance subsequent to the sale, and pending the suit, the sale was confirmed, *held* that the sale was not *pendente lite* and the purchaser took the property free from any charge of maintenance—*Lanka Gopalam v. Lenka Ratnamma*, 28 M.L.J. 666, 26 I.C. 353 (355).

239. Revival of suit :—Where a suit dismissed for default is revived within a reasonable time, there is no suspension of *lis pendens*. By the immediate application for re-trial, the plaintiff will be considered constant and continuous in the prosecution—*Bishop of Winchester v. Paine*, (1805) 11 Ves. 194 (200, 201). The restoration of a suit relates back to the date of the application for restoration. Thus, a suit was

dismissed for default on 23rd April, 1907 and an application for restoration was made on the 24th April. On the 25th April the defendant sold away a part of the property in dispute; the application for restoration was granted on 4th March, 1908. *Held* that the restoration must be deemed to have related back to the date of the application for restoration on the 24th April, so that the sale on the 25th April was affected by the rule of *lis pendens*—*Ashutosh v. Ananta Ram*, 50 I.C. 727 (Cal.).

But the doctrine has no application in a case, where on the dismissal of the first suit, the plaintiff is compelled to bring a *fresh* suit; and, therefore, a transfer made between the date of dismissal and that of the institution of a new suit will not be affected by the rule of *lis pendens*—*Hukum Chand on Res Judicata*, pp. 698, 699.

240. Review :—Proceedings on a review are not regarded as a continuance of the original suit, the judgment wherein it is sought to reverse. An application for review is a new and original proceeding which, to affect a stranger as a *lis pendens*, cannot be regarded pending before service of notice. Prior to the commencement of proceedings on a review and the service of notice, if the decree-holder in the original suit transferred the property decreed to him, the purchaser would be unaffected by the doctrine of *lis pendens*—*Hukum Chand on Res Judicata*, pp. 701, 702. "It is clear that when a sale of land is made between the date of final judgment affecting the land and the date when proceeding in error is commenced to reverse that judgment, it is not subject to a *lis pendens*, and the purchaser will get a good title by the purchase notwithstanding the circumstance that the judgment is afterwards reversed in the proceedings under the writ of error".—*Pierce v. Stinde*, 11 Moo. P.C. 364.

240A. Suits in British Courts :—This section restricts the operation of the doctrine of *lis pendens* only to suits in India. Therefore, when a land situate in India is the subject of proceedings in a foreign Court, a mortgage or sale thereof cannot be affected immediately by those proceedings—*Palani v. Subrahmanian*, 19 Mad. 257. The reason of the rule restricting the application of the doctrine only to suits pending in British Courts is obviously founded upon the fact that in foreign Courts not only the procedure but the remedy may be different and governed by different considerations and laws—*Cox v. Mitchell*, 7 C.B. (N.S.) 55.

"Court of competent jurisdiction" :—See Explanation.

The Court must have *jurisdiction* over the property. Where the property is situate outside the jurisdiction of the Court, it cannot pass a valid decree so as to affect an alienation made *pendente lite*—*Karusinga v. Narasinha*, A.I.R. 1938 Bom. 121, I.L.R. (1937) Bom. 895, 39 Bom. L.R. 1287, 174 I.C. 116. Therefore, where a Hindu widow in possession of land in the mofussil granted a *pu'ni* lease of the same during the pendency of an equity suit in the Supreme Court at Calcutta against her husband's executors, the lease was held valid as the land was not situated within the (original) jurisdiction of the Supreme Court

—*Bissanath v. Radha Kristo*, 11 W.R. 554. A decree of sale of land in the mofussil passed by the Supreme Court of Calcutta will not have any effect on the land and so cannot bind a purchaser *pendente lite*—*Anandamoyi v. Dhanendra*, 16 W.R. (P.C.) 19, 14 M.I.A. 101. But if the property is partly situated within the original jurisdiction of the High Court and partly outside its jurisdiction, the decree passed by the High Court on a mortgage suit in respect of the property (the suit having been instituted with the leave of the High Court under clause 12, Letters Patent) would attract the operation of *lis pendens*—*Kiernander v. Benimadhab*, 58 Cal. 598, 134 I.C. 561, A.I.R. 1931 Cal. 763 (767).

It has been held that a Registrar of Co-operative Societies under Rule 14 of the Co-operative Societies Act II of 1912 is a Court for the purpose of this section—*Velayudha v. Co-operative Rural Society*, A.I.R. 1934 Mad. 40, 57 Mad. 426, 148 I.C. 1098. But is it a "Court of competent jurisdiction"?

Pendency of suit in wrong Court :—It was held under the old section that the words "active prosecution" did include the prosecution of a suit in a *wrong* Court which from defect of jurisdiction was unable to entertain it. Therefore, the doctrine of *lis pendens* applied where the transfer of property took place during the interval between the return of the plaint by the wrong Court and its re-presentation in the proper Court—*Ma Than v. Maung Ba*, 5 Rang. 101, A.I.R. 1927 Rang. 145 (148), 101 I.C. 797; *Tangor Majhi v. Jaladhar*, 14 C.W.N. 322 (324), 5 I.C. 691. But these decisions are no longer good law, because the words "active prosecution" have been omitted, and because the Explanation expressly lays down that the pendency of a suit commences from the date of presentation of the plaint in a *Court of competent jurisdiction*. Thus where a minor member of a joint Hindu family institutes a suit for partition against his father in a wrong Court and the father executes a mortgage of the family property before the plaint is presented to the proper Court, the doctrine of *lis pendens* does not apply to the mortgage—*Nathu Singh v. Anandrao*, A.I.R. 1940 Nag. 185 (186), 1940 N.L.J. 20, 186 I.C. 688.

On such terms as the Court may impose :—When a party to a suit was not prepared to furnish security to compensate the opposite party in case the latter was restrained from selling the immoveable property in dispute during the pendency of the suit and thus sustained loss, ad-interim injunction asked for by the former could not be granted—*Kishan Lal v. Mool Chand*, A.I.R. 1950 Aj. 29.

242. Suit must not be collusive :—The words "contentious suit or proceeding" have been replaced by the words "suit or proceeding *which is not collusive*." Under the old section also, it was held that the word "contentious" was used in contra-distinction to a friendly or collusive suit—*Bhagirathi v. Raj Kishore*, 1930 A.L.J. 766, A.I.R. 1930 All. 354 (355), 122 I.C. 887; *Tinoodhan v. Trailokhya*, 17 C.W.N. 413; *Bharat Ramanuj v. Srinath*, 49 Cal. 220 (226); *Tangor Majhi v. Jaladhar*, 14 C.W.N. 322 (325), 5 I.C. 691. Where in a previous suit by A to set aside a sale made by him to B as void the plea of B that the sale and mortgage were good was upheld, a purchaser from B pending the suit

was however allowed to plead that the mortgage was invalid for want of consideration on the ground that no contest was made by his vendor in the previous suit as to the validity of the mortgage—*Manjeshwara v. Vasudeva*, 41 Mad. 458 (F.B.). Where a plaintiff in a suit abandons his claim the result of the suit will not operate as *lis pendens* against any purchaser *pendente lite* of the suit property—*Annamonal v. Chellakutti*, A.I.R. 1963 Mad. 300.

For the application of this section the proceedings should not be collusive and the right to immoveable property must be directly and specifically in question in the suit. Therefore, when an appeal from a decree in a partition suit is collusive, sec. 52 does not apply—*Ram Narain v. Nawab Sajjad Ali*, A.I.R. 1946 Oudh 99, 21 Luck 185. The mere fact that a suit results in a consent decree does not however render the suit a collusive one so as to bar the application of the doctrine of *lis pendens*—*Madholal v. Gajrabi*, A.I.R. 1951 Nag. 194, I.L.R. 1951 Nag. 241.

A collusive suit is no real suit at all but a mere pretence—*Ahmedbhoy v. Vulleebhoy*, 6 Bom. 703; *Chenvirappa v. Puttappa*, 11 Bom. 708. A collusive suit is a suit in which there is no real contest between the parties—*Bharat Ramanuj v. Srinath*, 49 Cal. 220 (226). The rule of *lis pendens* does not apply to a collusive suit or a suit in which the decree is obtained by fraud or collusion—*Tangor Majhi v. Jaladhar*, 14 C.W.N. 322 (325), 5 I.C. 961; *Nagubai v. B. Shama Rao*, A.I.R. 1956 S.C. 593. If the proceeding is tainted with fraud or collusion the doctrine of *lis pendens* does not apply. A collusive proceeding whether in the Court of first instance or in a Court of appeal is not a real proceeding but a mere pretence, and a decision arrived at in such a proceeding is binding only on the parties and their privies but not on others (transferees)—*Nuzhat-ud-dowla v. Dilband Begum*, 16 O.C. 225, 21 I.C. 570 (571); *Tangor Majhi v. Jaladhar*, 14 C.W.N. 322 (325), 5 I.C. 691; *Periamurugappa v. Manicka*, 49 M.L.J. 68, A.I.R. 1926 Mad. 50, 87 I.C. 213; *Emdad v. Haran*, A.I.R. 1936 Cal. 590. There is a fundamental distinction between a proceeding which is collusive and one which is fraudulent—*Nagubai v. B. Shama Rao*, A.I.R. 1956 S.C. 593.

A friendly suit stands on the same footing as a collusive suit, and the rule of *lis pendens* does not apply to a friendly suit, in which there is no contest and the parties bring the suit only to obtain the decree of a Court of Justice declaring their rights as to which they are themselves in perfect agreement—*Jogendra v. Fulkumari*, 27 Cal. 77 (92); *Kathir v. Maremadissa*, 38 Mad. 450 (451). As to whether the doctrine of *lis pendens* applies to administration suits, partition suits, etc., see Note 244, *infra*.

Decree in suit:—Section 52 expressly provides for all cases of decrees in suits relating to immoveable property whether they involve a mortgage or a charge or recovery of possession—*Kulandajvelu v. Soubhagayammal*, A.I.R. 1945 Mad. 350 (1945) 1 M.L.J. 261.

As this section stands, it is immaterial how the decree is obtained in the suit, whether after contest or by consent, and whether the decree is right or wrong. The Court cannot sit in judgment on the previous

decree. The principle of *lis pendens* applies though the right claimed in the suit was not the right given by the decree—*Hiranya v. Gouri*, A.I.R. 1943 Cal. 227, 76 C.L.J. 191.

Ex-parte decree :—The prohibition in this section is only against a suit which is collusive : there is nothing to prevent the doctrine of *lis pendens* from applying to a suit which is decreed *ex-parte*, owing to non-appearance of the defendant—*Krishnappa v. Shivappa*, 31 Bom. 393; *Brojo Kishore v. Miajan*, 11 C.W.N. 1138. The rule of *lis pendens* applies to a suit in which an *ex-parte* decree is passed, which is not fraudulent or collusive—*Ram Bharose v. Rampal*, 42 All. 319; *Bhagirathi v. Raj Kishore*, 1930 A.L.J. 766, A.I.R. 1930 All. 354 (355), 122 I.C. 887.

Compromise decree :—This section applies to a compromise decree and such a decree cannot, by reason of its very nature, be expected invariably to reflect the precise relief claimed—*Gouri Dutt v. Sukur Mohammad*, A.I.R. 1948 P.C. 147, 75 I.A. 175, 52 C.W.N. 840. Where in a suit on an agreement seeking specific performance and alternatively a charge on the property in question, a compromise decree providing in substance for the relief of charge is passed, the decree comes within the expression mentioned above, and the fact the plaintiff by the terms of the compromise relinquished their rights under the agreement could not lead to a different conclusion—*ibid.* But if the final decision in the pending suit is brought about by fraud and collusion, it cannot affect the rights of the transferee *pendente lite*—*Nathu v. Ramchand*, A.I.R. 1946 Bom. 462, 48 Bom. L.R. 301; *Lakshmi Gnanapakiam v. Thyne Nadar*, A.I.R. 1955 Trav-Co. 3.

A suit originally contentious (*i.e.*, non-collusive) does not cease to be so, merely because it is subsequently *compromised* by the parties. This section should be construed as applying to a suit originally contested but subsequently compromised, provided that such compromise is not tainted by fraud or collusion—*Annamalai v. Malayandi*, 29 Mad. 426 (F.B.) (overruling *Vythinaidayan v. Subrahmanyam*, 12 Mad. 439); *Bhagirathi v. Raj Kishore*, 1930 A.L.J. 766, A.I.R. 1930 All. 354 (355), 122 I.C. 887; *Ramdulari v. Upendra*, 4 Pat. 619, 90 I.C. 251, A.I.R. 1925 Pat. 462; *Mati Lal v. Preo Lal*, 13 C.W.N. 226 (232); *Bharat Ramanuj Das v. Srinath Chandra*, 49 Cal. 220 (227), 25 C.W.N. 806; *Parvati v. Govinda*, 45 M.L.J. 682, A.I.R. 1924 Mad. 359; *Periamurugapa v. Manicka*, 49 M.L.J. 68, 87 I.C. 213, A.I.R. 1926 Mad. 50; *Sarat Narain v. Badri*, 4 O.W.N. 1275, 107 I.C. 556, A.I.R. 1928 Oudh 146 (148); *Dhiraj v. Dinanath*, 6 N.L.R. 140, 8 I.C. 288 (289); *London v. Morris*, (1832) 2 L.J. Ch. 35; *Windham v. Windham*, (1667) 2 Eq. Cas. Abr. 280; *Norris v. Ite*, (1894) 152 Ill. 190; *McIlwraith v. Hollander*, (1880) 73 Missouri 105; *Partridge v. Shepherd*, (1886) 12 Pacific 480; *Turner v. Babb*, (1875) 60 Missouri 342; *Chhotabhai v. Dadabhai*, A.I.R. 1935 Bom. 54, 155 I.C. 715; *Krishnaji v. Motilal*, A.I.R. 1929 Bom. 337, 31 Bom. L.R. 476; *Shyam Lal v. Sohan Lal*, A.I.R. 1928 All 3 (7), 50 All. 290, 106 I.C. 255; *Parvati v. Govindaraja*, A.I.R. 1924 Mad. 359 (360), 45 M.L.J. 682, 76 I.C. 896. The fact that a sum of money was paid by one party to induce the other party to agree to a compromise decree does not make the doctrine of *lis pendens* inapplicable—*Ramdulari*.

v. *Upendra*, 4 Pat 619, A.I.R. 1925 Pat. 462, 90 I.C. 251. As to the effect of a compromise decree, see 50 All. 290 under Note 250.

The mere fact that a suit terminated by a consent decree does not take the suit out of the operation of the doctrine of *lis pendens*—*Tinoodhan v. Trailokhya*, 17 C.W.N. 413; *Ram Dulari v. Upendra*, supra; *Juthan v. Parasnath*, A.I.R. 1934 Pat. 270, 151 I.C. 70. Simply because the defendant admitted the plaintiff's claim, it would not render the suit non-contentious—*Gharbhoya v. Deodatta*, A.I.R. 1937 Nag. 400, 172 I. C. 389.

When a compromise is entered into by a party to the suit with the opposite party subsequent to the transfer of his interest in favour of a stranger with a view to defraud the latter, that compromise will not affect the interest of the transferee and the decree passed on such a compromise will not affect that transferee, that is to say, the principle of *lis pendens* will not apply to such a case—*Venkiteswara v. Mahomed Ali*, A.I.R. 1952 Tr.-Coch. 309. Where properties are brought to sale by both parties in pursuance of the same compromise decree, the principle of *lis pendens* cannot be applied to the earlier sale—*Chakravarti v. Gangadara*, A.I.R. 1953 Mad. 692, (1953) 1 M.L.J. 343.

243. Immoveable property :—Section 52, although in general terms, limits its own operation. For its application the suit must be one in which the rights to immoveable property are in issue, the order must be an order relating to the rights to such property and the transaction which will give place or be made subject to the order of the Court, must be one derogatory from other party's rights to the property in suit. A Court cannot create proprietary rights in a party on grounds distinct from the property itself. That is to say, section 52 only applies to rights of the other "party" involved in or arising out of the property which is the subject-matter of the suit—*Ramdhone v. Kedarnath*, A.I.R. 1938 Cal. 1 (5), 64 C.L.J. 406, 173 I.C. 828. See also *Maharaja Bahadur v. Abdul Rahim*, 62 I.C. 900 (Pat.); *Wigram v. Buckley*, (1894) 3 Ch. 483. Where the property is moveable, sufficient protection will be afforded by O. XXXIX, r. 1, and O. XX, r. 20 of the Civil Procedure Code, 1908.

But the principle of this section applies to moveables also. "The fact that sec. 52 of the T. P. Act relates only to immoveable property should not make us blind to the consideration that the legal principle underlying it might appropriately be applied to moveables also, in cases where the alienee of the moveables is proved to have had notice of the pending litigation at the time of the alienation"—*Talari Koval v. Viswanathan*, 1 L.W. 587, 25 I.C. 133. But in *Maharaj Bahadur v. Abdul Rahim*, 62 I.C. 900 (901) (Pat.), their Lordships felt doubt whether the principle of *lis pendens* applied to moveable property such as money; and in *Maharaj Bahadur Singh v. Nari Mollani*, A.I.R. 1936 Cal. 279, 40 C.W.N. 683, 63 Cal. 1117, 165 I.C. 17, the Calcutta High Court has definitely held that the doctrine of *lis pendens* does not apply to a suit to enforce a claim to a sum of money in which no question of any right to immoveable property is involved. Thus, a suit for rent in respect of an agricultural holding cannot be regarded as a claim to charge specific immoveable property, and if during the pendency of such suit the

tenant transfers the holding, the doctrine of *lis pendens* does not apply; and the same view has been expressed in *Josna Bank v. Asian Bank*, A.I.R. 1962 Ker. 309.

This section applies where immoveable property is transferred pending a suit. If a preliminary decree for sale of a mortgaged property is sold by the mortgagee after the passing of the decree, the doctrine of *lis pendens* applies, because, although a decree is not by itself immoveable property, still the decree for sale of immoveable property represents all the interest which the mortgagee has in the property, and this transfer of the decree carries with it a transfer of that *interest in immoveable property*, which after the transfer obviously does not remain in the mortgagee but passes with the decree to the assignee—*Chunni Lal v. Abdul Ali*, 23 All. 331 (335).

Standing timber:—This section applies to immoveable property. Standing timber is not immoveable property as defined in sec. 3 *ante*. The scope of sec. 52 cannot be enlarged by introduction into it in an indirect manner the definition of "immovable property" in the General Clauses Act—*Thangal v. Kutti*, A.I.R. 1952 Mad. 59. See Notes 17 and 18 *ante*. Where A obtains a decree against B's vendor for an injunction restraining the vendor from interfering with A's right to drain off water through the land of B's vendor and B purchases the property after the passing of the decree the only course for A is to execute the decree against B and not to file a separate suit, because the suit of A is governed by this section, easement being an interest in immovable property—*Addanki Ramanamma v. Ramavarupa Anthamma*, A.I.R. 1955 Andhra 199.

244. Right to property must be directly and specifically in question :— For the doctrine of *lis pendens* to affect an alienation, it is essential that the property transferred must *be directly and specifically* involved in the suit during the prosecution of which it was transferred. The question involved in the suit must directly affect an interest in the immoveable property and not merely money secured on it. Thus, where a suit is on a promissory note, the claim is limited to a money demand, and at least only a money-decree can be passed against the defendant; and the fact that the money-decree may be satisfied out of his property does not make the property directly and specifically in issue in the suit—*Maung Ta Pan v. Maung Po Thaw*, 3 Bur. L.T. 115, 8 I.C. 1208 (1209). So also, where in a suit for the recovery of the sums claimed to be due on a mortgage, only a *money-decree* not constituting any debt against the mortgaged estate was passed, *held* that so long as this decree remained unreversed the suit could not be regarded as one in which a right to immoveable property was directly and specifically in question within the meaning of this section—*Chatterput v. Maharaj Bahadur*, 32 Cal. 198 (212, 217) (P.C.). A proceeding under O. 34, r. 6 is not a proceeding in which a right to immoveable property is directly or specifically in question, because the decree which is passed in such proceeding is a mere *money-decree*—*Badri v. Hazari*, 7 O.W.N. 123, A.I.R. 1930 Oudh 93 (95).

The essence of the doctrine of *lis pendens* is that the property in question should form the subject-matter of dispute. Where the property is never the subject of a contest, nor is the charge on it, and the only

dispute is about a sum of money, the doctrine of *lis pendens* does not apply—*Badridas v. Raja Pratapgar*, A.I.R. 1940 Nag. 8 (13), 1939 N.L.J. 525, 188 I.C. 23; *Abdul Gaffar v. Ishtiaq Ali*, A.I.R. 1943 Oudh 354 (F.B.), (1943) O.W.N. 261; *Kedarnath Lal v. Sheonarain Ram*, A.I.R. 1957 Pat. 408. Consequently, where by agreement the debtor and the creditor referred the question of the liability of the debtor under certain promissory notes to arbitration and the arbitrator passed an award declaring the amount of the debtor's liability and charging the same upon the property of the debtor, and decree in terms of the award was passed by the Court on the application of the debtor, no right to immovable property was directly and specifically in question, nor any question of charge arose before the arbitrator made his award or thereafter, and therefore this section had no application in such a case, and a transfer of the property charged after the passing of the decree would not be hit by this section—*ibid.* Moreover proceedings involving a charge on immovable property does not imply that a right to immovable property is directly or specifically in question—*ibid.* But see *Govindan Sankaran v. Sankaran Achuthan*, A.I.R. 1955 Trav.-Cochin 234, where it has been held that the principle of *lis pendens* applies not only to a case where the plaintiff seeks to enforce a pre-existing charge but also to a case in which the plaintiff asks for the grant of a charge and that in the latter case the transferee *pendente lite* takes a transfer from the defendant subject to the rights granted by and enforceable under the decree. See also *Nagubai v. B. Shama Rao*, A.I.R. 1956 S. C. 593. In cases where there is no plaint, the property must be the subject-matter of the relief sought in the application which starts the contest, e.g., application for probate, administration, etc.—*Badridas v. Raja Pratapgar*, *supra*. The mere fact that the defendant does not appear does not destroy the *lis*, because the fact of suing itself indicates a contest—*Ibid.* The right to a property cannot be said to be 'directly and specifically in question after its attachment in execution of a money-decree, particularly where the attachment remains undisputed by a judgment-debtor or any other person—*Lankaram v. Sundaragopala*, A.I.R. 1941 Mad. 208, (1940) 2 M.L.J. 1038, 1941 M.W.N. 66. See also *Saroop Singh v. Nar Singh*, A.I.R. 1929 All. 846, 122 I.C. 679; *Mahadeo Saran v. Thakur Pershad*, 14 C.W.N. 677, 11 C.L.J. 528, 6 I.C. 40. Where attachment of the joint family property in execution of a money decree obtained against the father alone was effected when the father and the sons were joint and a partition between them took place after the date of attachment: held that the proceeding for execution of the money decree was not a proceeding in which any right to the immovable property of the family was directly and specifically involved. Therefore s. 52 had no application to the partition—*Ganpatrao v. Bhinrao*, A.I.R. 1950 Bom. 278, I.L.R. 1950 Bom. 114.

Where the estate of a deceased person is under administration by the Court, a purchaser from a residuary legatee or heir buys subject to any disposition which has been or may be made of the deceased's estate in due course of administration—*Chatterput v. Maharaj Bahadur*, 32 Cal. 198 (218) (P.C.). Where during the pendency of a suit brought against the trustees for the construction of the trust-deed, for the ascertainment of the respective rights of the parties interested thereunder and for directions as to the administration of the trust, one of the beneficiaries alienates

the property covered by the trust, the alienee takes the property subject to the orders and directions that may be given by the Court—*Puran Chand v. Monmotho*, 55 Cal. 532 (P.C.), 32 C.W.N. 629 (633), 108 I.C. 342, A.I.R. 1928 P.C. 38. Where a creditor of the deceased brought a suit against the heirs of the deceased for recovery of the sum due to him and, if necessary, for administration of the estate and the appointment of a receiver, *held* that as there was no specific property mentioned in the plaint, the suit was not one in which a right to immoveable property was directly and specifically in question merely because the plaintiff included in his plaint a general prayer that if necessary the estate should be administered by and under the directions of the Court—*Bepin Krishna v. Byomkesh*, 51 Cal. 1033 (1042), A.I.R. 1925 Cal. 395, 84 I.C. 880.

Suit for rent:—A suit for rent is not a suit in which any right to immoveable property is directly and specifically in question. It is primarily a suit for money, and although rent is a first charge on the property, no charge is created in any event before decree. The suit by itself can hardly be regarded as a claim to charge specific property—*Syed Jaynal Abedin v. Hyder Ali*, 55 Cal. 701, 32 C.W.N. 268 (271, 272), A.I.R. 1928 Cal. 441; *Maharaj Bahadur Singh v. Nari Mollani*, A.I.R. 1936 Cal. 279, 40 C.W.N. 683, 63 Cal. 1117, 165 I.C. 17; *Nrisingha v. Nil Ratan*, A.I.R. 1951 Cal. 221, 54 C.W.N. 683; *Dirpal v. Karamchand*, A.I.R. 1952 Pat. 9; *Giridhari v. Abdul*, A.I.R. 1951 Or. 41, I.L.R. 1950 Cut. 195; *Sheolal v. Balkrishna*, A.I.R. 1949 Nag. 114; I.L.R. 1948 Nag. 537. Therefore an involuntary sale effected during the pendency of execution of a rent decree is not affected by the doctrine of *lis pendens*—*ibid*. The rights referred to in this section are rights such as arise with regard to sale, specific performance, lease and so on; a mere *claim for rent* is not a 'right to immoveable property' within the meaning of this section—*Dhirendra v. Charushashi*, A.I.R. 1926 Cal. 191, 90 I.C. 431. If in a suit to recover a simple money debt a charge over the immovable property of the debtor is created by the decree sec. 52 is not attracted as no right in immovable property was involved in the suit—*Raichand Gulabchand v. Dattatraya Sankar Mote*, A.I.R. 1964 Bom. 1.

A *suit for specific performance* of a contract for sale or lease of immoveable property is a suit in which the immoveable property is directly and specifically involved within the meaning of this section, and the purchaser *pendente lite* is bound by the result of the suit—*Moti Lal v. Preo Lal*, 13 C.W.N. 226 (232); *Jahar Lal v. Bhupendra*, 49 Cal. 495 (499); *Vedachari v. Narasimha*, 45 M.L.J. 825, A.I.R. 1924 Mad. 307, 76 I.C. 793; *Hadley v. London Bank*, (1865) 3 DeG. J. & S. 63; *Bhaskar v. Shankar*, 26 Bom. L.R. 518, A.I.R. 1924 Bom. 467, 80 I.C. 453; *Pancham v. Kandhai*, A.I.R. 1934 All. 713, 148 I.C. 653; *Khaja Bi v. Mohammad Hussain*, A.I.R. 1964 Mys. 269 (F.B.) Sec. 47, Registration Act can only be read together with sec. 54, T. P. Act on the basis that the transfer by a registered instrument under sec. 54 once effected relates back to the date of execution or other conventional date. Consequently a deed of sale executed before the institution of the suit for specific performance of a prior contract for sale of the same property but registered thereafter cannot be held to be executed *pendente lite*—*Sadei Sahu v. Chandramani*, A.I.R. 1948 Pat. 60, 13 Cut. L.T. 21. If during the pendency of a suit for the specific perfor-

mance of a contract to sell instituted by a subsequent contractee without impleading the prior contractee the property in suit is sold to the prior contractee the sale is not hit by *lis pendens*—*Munnial v. Bhaiyalal*, 1962 M.P.L.J. 142.

A suit for declaration of charge upon specific immoveable property does come within the purview of this section. A charge may not create an interest in immovable property, but all that is necessary for bringing a case within the scope of sec. 52 is that a right in immovable property must be directly or specifically in question—*Sudhamoyee v. Jessore Loan Co. Ltd.*, A.I.R. 1945 Cal. 322, 49 C.W.N. 68; *Nagubai v. Shama Rao*, A.I.R. 1956, S.C. 593.

Maintenance-suit:—Ordinarily a suit by a Hindu wife for maintenance against her husband is a personal suit, and any purchaser of the family property during the pendency of the suit is not affected by the rule of *lis pendens*—*Gangubai v. Pegubai*, A.I.R. 1939 Bom. 403, 41 Bom. L.R. 815, 185 I.C. 81. Where a Hindu widow brought a suit for maintenance against her step-son merely enumerating in the plaint the immoveable properties of her husband in the hands of her step-son, but not charging any specific property with the maintenance, held that the plaintiff enumerated the properties merely to enable the Court to determine what amount of maintenance might fairly be given and there was not any right to immoveable property directly and specifically in question. Therefore, a mortgage of the properties by the defendant during the pendency of the suit was not affected by the doctrine of *lis pendens* under this section—*Manika v. Ellappa*, 19 Mad. 271 (272, 273). But where in a suit for maintenance, the widow claims that her maintenance should be made a charge on the property, this section applies and an alienation of the property made during the pendency of such a suit is affected by the rule of *lis pendens*—*Dose Thimanna v. Krishna*, 29 Mad. 508 (510); *Venkatrama v. Rangiah*, 46 M.L.J. 258, A.I.R. 1924 Mad. 449 (450), 77 I.C. 504; *Mahesh v. Mundar*, infra. See also, *Shidlingappa v. Sankappa*, A.I.R. 1946 Bom. 207, I.L.R. 1945 Bom. 885; *Ramchandra v. Kamalabai*, A.I.R. 1944 Bom. 191, I.L.R. 1949 Bom. 274; *Nagubai v. B. Shama Rao*, A.I.R. 1956 S.C. 593; *Singamaneni Ramappa v. Amilineni Paddakka*, (1968), 1 An L.T. 242. This is so even if the sale is for discharge of the husband's debts or the debts of the joint family or in favour of the holder of a pre-existing mortgage—*Gangubai v. Pagubai*, supra. See also *Seetharamanujacharyulu v. Venkatasubbamma*, 54 Mad. 132, A.I.R. 1930 Mad. 824, 59 M.L.J. 485; *Somasundaram v. Unnamalai*, 43 Mad. 800; *Sudhirendra v. Ramendra*, 51 C.L.J. 364, A.I.R. 1930 Cal. 539. Where a decree is passed specially creating a charge on specific immovable property and the decree is not merely a declaratory decree but an executable one, a transferee of the property before the decree is fully satisfied, is bound by the decree, irrespective of the fact that he had no notice of the charge created by the decree—*Mahesh v. Mt. Mundar*, A.I.R. 1951 All. 141 (F.B.), 1951 A.L.J. 39. See also *Ramchandra v. Kamalabai*, supra and *Tirthabasi v. Trinayani*, A.I.R. 1951 Or. 306; *Madan Mohon v. Hari Anandilal*, A.I.R. 1959 Bom. 269. Where a decree is merely a declaratory one and does not admit of execution proceedings being taken, the *lis* ends with the passing of the decree and any transfer made by the judgment-debtor after the date of the decree

will not be affected by the doctrine of *lis pendens*. But in a maintenance suit the decree does not terminate the litigation, and the *lis* continues even after the decree, and the transfer of the property executed by the judgment-debtor after the decree in the suit is affected by *lis pendens*—*Shudlingappa v. Sankappa*, supra.

When a suit is filed for maintenance with a prayer that it be charged on specified properties it is a suit in which right to immovable property is directly in question and the *lis* commences on the date of the plaint and not on the date of the decree creating the charge. Hence the purchaser of the suit properties during the pendency of the suit for maintenance but before the decree takes them subject to the result of the suit for maintenance—*Nagubai v. B. Shama Rao*, A.I.R. 1956 S.C. 593 ; *Krishnaji v. Anusayabi*, A.I.R. 1959 Bom. 475.

When a private award creates a charge for maintenance, the presentation of the application to file the award is a plaint for creating a charge over the suit properties. The *lis* commences with the application to take a decree in terms of the award and it will continue till the final satisfaction of the maintenance decree or till its satisfaction becomes unobtainable by reason of the bar of limitation—*Shidlingappa v. Sankappa*, supra.

The case is however different when a wife brings a suit for maintenance against the husband. The husband's liability to maintain the wife is a personal and absolute obligation independent of any property ; and when a wife brings a suit against the husband for maintenance and asks for a charge on the property belonging to him, she does not ask for any right directly and specifically in respect of the property. Of course, in order to get maintenance properly paid she is entitled to ask for a charge, and the Court in decreeing maintenance gives her a charge on the property. But the mere fact that she mentions in the plaint all the property belonging to her husband would not make the property the subject-matter of the suit. Consequently, a transfer of the property by the husband pending the suit is not affected by sec. 52—*Rattamma v. Seshachalam*, 52 M.L.J. 520, A.I.R. 1927 Mad. 502, 101 I.C. 806. See also *Official Receiver v. Subbamma*, A.I.R. 1927 Mad. 403 (404), 99 I.C. 564. If the wife's suit is decreed, and the decree gives her a charge on the property, it cannot be said that the charge is given to her from the date of suit. The charge takes effect from the date of the decree. Therefore, a transfer of property by the husband before the decree is not affected by the rule of *lis pendens*—*Rattamma v. Seshachalam*, supra. But the case would be different if the plaint claims a charge on specific immoveable property of her husband and the decree also grants such prayer and charges such immoveable property. In such a case the decree creating a specific charge over specific items of property mentioned in the plaint operates to give her a charge as from the date of the plaint and not as from the date of the decree. A simple money-creditor or her deceased husband has no priority over such a charge granted by the maintenance decree, and a purchaser in a sale held in execution of a simple money-decree obtained by the creditor during the pendency of such maintenance suit, is not entitled to priority over a person who purchases such property in execution of the maintenance decree—*Seetharamanujacharyulu v. Venkatasubbamma*, 54 Mad. 132, 59 M.L.J.

485, A.I.R. 1930 Mad. 824 (831, 832), 127 I.C. 809, distinguishing (and also dissenting from) *Rattamma v. Seshachalam*, supra.

Where a lady who claims maintenance prays that a charge may be declared, not on all the properties, but on a sufficient portion of the properties, all the properties are involved in the *lis*, so far as her prayer is concerned; a reference in the written statement to the undoubted power of the Court to restrict the charge to a reasonable portion of the property should not itself be made the reason for excluding the operation of the doctrine of *lis pendens*—*Bommadevara v. Subba Rao*, A.I.R. 1936 Mad. 84, 116 I.C. 421; see also *Ramaswami v. Trichinopoly C. C. Bank*, A.I.R. 1935 Mad. 867, 69 M.L.J. 447, 158 I.C. 778.

Suit for dower:—Where a Mahomedan widow brought a suit for dower against the heir of her deceased husband and for *possession* of her husband's property in the hands of the heir, the rule of *lis pendens* applied if there was an alienation during the pendency of the suit, even though the decree was not for possession but was passed for an account declaring the liability of the defendant to pay the amount decreed out of the assets coming into his hands—*Bazayet Hossein v. Dooli Chand*, 4 Cal. 402 (409) (P.C.). The doctrine of *lis pendens* is also applicable to a suit in which the widow merely claims the dower, although it contains neither any prayer for possession of the property nor any prayer that any specific items should be charged with the dower, if the decree passed in the suit is such that it can only be executed *against the property* of the husband in the possession of the husband's heirs—*Yasin Khan v. Yar Khan*, 19 All. 504 (505). But the Oudh Chief Court is of opinion that a Mahomedan woman claiming dower debt cannot claim a charge on any specific portion of her husband's property; her claim is a mere money claim, although the decree may be executed against her husband's property; consequently a husband transferring a portion of his property during a suit brought by his wife for dower is not affected by this section, especially if the remaining property is not insufficient to satisfy the dower claim—*Abdul Rahman v. Inayati*, 7 O.W.N. 1181, 130 I.C. 131, A.I.R. 1931 Oudh 63 (65), dissenting from 19 All. 504, and following *Bhola Nath v. Maqbulunnissa*, 26 All. 28 (in which 19 All. 504 was doubted).

Administration-suit:—Speaking generally, the doctrine of *lis pendens* does not apply to administration-suits, because in such a suit though the property may be said to be directly in question, it cannot be said to be *specifically* in question. But if in such a suit a particular portion of the estate is sought to be affected in a particular way, the doctrine would apply—*A. L. A. R. Chetty Firm v. Mg. Thwe*, 1 Bur.L.J. 133, A.I.R. 1923 Rang. 69 (70), 74 I.C. 54. An administration-suit brought by a creditor or next-of-kin of the deceased against the administrator for the administration of the estate of the deceased by or under the directions of the Court is not a suit in which any property is directly or specifically in question and consequently a sale of a property of the deceased made by the administrator pending the suit cannot be set aside on the ground of *lis pendens*. So also, where the claim in the administration suit was really one for a *money-decree* to be calculated on the realisation of the entire estate, it cannot be said that the right to any property was specifically in question in that suit, and consequently the rule of *lis pendens*

could not apply to a sale of property pending that suit—*Lee Lim Ma Hock v. Saw Math Home*, 2 Rang. 4 (19), A.I.R. 1924 Rang. 221, 79 I.C. 729. Where a creditor or a next-of-kin instituted an administration-suit against an executor or administrator, the mere institution of the suit or obtaining of a mere administration-decree will not bring the doctrine of *lis pendens* into operation and does not deprive the executor or administrator of his general power to dispose of the assets, unless and until the plaintiff has obtained an order appointing a Receiver of the estate or at least an injunction restraining the executor or administrator from exercising the powers vested in the executor or administrator—*Ibid* (at p. 21) following *Berry v. Gibson*, L.R. 8 Ch. App. 847. A suit in which one of two co-heirs sues the other heir, who is administrator of the estate, for his share of the estate and asks for the profits of the estate, in which a preliminary decree is given declaring that the plaintiff is entitled to a half share of the estate and directing that the usual accounts and enquiries be taken and made, in which a commissioner is appointed to take those accounts and make enquiries, and in which a final decree is given for the half share in the estate as found by the commissioner, is in fact an administration-suit, and the doctrine of *lis pendens* does not apply to such a suit—*Ma Kin v. Ma Bwin*, 5 Rang. 266, A.I.R. 1927 Rang. 186 (187), 103 I.C. 264. A creditor's action for general administration of an estate may be a sufficient *lis pendens* so as to entitle the plaintiff to priority over a purchaser or mortgagee from the defendant taking subsequently to the institution of the *lis*, if the plaintiff, previously to the purchase or mortgage, has sufficiently indicated his intention to make the *particular estate specifically liable* for his debt; a *mere general claim* for administration is not of itself a sufficient indication of such intention—*Price v. Price*, (1887) 35 Ch. D. 297. In an administration-suit brought in 1914 by the heir of the deceased, at first there was no specific mention of any property and no indication as to the property which was claimed, and the Court passed a preliminary administration decree in January 1917, and then the proceedings went before a Commissioner for an enquiry as to what the estate consisted of. The land in dispute was then claimed before the Commissioner to be part of the estate, and the Commissioner submitted his report in April 1917 recording his finding that the land was part of the estate. In 1926, the defendant in that suit transferred the land. *Held* that when the suit was first filed, there was no property directly or specifically in question, but when the matter went to the Commissioner, before whom the land was specifically claimed, and he reported that the land was part of the estate, the doctrine of *lis pendens* came into operation, and the subsequent transfer of the land was affected by it—*K. Y. Chettyar Firm v. Jamila*, 7 Rang. 734, 121 I.C. 792, A.I.R. 1930 Rang. 132 (136).

Where in an administration-suit brought by the creditor against the heirs of the deceased, an administration order was made which directed that an account should be made of the moveable and immoveable properties of the deceased, and that the estate of the deceased should be applied in payment of his debts and funeral and testamentary expenses in due course of administration, *held* that the estate of the deceased came under the administration of the Court and consequently a mortgage created by the heir after the passing of that order would be subject to

any disposition of the deceased's estate that might be made by the Court in due course of administration—*Bepin Krishna v. Byomkesh*, 51 Cal. 1033 (1044), A.I.R. 1925 Cal. 395, 84 I.C. 880. See also *Puran Chand v. Mommotho*, 55 Cal. 532 (P.C.). "It is difficult," observed their Lordships of the Judicial Committee, "for their Lordships to understand that the Legislature could have intended that when a suit for administration of any estate is before a Court competent to entertain it and to order that accounts should be taken in the suit, any other Court should have power to grant permission for the sale of property, part of the estate"—*Ma Chit v. National Bank of India*, A.I.R. 1925 P.C. 261 (263), 91 I.C. 432.

A suit brought by a legatee for a declaration of his right under a will does not fall under this section ; and therefore, if during the pendency of such a suit, a creditor of the deceased testator brings a suit, obtains a decree and in execution thereof brings some properties of the deceased to sale, the sale is not affected by the legatee's suit, but would bind the legatee—*Chaturbhujadoss v. Rajamanicka*, 54 Mad. 212, 60 M.L.J. 97, A.I.R. 1930 Mad. 930 (938), 129 I.C. 460.

A suit under O. 21, r. 63 C. P. Code is not in essence an original suit but merely a continuation of the proceedings in a claim petition, and hence all alienations during the continuance of the proceedings originated by claim petition till disposal of the suit under O. 21, r. 63 are affected by the doctrine of *lis pendens*. Where the auction sale takes place after the rejection of an objection under O. 21, r. 58 but before the institution of suit under O. 21, r. 63 it would be affected by the doctrine of *lis pendens* which applies to auction sales also—*Madholal v. Gajrabi*, A.I.R. 1951 Nag. 241.

Interpleader suit :—Where a person purchases a property from one of the parties to an interpleader-suit, in which a decree creating a charge on the property has been passed, the purchase is *pendente lite*, and the purchaser is bound by the charge—*Arunachalam v. Pratapasimha*, 60 M.L.J. 79, 33 L.W. 391, 129 I.C. 63, A.I.R. 1930 Mad. 988 (990).

Suit for partition :—The section does not apply to a suit for partition in which neither the shares of the parties nor the rights of the parties to the shares are disputed. "In this case, the question is, whether the *mode* in which the lands should be allotted between the ascertained sharers affects the right to any property specifically. I do not think it does. The shares are ascertained shares, and the only office that the Court has to perform is to divide the property which belongs to them all, in such plots of land as are most convenient for the enjoyment of each"—*Shaik Khan Ali v. Pestonji*, 1 C.W.N. 62 (64) ; *Ramchandra v. Jaideo*, A.I.R. 1928 Nag. 198 (199), 109 I.C. 566 ; *Bhupati v. Bon Behary*, A.I.R. 1941 Cal. 436. In other words, if the *rights* are not disputed and the *shares are ascertained*, and the Court has only to divide the plots of land between the co-sharers in a convenient manner, the suit cannot be said to be one in which the "right to immoveable property is directly and specifically in question". But if the shares are not ascertained and the Court has to decide the question as to whether the defendant is entitled to a share, or to decide what share is to be taken by each sharer, then this section unquestionably applies. The quantum of interest to which each member is entitled is a right to

immoveable property, and since it is directly and specifically involved in the suit, the doctrine of *lis pendens* applies, and the final decision of the suit is binding upon the transferee purchasing *pendente lite*—*Jogendra v. Fulkumari*, 27 Cal. 77 (92); *Nand Kishore v. Lallu*, 1930 A.L.J. 1286, A.I.R. 1931 All. 45 (47); *Chandan v. Fakirgir*, 11 N.L.R. 21, 27 I.C. 940 (942).

It is well settled that a partition suit operates as *lis pendens* with the result that the purchaser of an undivided share pending a suit takes only that property which is allotted on partition to his vendor. But such a suit does not operate as a *lis pendens* where a property subsequently allotted to the mother under a final decree for partition has been sold pending the partition suit in execution of a decree in respect of a pre-partition debt binding on all the members of the family and no provision is made in the partition decree for payment of that debt because the decree-holder is entitled to proceed against the entire joint family property which, on the date on which he proceeds to sell it, is not vested in the mother in any sense—*Jamuna Devi v. Mangal Das*, A.I.R. 1946 Pat. 306, 25 Pat. 13. Where in an appeal from a decree in a partition suit the share of the parties in the immovable property is not disputed, the appeal is not one in which their rights thereto are directly and specifically in question, and hence this section does not apply not such a case—*Ram Narain v. Sajjad Ali*, A.I.R. 1946 Oudh 99, 21 Luck. 185.

Where a joint family property was mortgaged and the mortgaged property was purchased by the mortgagee under a final decree on the mortgage while the suit for partition was pending and the mortgagee was impleaded as a party to the partition suit by reason of the mortgage, the purchase of that property cannot be annulled by invoking the principle of *lis pendens*—*Baldeo v. Sorojini*, A.I.R. 1929 Cal. 697, 34 C.W.N. 160. But where the plaintiff purchased a certain property included in a pending partition suit, it was held that the doctrine of *lis pendens* applied—*Khem Chand v. Mul Chand*, A.I.R. 1934 Lah. 457, 148 I.C. 731. So, where a suit for partition was pending between a father and a son, and the father between the preliminary and final decrees granted a lease of the suit property in favour of a third person, the lease could not prevail against the decree in the suit by which the property affected by the lease was allotted to the son—*Veerayya v. Venkata*, A.I.R. 1936 Mad. 887, M.L.W. 861.

245. Property must be definitely described :—In order that the rule of *lis pendens* may apply, the plaint in the suit must be so definite in the description that any one reading it can learn thereby what property is intended to be made the subject of the litigation. In other words, in order that *lis pendens* may be created, it is essential that the property involved in the suit must be described by such definite and technically legal description that its identity can be made out by the description alone, or that there be such a general description of its character or status that upon inquiry the identity of the property involved in the litigation can be ascertained—*Hukum Chand on Res Judicata*, p. 728; *Loke Nath v. Achutananda*, 15 C.L.J. 391, 2 I.C. 85 (86); *Miller v. Sherry*, 2 Wallace 237; *Achut v. Shivajirao*, A.I.R. 1937 Bom. 244 (253), 39 Bom.L.R. 224, 170 I.C. 172. Where there is nothing in the proceedings, except the simple description of the property, which will tend to put the

public on enquiry or give a clue for further and more definite knowledge, the description must be so definite that any one reading it can learn thereby what property is intended to be made the subject of the litigation. On the other hand, if enough appears in the proceedings to put a purchaser on guard, although they do not in themselves describe the property with that particularity which amounts of itself to complete identification, *lis pendens* would be created. In other words, in order to make the doctrine of *lis pendens* applicable, the property must be described in the pleadings with sufficient accuracy—*Loke Nath v. Achutananda*, 15 C.L.J. 391, 2 I.C. 85 (87); *Periamurugappa v. Manicka*, A.I.R. 1926 Mad. 50 (51), 46 M.L.J. 68. Whether the misdescription of the property is of such a character as to render the identification of the property impracticable, is a question of fact which must be decided with reference to all the records of the suit—15 C.L.J. 391. But misdescription of the property will not prevent the application of the rule of *lis pendens*, in the case of a person having *knowledge* or *notice* of the true state of things—*Bepin Krishna v. Priya Brata*, 26 C.W.N. 36, A.I.R. 1921 Cal. 730.

Where the judgment-debtor's interest in the property is not specified nor the encumbrances on the property in the sale-proclamation, the auction-purchaser is not affected by the doctrine of *lis pendens* because he has purchased the property during pendency of another suit by the decree-holder in which the same property was involved. In such a case since the auction-purchaser has suffered detriment on account of the decree-holder, the latter would be estopped from raising the plea that the purchase is affected by the doctrine of *lis pendens*—*Rajkishore v. Sultan Jehan*, A.I.R. 1953 Pat. 58.

If any amendment is made *pendente lite* in the plaint by a change in the description of the property, the amendment dates from the time it is made and will not relate back to the date of the institution of the suit so as to affect a prior alienation—*Wali Bandi v. Tabeya Bibi*, 41 All. 534, 50 I.C. 919. Plaintiff got a decree in 1912 for foreclosure but by mistake a particular piece of property was not included in the decree. Subsequently the defendant attached that property in execution of a decree obtained by him, and brought it to sale. In 1914 the plaintiff obtained amendment of his decree by the inclusion of the above property, and then brought a suit for declaration that the property was not liable to be attached or sold in execution of the defendant's decree. *Held* that the plaintiff was not entitled to the declaration. The doctrine of *lis pendens* was not applicable, in as much as at the time of the auction-purchase no suit or proceeding was pending in respect of this property—*Ram Chandra v. Bhagwan*, 57 I.C. 652.

246. "Transferred":—Transfer includes the grant of a lease, and therefore a person taking a lease of immoveable property during the pendency of a suit or proceeding relating thereto will be affected by this rule—*Madan Mohan v. Rajkishori*, 21 C.W.N. 88, 39 I.C. 182 (183); *Kiran Chandra v. Dutt & Co.*, 29 C.W.N. 94, A.I.R. 1925 Cal. 251; *Nisan v. Sundar*, 50 All. 202, 104 I.C. 292, A.I.R. 1927 All. 657 (658); *Nageshar v. Gudar*, 4 O.W.N. 660, 2 Luck. 659, A.I.R. 1927 Oudh 603 (604); *Girdharilal v. Harilal*, 33 Bom.L.R. 1123, A.I.R. 1931 Bom. 539, 134 I.C. 1223; *Ramasami v. Govinda*, 38 I.C. 1 (4), 31 M.L.J. 839; *Pancham v.*

Kandhai, A.I.R. 1934 All. 713, 148 I.C. 653. The doctrine of *lis pendens* is as much applicable to agricultural leases as to any other kind of transfer—*Rati Ram v. Shri Krishna*, A.I.R. 1949 All. 257, (1948) O.W.N. 376. An agricultural lease (in C.P.) is a transfer, and it lies on the party relying on the lease to show that it did not affect the rights of the other party to the litigation—*Shri Ganesh v. Pandurang*, 14 N.L.R. 133, 46 I.C. 762; *Matilal v. Ganpatrao*, A.I.R. 1924 Nag. 211; *Narain v. Abdul Majid*, 15 C.P.L.R. 6; *Dhiraj v. Dinanath*, 6 N.L.R. 140, 8 I.C. 288 (290); *Chandan Singh v. Fakirgir*, 11 N.L.R. 21, 27 I.C. 940 (941); *Maroti v. Tulsi*, A.I.R. 1927 Nag. 299. If the agricultural lease does not affect the rights of the other party, it will not come within the mischief of the rule. Thus, where an agricultural lease was granted by the mortgagor in the ordinary course of management, and it was for the benefit of the mortgagee as he would clearly get the lessor's share of the crops, held that this section did not apply—*Sakharam v. Tukaram*, A.I.R. 1927 Nag. 316 (318). Where during the pendency of a suit on a mortgage of the proprietary right in a field, a lease of the land was granted in good faith, and with no intention of affecting the rights which the mortgagees would acquire if they obtained a final decree for foreclosure, held that sec. 52 had no application—*Seth Misrilal v. Bhimrao*, A.I.R. 1927 Nag. 295 (296). A lease for a year given by a mortgagor who was allowed to remain in possession, pending the execution-sale of his property, was an ordinary and reasonable incident of an interim beneficial enjoyment, and was not affected by the doctrine of *lis pendens*, and the lessee was entitled to the crops raised by him for the year—*Subbaraju v. Seetharamaraju*, 39 Mad. 283 (285) (dissenting from *Thakur Prasad v. Gaya Sahu*, 20 All. 349); *Radhika v. Radhamani*, 7 Mad. 96 (99); *Karu v. Pandia*, A.I.R. 1924 Nag. 226 (227), 75 I.C. 874.

This section hits all transfers affecting rights of the other party. It is only in cases where there is no such express provision of law which is in force that the principle underlying sec. 100 can come into play, namely the postponement of the rights of a charge-holder to the right of a *bonafide* purchaser for value without notice; where the charge falls within the ambit of sec. 52 there is an end altogether of the transfer or alienation prevailing over the rights of the party in whose favour a charge has been created under the decree—*Kulandaivelu v. Sowdhagayammal*, A.I.R. 1945 Mad. 350, (1945) 1 M.L.J. 261. Where the defendant became the purchaser during the pendency of the plaintiff's mortgage suit, he was bound by the result of that suit—*Maulabux v. Sardarmal*, A.I.R. 1952 Nag. 341 (F.B.). The transfer to which the provisions of sec. 52 can properly be applied is the creation of the mortgage itself, not the subsequent sale in the enforcement of the mortgage—*Natesa v. Subbimarayana*, A.I.R. 1945 Mad. 91, I.L.R. 1945 Mad. 578. A mortgage executed after a mortgage decree and during the course of the proceedings in execution of that decree is subject to *lis pendens*. Therefore a mortgage executed by the mortgagor before the suit to which he was a party ended by sale of the mortgaged property in execution of the mortgage decree passed in the suit is affected by *lis pendens*—*Madho Ram v. Kritiya Nand*, A.I.R. 1944 P.C. 96, 49 C.W.N. 75, (1944) 2 M.L.J. 343. The right of the plaintiff co-sharer to pre-empt under sec. 4(1), Partition Act, 1893 the share purchased by a stranger is not affected by the subsequent reconveyance

by the stranger to a co-sharer, because such reconveyance is hit by sec. 52—*Sundari Bewa v. Ranka Behara*, A.I.R. 1968 Orissa 134.

Transfer includes a charge by a liquidator and the doctrine of *lis pendens* applies to it even though it be created by the authority of the District Court in a winding up when a suit relating to the property was pending in the High Court—*Motilal v. Poona C & S. Manufacturing Co.*, 19 Bom. L.R. 602, 41 I.C. 246. It of course includes a mortgage which is a transfer of immoveable property, so a mortgage taken from one of the parties to a pending suit is affected by the doctrine of *lis pendens*—*Thakur Das v. Jai Kishen*, A.I.R. 1938 Lah. 448, 40 P.L.R. 763. But a subsequent mortgage taken before a suit on the prior mortgage is instituted will not be subject to the doctrine of *lis pendens*—*Lachmi v. Hirday*, A.I.R. 1926 All. 480, 24 A.L.J. 661, 97 I.C. 4.

Transfer of possession *pendente lite* is transfer of "property" within the meaning of this section, but the *lis* must be such as can affect possession. Thus where the suit was for redemption of the mortgage in favour of defendant 1 and not for the redemption of the sub-mortgages granted by the latter, it did not mean that the plaintiff was redeeming the sub-mortgages directly and therefore the transfer of possession by the sub-mortgagees in favour of the transferee's transferee of the mortgage right could not be a transfer which could be vitiated by the pendency of the proceeding which was only for the redemption of the mortgage—*Devassya v. Thomman*, A.I.R. 1953 Tr. Coch. 573.

In applying the doctrine of *lis pendens* law does not make any difference between a transfer *inter vivos* and an involuntary transfer—*Udayanarayan v. Radhashyan*, A.I.R. 1950 Or. 36, I.L.R. (1949) 1 Cut. 559. A lease granted by a mortgagor under the statutory power given by Sec. 65A pending a suit by the mortgagee would be subject to the rule of *lis pendens*—*M. Sathianesan v. M. Sankaran*, A.I.R. 1957 Trav. Co. 292.

247. "Or otherwise dealt with": The words "or otherwise dealt with" include partition; and therefore a *partition* of the property among the defendants *pendente lite* does not affect the right of the plaintiff—*Iswar v. Dattu*, 37 Bom. 427, 19 I.C. 885 (887, 890). See also *Bhubendra v. Tarupriya*, A.I.R. 1950 Ass. 119, I.L.R. (1950) 2 Ass. 159. The words also include a contract for sale—*Kubra Bibi v. Khudaija*, 20 O.C. 13, 38 I.C. 582 (584).

But an *adoption pendente lite* is not to be regarded as an alienation pending the suit. If a legitimate son had been born to C during the suit, such son, to be bound by a pending suit affecting his father's ancestral property, must have been made a party, and a son adopted during a suit is in the same position. The one at his birth and the other at his adoption would take a vested interest in his father's property according to the Hindu Law in the Presidency of Bombay. The circumstance that C might have adopted the plaintiff for the purpose of endeavouring to defeat the *bakshishpatra* did not alter the case, because as a sonless Hindu he had a right to adopt a son—*Rambhat v. Lakshman*, 5 Bom. 630 (635).

Similarly where an owner of property files an insolvency petition, is adjudged an insolvent and his property vests in the Court or receiver appointed by the Court, it cannot be said that the owner of the property

has transferred or otherwise dealt with it—*Indian Cotton Co. v. Ram-charanlal*, A.I.R. 1939 Nag. 128, 1939 N.L.J. 202, 183 I.C. 97; see also *Puninthavelu v. Bhashyam Ayyangar*, 25 Mad. 406 and *Subramania v. Rama Krishna*, 46 M.L.J. 426, A.I.R. 1922 Mad. 335, 70 I.C. 357. Where after the discharge of a trustee under a mortgage trust-deed a new trustee is appointed by the author of the trustee deed, the latter cannot be said to have transferred or otherwise dealt with the trust properties within the meaning of this section—*Matinuzzaman v. Hunter*, 14 Luck. 548, A.I.R. 1939 Oudh 161, 1939 O.W.N. 402.

So also, the mere admission of the execution of a sale-deed before the registering officer relating to a property covered by such a deed is not 'dealing with the property' within the meaning of the section—*Rafuddin v. Brijmohan*, 9 N.L.R. 155, 21 I.C. 602. So also, the receiving of the balance of the purchase-money after the institution of the suit does not amount to 'transferring or otherwise dealing with' the property—*Ibid*.

If a subsequent mortgagee pays off a prior mortgage, and is entitled under the law to claim a charge in respect of such payment, the doctrine of *lis pendens* would not affect him, for the taking over of the prior debt would not amount to any dealing with the property in suit. It would be a mere continuance of a pre-existing paramount liability—*Shafiqullah v. Samiullah*, 52 All. 139, A.I.R. 1929 All. 943 (945), 1930 A.L.J. 57.

A defendant will not be at liberty to erect buildings on a piece of land which is the subject-matter of the litigation and thus compel the plaintiff to file another suit for the removal of the obstruction. To such a case sec. 52 applies—*Narain v. Imam Din*, A.I.R. 1934 Lah. 978.

Surrender to a person having no title cannot operate as a surrender. It will however operate as an assignment, and if it does so, it would not be vitiated by *lis pendens* unless the transfer is made by a defendant in the suit, the proceedings of which operate as *lis pendens*—*Philipose v. Karunakara*, A.I.R. 1953 Tr.-Coch. 12.

248. Transfer by persons other than parties to the suit:—The rule in this section applies where the property is transferred by a *party* to the suit or proceeding: and those persons only are affected by *lis pendens* who purchase from any of the parties to the litigation. Thus, where a decree-holder is seeking to establish his right to attach and sell his judgment-debtor's property by a suit against a successful claimant, the judgment-debtor is *not a party* to the claim suit, and if another decree-holder attaches the same property and brings it to sale, the auction-purchaser who purchases at such sale is not affected by the doctrine of *lis pendens* and is not affected by a subsequent sale held in execution of the decree of the first-named decree-holder—*Pethu Aiyar v. Sankaranarayana*, 40 Mad. 955 (958), 32 M.L.J. 374, 38 I.C. 778. The doctrine of *lis pendens* is not applicable in favour of a third party. Where the only point for decision in the suit was whether a deed of settlement was true or false, a right to immovable property was not in question and this section did not apply, nor could it be invoked by a person who was not a party to the suit—*Shammugasundaram v. Parvathi Ammal*, A.I.R. 1945 Mad. 454, (1945) 2 M.L.J. 173.

So also, the operation of the law of *lis pendens* cannot extend to persons whose title is paramount to that of the parties to the suit, or whose title is not in any way connected with them. Therefore, where pending a suit between a *pattadar* and his mortgagee, the landlord got the land sold for default in payment of rent, *held* that the landlord's right being paramount to that of his *pattadar*, the suit did not affect his statutory power of sale under the Madras Rent Recovery Act, and the purchaser was also unaffected by the suit—*Munisami v. Dakshinamurthi*, 5 Mad. 371.

The words "by any party" are not merely descriptive; they refer to the *time* at which the transaction which it is sought to assail actually took place. Therefore, the doctrine of *lis pendens* does not apply where the transfer was made, during the suit, by a person who was not a party to the suit *at the time* of the transfer but who was *subsequently* made a party—*Ammayya v. Narayana*, 21 L.W. 125, 86 I.C. 187, A.I.R. 1925 Mad. 407; *Bala Ramabhadra v. Daulu*, 27 Bom. L.R. 38, A.I.R. 1925 Bom. 176, 86 I.C. 126; *Sheoratan v. Kamta Prosad*, 11 Pat. 485, 139 I.C. 78, A.I.R. 1932 Pat. 270. Thus, in 1910 V made a gift of his land to his daughter R. The plaintiff sued V in 1914 to recover possession of the land. V died pending the suit and R was brought on the record as V's legal representative. But before she was so brought on the record, she had sold the land to the defendants. The plaintiff thereupon sued the defendants to recover possession of the land from them on the ground that the sale was affected by the doctrine of *lis pendens*. *Held* that R was not a party to the suit of 1914 and the sale to defendants took place before she was brought on the record, and therefore the doctrine of *lis pendens* did not apply—*Bala Ramabhadra v. Daulu*, (supra).

249. Effect of transfer pendente lite :—The words "cannot be transferred so as to affect the rights of any other party thereto" show that the transfer *pendente lite* is not *ipso facto* void but is only voidable at the option of the party whose interests are affected thereby. See Bennett on *Lis pendens*, p. 234. The effect of the rule of *lis pendens* is not to annul the conveyance, but only to render it subservient to the rights of the parties to the litigation. Its effect is only to bind the transferee if he happens to be a third person with any decree that is made in the suit, even if he is no party to it—*Madho Singh v. Skinner*, A.I.R. 1941 Lah. 433 (442) (F.B.), 43 P.L.R. 58; see also *Har Prasad v. Sitaram*, (infra). The rule is not that an alienation *pendente lite* is absolutely void, but that the transfer will not affect the rights of any party thereto under any decree or order that may be made in the suit. In other words the transfer will be available and valid, subject, however, to the result of the suit—*Jagannatha v. Ram Chandra*, A.I.R. 1936 Mad. 589, 165 I.C. 453; *Liladhar v. Shivaji*, A.I.R. 1936 Nag. 125, 165 I.C. 550; *Mathura Prasad v. Ghansiram*, 132 I.C. 767. Thus, where during the pendency of a partition suit between A and B, A mortgages the suit property, and then the Court declares A to be entitled to a half share of the property, the mortgage would not be absolutely void, but would be binding on the moiety that has been granted to A, though it would not be binding on the other moiety granted to B—*Rangaswami v. Sundarapandia*, A.I.R. 1928 Mad. 635 (637), 110 I.C. 548. If the father and the eldest son of a Mitak-

shara Hindu joint family mortgage some property for the benefit of the family and the mortgagee obtains possession after purchasing the property in execution of his mortgage decree, alienations in the meantime by the other sons are hit by *lis pendens*—*S. A. Venkatagiriiah v. A. Ramarthana*, (1968) 1 Mys. L. J. 384. Where a lease is made after the decree for the sale of the mortgaged property but before its final satisfaction, the lease is hit by *lis pendens* and is not binding on the mortgagee or the auction-purchaser—*Maganlal Jaiwandas Firm v. Lakhiram Haridasamal*, A.I.R. 1968 Guj. 193.

Even though the transfer is voidable only, there is no analogy between a suit for possession by a decree-holder against a transferee *pendente lite* and a suit by a Hindu reversioner for possession of property alienated by a widow—*Har Prasad v. Sitaram*, A.I.R. 1940 All. 141, 187 I.C. 332.

The purchaser can have no higher right than the vendor, and the sale having been made during the prosecution of the litigation, the purchaser must be bound by the result of the litigation—*Shib Chandra v. Lachmi Narain*, 33 C.W.N. 1091 (1096) (P.C.), 56 I.A. 339, A.I.R. 1929 P.C. 243, 119 I.C. 612; *Bhagirathi v. Raj Kishore*, A.I.R. 1930 All. 354, 122 I.C. 887. In transfers of this kind the transferee stands in the shoes of the transferor, and takes the title of the latter subject to the pending litigation. If the litigation terminates in favour of the transferor, the title of the transferee becomes valid; if however the transferor fails, the interest acquired by the transferee becomes voidable, and the other party, if his rights in the subject-matter of the litigation are affected by the alienation, may eject the transferee from the property; *Hukum Chand on Res Judicata*, p. 730. If the transferor succeeds in the Court of first instance but fails in the appellate Court, and the transfer was made while the suit was pending in the first Court, the transferee is bound by the decision of the appellate Court, and cannot obtain possession under the transfer. It makes no difference to the application of the doctrine of *lis pendens* that the decree of the Court of first instance was in favour of the transferor. That decree was open to appeal, and the decree being appealed against, it was the decree of the appellate Court that was the decree in the suit, and the parties were bound by that decree—*Gobind Chunder v. Guru Churn*, 15 Cal. 94 (99). In other words, the "decree or order which may be made therein" means the *final* decree or order in the suit. This is also borne out by the words of the Explanation which says that the *lis* continues "until the suit or proceeding has been disposed of by a *final* decree or order."

A final decree for foreclosure can be executed against the judgment-debtor's transferee *pendente lite* who is in possession of the property under the transfer, although he may not have been a party to the decree and although the decree-holder may have previously obtained symbolical possession against the judgment-debtor—*Parmeshwari Din v. Ram Charan*, 41 C.W.N. 1130 (P.C.).

The word 'rights' in this section ("so as not to affect the rights of any other party" etc.) has reference not only to substantive rights but also to a matter of procedure. Thus, it includes a right to execute a

decree—*Krishnabai v. Savlaram*, 51 Bom. 37, A.I.R. 1927 Bom. 93 (95), 29 Bom. L.R. 60,100 I.C. 582.

A person who has acquired a right of redemption by transfer or by adverse possession during the pendency of a mortgage suit is not a necessary party to the suit, as the right he acquired is hit by the principle of *lis pendens*—*Sakhubai v. Eknath*, A.I.R. 1948 Nag. 97, I.L.R. 1948 Nag. 719. A purchaser from the defendant *pendente lite* is deemed to be a representative in interest of the defendant and therefore a representative within sec. 47 C. P. Code—*Narayanrao v. Chunnilal*, A.I.R. 1953 Nag. 236, I.L.R. 1952 Nag. 150.

Notice :—The wording of this section makes it clear that the doctrine of *lis pendens* is not based upon notice, but it rests upon the ground that neither party to a suit can alienate the property in suit pending the suit so as to defeat the rights of the other party. It is based upon expediency and it is immaterial whether the alienee *pendente lite* had or had not notice of the suit. A purchase made for valuable consideration and without any express or implied notice affects the purchaser *pendente lite* in the same manner as if he had notice—*Achut v. Shibajirao*, A.I.R. 1937 Bom. 244, 39 Bom. L.R. 224, 170 I.C. 172; *Kulandaivelu v. Sowbhaggyammal*, A.I.R. 1945 Mad. 350, (1945) M.L.J. 261. The doctrine of *lis pendens* is independent of notice—*Maharaj Bahadur Singh v. Abdul Rahim*, 62 I.C. 900; *Krishnaji v. Anusaya Bai*, A.I.R. 1959 Bom. 475. A purchase made of property actually in litigation, though for valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had such notice—Story's Equity Jurisprudence, Sec. 405; *Baswan v. Natha*, 11 O.L.J. 452, 1 O.W.N. 319, 82 I.C. 747, A.I.R. 1925 Oudh 30; *Sohan Lal v. Jot Singh*, 16 O.C. 148, 20 I.C. 458. Where a litigation is pending, the decision in the suit shall be binding not only on the litigating parties but also on those who derive title under them by alienations made pending the suit, whether such alienees *had or had not notice* of the pending proceedings. If this were not so, there would be no certainty that the litigation would ever come to an end—*Bellamy v. Sabine*, 1 DeG. & J. 556 (*per* Lord Cranworth); *Lakshmandas v. Dasrat*, 6 Bom. 168; *Basappa v. Bhimangowda*, 52 Bom. 208, A.I.R. 1928 Bom. 65 (66); *Girdharlal v. Harilal*, 33 Bom. L.R. 1123, 134 I.C. 1223, A.I.R. 1931 Bom. 539; *Dodey Ram v. Gulkando*, A.I.R. 1929 All. 601, 118 I.C. 650. The doctrine of *lis pendens* is not based on the equitable doctrine of notice but on the ground that it is necessary to the administration of justice that the decision of a Court in a suit should be binding not only on the litigating parties but on those who derive title from them *pendente lite*, whether with notice of the suit or not—*Krishnabai v. Savlaram*, 51 Bom. 37, 100 I.C. 582, A.I.R. 1927 Bom. 93 (95) (*per* Fawcett J.); *Nathaji v. Nana*, 9 Bom. L.R. 1173.

Sec. 41 *ante* cannot be invoked when the transfer is *pendente lite* and when the transferee knew of the claim of the real owner long before the transfer—*Sadiq Hussein v. Co-operative Central Bank*, A.I.R. 1952 Nag. 106.

249A. "Any party to the suit" :—A person, who ought to have been

joined as a party to a suit but had not been joined before the decree, cannot be impleaded in the course of execution proceedings so as to make him bound by the decree—*Ammanna v. Ramakrishna*, A.I.R. 1949 Mad. 886, I.L.R. 1949 Mad. 904.

A transferee *pendente lite* is a representative of the transferor, the party to the suit, and is also a person bound by the decree within the meaning of O. 21, r. 35, C. P. Code read with the present section, even though he is not made a party to the suit or appeal—*Hurmat v. Matlib*, A.I.R. 1952 Ass. 111. The transferee has no right to insist upon being impleaded in addition to or instead of the transferor. The right of the decree holder to ignore the transfer continues after the death of the transferor and the decree holder can prosecute the proceedings in execution with the legal representatives of the deceased transferor on record and without the transferee—*Pyte v. Varghase*, A.I.R. 1956 Trav.-Co. 147 (F.B.).

250. “Any other party” :—The doctrine of *lis pendens* is intended to protect the parties to the litigation against alienations by their *opponents* pending the suit. Therefore, if the first defendant sells a property to the second defendant pending the suit, the third defendant cannot dispute the validity of the sale on the ground of *lis pendens*. In other words, the prohibitions contained in this section is inapplicable between parties to a suit who are ranged on the *same side* and between whom there is no issue for adjudication. The words ‘any other party’ in this section mean any other party who can be said to be arrayed on the *opposite* side to the party alienating, owing to the existence of some issue between them upon which the Court is called to adjudicate in the suit; the words mean any other party between whom and the party alienating there is an issue for decision which might be prejudiced by the alienation—*Krishnaya v. Mallaya*, 41 Mad. 458 (463); *Manjeshwara v. Vasudeva*, 41 Mad. 458 (F.B.). But in a recent case in the Patna High Court, Mr. Justice Wort has expressed the opinion (obiter) that the words “any other party” in this section are unconditional and are not in any way restricted as to mean any opposite party and not co-defendants—*Nrishingha v. Ashutosh*, A.I.R. 1938 Pat. 487, 19 P.L.T. 35.

During the pendency of a suit for possession of land brought by T against D, the land was mortgaged by T to W. The suit ended in a compromise, whereby the debt due to the mortgagee was agreed to be paid by D (who obtained a part of the property under the compromise) and the mortgagor was absolved from payment of the debt. The debt was not made a charge on any property in the hands of D but was described merely as a personal covenant. Afterwards, the mortgagee brought a suit to enforce the mortgage against D. Held that sec. 52 has been enacted for the benefit of the “other party” and not for the benefit of the party making the transfer. The other party (*viz.*, D) is not affected by the transfer, and the mortgagee cannot enforce his mortgage against D. Moreover, under the compromise the mortgage debt was converted into a purely personal contract, and no property was charged or earmarked. Therefore, the mortgagee cannot touch the property which D, the other party, got under the term of the compromise-decree—*Shyam Lal v. Sohan Lal*, 50 All. 290, 25 A.L.J. 77, 106 I.C. 255, A.I.R. 1928 All. 3 (9).

Under this section protection is given only to the rights of the parties as they existed when the suit was commenced. Nothing done by a party during the pendency of the suit affects the rights of any other party under the decree, but if a right exists in a stranger from before in relation to the property, it will not be affected merely because the title to the property in pursuance of that right was perfected during the pendency of the suit—*Narayan v. Rajkishore*, A.I.R. 1951 Pat. 613.

A brought a suit against B as legal representative of the deceased C and obtained a decree. Subsequently D who was another legal representative of C filed a suit to have the decree obtained by A set aside and obtained an award by which it was declared that the decree passed against B in favour of A was not binding on the property of C and that C's property belonged to D. During the pendency of this suit the property covered by it was sold in execution of decree obtained in the former suit. Held that D was not "any other party" within the meaning of sec. 52. D was as much a legal representative as B was. Hence sec. 52 had no application—*Dholandas v. Dadanbai*, A.I.R. 1947 Sind 181.

251. Transfer made before commencement of suit :—Where a right is acquired *before* the suit but is perfected and paid for after the institution and during the pendency of the suit, the rule in this section does not apply, and therefore a deed of sale or mortgage made prior to the institution of the suit may be registered *pendente lite* (because the deed on registration takes effect from the date of execution)—*Venkataramana v. Rangiah*, 41 M.L.J. 399, A.I.R. 1922 Mad. 249, 70 I.C. 212; *Guru Basappa v. Setra Santhappa*, A.I.R. 1925 Mad. 359, 48 M.L.J. 496; *Veerakutty v. Ramaswami*, 32 I.C. 431; *Rafiuddin v. Brijmohan*, 9 N.L.R. 155, 21 I.C. 602; *Akki v. Valuvathi*, A.I.R. 1925 Mad. 710, 48 M.L.J. 496, 87 I.C. 568; *Harichand v. Gordhan Das*, A.I.R. 1957 Punjab 238; *Shankar Prasad v. Mt. Mureshwari*, A.I.R. 1969 Pat. 304. The party relying on section 52 must establish that his suit was instituted before the execution of the deed of transfer, i.e., that the transfer took place after the institution of the suit. If the execution of the deed of transfer takes place before the institution of the suit, the doctrine of *lis pendens* cannot apply even though the deed is registered during the pendency of the suit—*Rafiuddin v. Brijmohan*, 9 N.L.R. 155, 21 I.C. 602 (603). A mortgage executed before the institution of the suit may be enforced (by a sale in pursuance of mortgage-decree) after the suit. The doctrine of *lis pendens* does not apply to previously existing transfers or to legal proceedings taken to enforce those transfers—*Chinnaswamy v. Darmalinga*, 63 M.L.J. 394, 139 I.C. 309, A.I.R. 1932 Mad. 566 (573); *Joy Chandra v. Sreenath*, 32 Cal. 357.

A second mortgage executed before but registered after the institution of a suit on the first mortgage is not affected by *lis pendens*. The second mortgage takes effect from the date of its execution—*Pingali v. Kotigari*, A.I.R. 1922 Mad. 249, 70 I.C. 212.

The rule of *lis pendens* does not afford any protection from any antecedent right—from any right *in rem* acquired prior to the litigation. When a prior mortgagee brings a suit on his simple mortgage without impleading a puisne mortgagee, he does not acquire any right under the decree

which can be hostile to the left out puisne mortgagee. No question of protection by *lis pendens* arises in such a case—*Md. Juman v. Akali Mudiani*, A.I.R. 1943 Cal. 577, 47 C.W.N. 682. See this case as to the effect of the rule of *lis pendens* on a lease granted by the prior mortgagee-decree-holder auction purchaser.

In a Bombay case an opinion was expressed that if A executed a deed of gift of certain property in favour of B, and then during the pendency of a suit in respect of the property B got the deed of gift registered, the registration was invalid because by registering the document he transferred the property to himself *pendente lite*—*Subba Ramu v. Venkatasubba*, 48 Bom. 435 at p. 441 (*per Macleod, C.J.*). But this should be taken as a mere *obiter* and not as an authoritative pronouncement (because it was not a case under sec. 52). Moreover the case has been overruled by the later Full Bench decision in *Atmaram v. Vaman*, 49 Bom. 388 (F.B.), 27 Bom. L.R. 390.

The rule of *lis pendens* does not affect a person who purchased by contract and entered into possession before the commencement of the suit, and then *pendente lite*, without actual notice, fulfilled his contract, and took a deed for the property. See *Hukam Chand on Res Judicata*, p. 709. When a particular property is added by amending the plaint but the property is sold to a bonafide purchaser before amendment the sale is not hit by *lis pendens*—*Rangaswamy v. Upparige Gowda*, A.I.R. 1962 Mys. 189.

So also, this section does not apply where the sale actually took place before the commencement of the suit but by virtue of a compromise entered into in the suit the validity of the sale-deed was accepted by the other party—*Krishnaji v. Motilal*, 31 Bom. L.R. 476, A.I.R. 1929 Bom. 337 (339), 122 I.C. 66.

Where a subsequent mortgagee assigned to the plaintiff his mortgagee rights during the pendency of a suit based on a prior mortgage to which he was no party at the date of the assignment, but subsequently he was impleaded as a party, it was held that the plaintiff was not affected by the doctrine of *lis pendens* and he was entitled to redeem the prior mortgage—*Mt. Sheoratan v. Kamta Prasad*, A.I.R. 1932 Pat. 210, 11 Pat. 415, 139 I.C. 78.

The doctrine of *lis pendens* is applied to things coming into existence during the pendency of the suit and not where there is an existing right prior to the suit. In a case where the right of pre-emption had accrued before the declaratory suit was instituted and pre-emptors had also obtained their decree for pre-emption, the doctrine of *lis pendens* had no application. The right of pre-emption is one of substitution and it cannot, therefore, be said that the successful pre-emptors are representatives of or claim under the original vendee. They cannot thus be bound by the decree against the vendee—*Shariff Hussain v. Nur Shah*, A.I.R. 1929 Lah. 589 (590). See also *Bishan Singh v. Khazam Singh*, A.I.R. 1958 S.C. 838. There the defendants sold the disputed land to A. B applied for pre-emption. The parties compromised on the terms that B should pay the consideration to A by a certain date. Before B deposited the amount C,

having an equal right of pre-emption filed a suit for pre-emption. Held B's purchase was not hit by *lis pendens*. C's suit was dismissed.

Where a lease was granted by the mortgagor before the institution of the mortgage suit, the lessees can maintain their possession as against the purchaser in execution of the decree in the mortgage suit—*Madan Mohan v. Rajkishori*, 21 C.W.N. 88, 17 C.L.J. 384, 39 I.C. 182 (185). When an auction-sale took place before the institution of the suit, the fact that the sale certificate was issued pending the suit does not bring in the doctrine of *lis pendens*. Though under sec. 316, C. P. Code, 1882, the title of the auction-purchaser is made to date from the certificate and not before, still his equitable title arose on and was completed with effect from the date of the sale; such title was incomplete until the sale was confirmed, but on confirmation it related back to the date of sale—*Lanka Gopalam v. Lanka Ratnamma*, 28 M.L.J. 666, 26 I.C. 353 (355). If in a suit for declaration of title and possession the plaintiff dispossesses the defendant and thereafter the suit is dismissed but the plaintiff remains in possession for more than 12 years and the defendant thereafter files a suit for possession he cannot invoke the doctrine of *lis pendens* and his suit must fail on the ground of limitation—*Santa Singh v. Rajinder Singh*, A.I.R. 1965 Punj. 415 (F.B.).

“Except under the authority of the Court” :—A transfer made by an order of Court is an exception to the section—*Sripat v. Naresh*, A.I.R. 1926 Pat. 94. If a transfer is to be made free from defect, this clause authorises the parties to apply to the Court before which the suit is pending, and any transfer made by permission of the Court will not be invalid. If, however, the order of the Court is obtained by fraud (e.g., where the order is issued under a misapprehension of which the applicant was the wilful cause) any alienation made under such order will not be free from the rule.

252. Plea of *lis pendens* :—A plea of *lis pendens* raised in the first Court but not pleaded in the written statement ought to be tried by the appellate Court, when no further facts or evidence than those already on the record are necessary—*Kather v. Maremadissa*, 38 Mad. 450.

53. Every transfer of im-
 Fraudulent moveable property,
 transfer. made with intent to
 defraud prior or subsequent
 transferees thereof for consi-
 deration, or co-owners or
 other persons having an in-
 terest in such property, or to
 defeat or delay the creditors of
 the transferor, is voidable at
 the option of any person so de-
 frauded, defeated or delayed.

Where the effect of any transfer of immoveable property is to defraud, defeat or

53. (1) Every transfer of
 Fraudulent immoveable property
 transfer. made with intent to
 defeat or delay the creditors of
 the transferor shall be voidable
 at the option of any creditor so
 defeated or delayed.

Nothing in this sub-section shall impair the right of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

delay any such person, and such transfer is made gratuitously, or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid.

Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) *Every transfer of immoveable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.*

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.

Amendment :—The whole section has been re-drafted by sec. 15 of the T. P. Amendment Act (XX of 1929). The following amendments have been made :—

- (a) The first para of the old section which related both to transferees and creditors, has been split up into the two sub-sections of which sub-section (1) relates to creditors, and sub-section (2) applies to transferees. See Note 253.
- (b) The reference to prior transferees and co-owners or other persons interested in the property (1st para of the old section) has been omitted. See Notes 268.
- (c) The second para of old section has been omitted. See Note 266.
- (d) The third para of old section, which was an exception to the whole section, has now been appended to sub-section (1) of the new section. See Note 261.
- (e) The 3rd and 4th paras of sub-section (1) and the second para of sub-section (2) are new. See Notes 263 and 269.

The reasons have been stated in proper places.

Analogous laws :—The old section was taken from 13 Eliz., c. 5 and 27 Eliz., c. 4. Both these Statutes applied to Presidency-towns [22 W.R. 60; 6 Mad. H.C.R. 455, 474; 25 Bom. 202, 208-209; *Abdul v. Mazaffar*, 10 Cal. 616 (P.C.)], and were repealed by the Transfer of

Property Act, so far as they applied to those towns. 13 Eliz., c. 5, dealt with transfers made with intent to defeat or delay *creditors*, and 27 Eliz., c. 4, dealt with transfers made with intent to defraud subsequent *transferees* for consideration.

The amended section has been framed on the lines of secs. 172 and 173 of the (English) Law of Property Act, 1925. The section as it stood before amendment has been printed on the left hand side.

253. Reasons for splitting up the section :—"The first paragraph of old section 53 consists of two parts, of which the first relating to subsequent transferees is based on section 2 of 27 Eliz., c. 4, and the second relating to creditors is based on section 1 of 13 Eliz., c. 5."

"On the statute 27 Eliz., c. 4, the English decisions are clear to the effect that a voluntary (*i.e.*, gratuitous) transfer of land, afterwards made the subject of a conveyance for valuable consideration, may be avoided by the subsequent purchaser, although in making the voluntary conveyance there was no actual fraud and although the purchaser had notice of the settlement; see 1 Smith's Leading Cases, 12th edition, page 27. From the fact that the settlor afterwards conveyed the land to a purchaser for consideration it was inferred that the voluntary conveyance was made with intent to defeat the purchaser. 'The principle appears to be that, by selling the property for a valuable consideration the settlor so entirely repudiates the former voluntary conveyance and shows his intention to sell, as that it shall be taken conclusively against him and the person to whom he conveyed, that such intention existed when he made the conveyance, and that it was made in order to defeat the purchaser'—*Newman v. Rusham*, 17 Q.B. 723. 'It may be assumed', said Grant. M. R. 'that a voluntary settlement, however free from actual fraud, is by the operation of that statute (27 Eliz., c. 4) deemed fraudulent and void against a subsequent purchaser for a valuable consideration even when the purchase has been made with notice of the voluntary settlement'.

"Following the same principle, Sale, J. held in *Joshua v. Alliance Bank of Simla*, (1895) 22 Cal. 185, that the words 'may be presumed' in para. 2 of the old section should be construed as equivalent to 'shall be presumed', and that a voluntary transfer of immoveable property afterwards made the subject of a transfer for consideration was void as against the subsequent transferee, even though the subsequent transferee had notice of the previous transfer. The view taken by Sale, J., was dissented from by Jenkins, C.J., in *Bai Cooverbai v. Muhammad*, (1905) 7 Bom. L.R. 267. As regards transfers made with intent to defraud creditors, the Courts in India have held that the phrase 'may be presumed' in the second paragraph should be given its plain meaning, that is to say, the meaning which it bears in the Indian Evidence Act, 1872, section 3. The result is that the same phrase 'may be presumed' may have one meaning attached to it in case of transfers made to defraud subsequent *transferees* and another meaning in case of transfers made to defeat or delay *creditors*. Again, paragraph 3 of the old section can hardly apply to cases where there is a contest between a prior voluntary transfer and a subsequent transfer for consideration.

"Such being the case, it is desirable to split the section into two parts—one dealing exclusively with transfers made with intent to defraud *creditors* and the other with transfers made to defraud *subsequent transferees*. In drafting the two sub-sections we have followed the lines of sections 172 and 173 respectively of the English Law of Property Act, 1925."—*Report of the Special Committee* (1927).

254. Application of section :—The principle of this section applies to Hindus and Mohamedans, as it is not inconsistent with their laws—*Rangilbhai v. Vinayak*, 11 Bom. 666 ; *In re Kahandan*, 5 Bom. 154 ; *Abdul Hye v. Mahomed*, 10 Cal. 616 ; *Hormusji v. Cowasji*, 13 Bom. 297.

The principle of this section has been held to be applicable to the Punjab, although this Act does not apply to that province—*Md. Ishaq v. Md. Yusuf*, 8 Lah. 544, A.I.R. 1927 Lah. 420, 101 I.C. 172 ; *Champa v. Shankar Das*, 14 I.C. 232, 74 P.R. 1912 ; *Ibrahim v. Jivan Das*, A.I.R. 1924 Lah. 707, 75 I.C. 1043 ; *Tapasi v. Raja Ram*, 115 I.C. 417 ; *Chattru Mal v. Mt. Majdan*, A.I.R. 1934 Lah. 460, 15 Lah. 849 ; *Miler v. Mangal*, 1938 Lah. 156.

By virtue of secs. 2 (d) and 5 the present section in terms does not apply in the case of a transfer under an order or decree of Court. But where a person has obtained a transfer under an order of the Court as a result of gross fraud, the Court can give relief by applying the principle of common law for avoiding fraudulent transfers—*Ramanathan v. Unnamalai*, A.I.R. 1942 Mad. 632 (1942) 2 M.L.J. 213. The principles embodied in this section are in accordance with the general principles of justice, equity and good conscience and as such should be taken as a guide by the Courts even in cases such as when a party bases his title on a transfer by a decree of the Court where the provisions of this section do not apply—*Mt. Akramunnissa v. Mt. Mustafannissa*, A.I.R. 1929 All. 238, 51 All. 595, 116 I.C. 445.

This section has no application in a case where a creditor pleads that the deed of sale by the judgment-debtor was a sham and bogus transaction and that the property was never conveyed at all and remained the property of the vendor—*Parbhu Nath v. Sarju Prasad*, I.L.R. 1940 All. 542, A.I.R. 1940 All. 407, 1940 A.L.J. 470. See also *Fakir Bux v. Thakur Prasad*, A.I.R. 1941 Oudh 457 (465), 1941 O.W.N. 801, 194 I.C. 588 ; *Purna Chandra v. Sarojendra*, A.I.R. 1953 Cal. 251, 50 C.W.N. 740 ; *Bankey Behari v. Brij Rani*, A.I.R. 1944 Oudh 314, (1944) O.W.N. (410) ; *Raj Kuer v. Rajendra*, A.I.R. 1951 All. 443 ; *Bommarayigowda v. Kalegowda*, A.I.R. 1951 Mys. 103 ; *Ram Rao v. Ajodhya Pada*, A.I.R. 1952 All. 83 ; *Mahendra Mahto v. Suraj Prasad Ojha*, A.I.R. 1958 Pat. 568. In such a case the creditor is entitled to a declaration independent of this section, that the property purported to have been sold is liable to sale in execution of his decree—*Parbhu Nath v. Sarju Prasad*, supra. Attack based on this section involves the admission that the transfer is a real transfer—*Mt. Hedayat-ul-Nissa v. Jalabud-Din*, A.I.R. 1941 Oudh 95, 1940 O.W.N. 1057, 1941 O.L.R. 29. All transfers intended to defeat or delay creditors cannot be presumed to be sham. Such a transfer, whether real or sham, has to be decided with reference to the document and the surrounding circumstances. The

question depends upon the *animus transferendi* which the parties had at the time of the transaction—*Tirupathi v. Lakshmana*, A.I.R. 1953 Mad. 545, (1953) 1 M.L.J. 123.

This section is not intended to apply to a transfer by which one creditor is preferred to another. It is intended to apply to transfer by which property is removed from the creditors to the benefit of the debtor—*Ma Pua May v. Chettiar Firm*, 56 I.A. 379, 7 Rang. 624, 34 C.W.N. 6, A.I.R. 1929 P.C. 279; *Naraindas v. Bhojraj*, I.L.R. 1939 Kar. 269, A.I.R. 1939 Sind 97 (99), 181 I.C. 888. See Note 263, *post*.

If the debtor does not retain any benefit for himself and if it is found that the transfer was for adequate consideration which was entirely expended in satisfaction of genuine debts of the debtor, then this section does not apply—*Gharbhoya v. Deodatta*, A.I.R. 1937 Nag. 400, 172 I.C. 389. Where the sale was effected in order to satisfy a decree and was the means of the decree-holder securing a benefit in the previous execution proceedings, it would not be set aside under this section—*Chettyar Firm v. Ma Mai*, A.I.R. 1937 Rang. 51, 167 I.C. 599. The mere fact that the judgment-debtor has other property to meet a creditor's decree does not, however, prevent the application of this section—*Gopi Chand v. Jodhraj*, A.I.R. 1929 All. 458, 116 I.C. 815.

A inherited some property from his father and as he began to contract debts, disputes arose between him, his wife and his minor son. The matter was referred to arbitration and an award was made by which the entire property was allotted to the minor son and a monthly allowance was fixed for A and his wife and a decree was passed in terms of the award, the wife acting as guardian for her minor son: *held*, that though A was entitled to a share, as he had submitted to the award and the order of the Court, neither he nor his creditors were entitled to attack the award subsequently—*Shantilal v. Munshilal*, A.I.R. 1932 Bom. 498, 56 Bom. 595.

255. Transfer :—The word "transfer" used in this section is comprehensive enough to embrace within its purview all kinds of transfers, whether with or without consideration—*Ram Raj v. Lal Chandra*, A.I.R. 1941 Oudh 205, 1941 O.W.N. 56, 1941 O.L.R. 210. The mere fact that a transfer is executed without consideration, as in the case of a gift, will not necessarily lead to an inference that the transfer was made with intent to defeat or delay the creditors of the transferor. Each case must be examined on its own merits. A transfer made merely with intent to defeat an anticipated execution is not a transfer made with intent to defraud, defeat or delay creditors within the meaning of this section—*ibid*; see also *Musahar v. Hakim*, 43 I.A. 104, 43 Cal. 521, 32 I.C. 343 and *Riazat Husain v. Mt. Ali Bandi*, A.I.R. 1920 Oudh 182, 60 I.C. 725.

This section contemplates a transfer of property binding as between the parties to it, but which is voidable in the circumstances laid down in the section. If, however, the transaction is merely colourable and not meant to be acted upon between the parties there is no transfer at all, but merely a fraudulent attempt to avoid a liability—*Bhagwan v. Rajendra*, A.I.R. 1923 Pat. 564, 77 I.C. 1. This section does not apply to the purchase of property in the name of another as benamdar, as there

is no transfer of any property—*Jamnabai v. Dattatraya*, A.I.R. 1936 Bom. 160, 60 Bom. 226. See in this connection *Narayan v. Guru Prasad*, A.I.R. 1952 Nag. 246; *Ishwar Das v. Radha Mal*, A.I.R. 1960 Punj. 417. But the mere fact that the transaction is hollow does not make it the less a transfer of immoveable property within the meaning of this section, and if its conditions are satisfied, the document should be declared void against the creditors of the transferor—*Vetchand v. Sittaram*, A.I.R. 1925 Bom. 287, 27 Bom.L.R. 205, 86 I.C. 873. This section applies to a suit by the creditor for a declaration that the transfer is sham and that he is entitled to proceed against the property for the realisation of his debt—*Ouseph Skaria v. Cherian Joseph*, A.I.R. 1965 Ker. 288. Where the sale is void *ab initio* the creditor need not bring any suit for avoiding it, but need only, after obtaining a decree against the transferor-debtor, attach the property, and in the event of the transferee filing a claim case or a suit, plead that the transfer was void *ab initio*—*Shantilal v. Champalal*, A.I.R. 1962 Madh. Pra. 363.

Where two debtors allowed the wife of one of them to apply for mutation on a false allegation of an oral gift of their property and to allege possession under the gift and themselves acquiesced in the passing of an order for mutation by stating that they had no objection, such an act amounted to a transfer and was voidable under this section—*Askari Begam v. Ballabh Das*, A.I.R. 1938 Oudh 165, 175 I.C. 708.

A partition among the members of a joint Hindu family is a transfer within the meaning of this section—*Rasa Goundan v. Arunachela*, 44 M.L.J. 513, 72 I.C. 978, A.I.R. 1923 Mad. 577 (dissenting from *Indoji Jithiaji v. Kothapalli*, 10 L.W. 498, 54 I.C. 146); *Ramaswami v. Kathamuthu*, 24 L.W. 180, 97 I.C. 70, A.I.R. 1926 Journal 167. See also *Chhote Lal v. Lakhimchand*, A.I.R. 1926 Nag. 355. Where immoveable property has been partitioned among co-owners, it is a transfer within the section—*Waman v. Ganpat*, A.I.R. 1936 Bom. 10, 60 Bom. 34, 160 I.C. 242; *Sm. Rattan Devi v. Jagadhar Mal*, A.I.R. 1956 Punj. 46. Whether a partition is or is not a transfer within the meaning of this section the principle thereof would apply—*Vinayak v. Moreswar*, A.I.R. 1944 Nag. 44 (F.B.), I.L.R. 1944 Nag. 342.

The word "transfer" in this section covers a surrender by a Hindu widow of her widow's estate and if made to defeat or delay creditors, it is voidable—*Nilkanta v. Muktabai*, A.I.R. 1936 Nag. 166, 165 I.C. 944; *Shivu Shidda v. Lakhmichand*, A.I.R. 1939 Bom. 496, 41 Bom.L.R. 1007.

The execution of a *baimukassa* deed by a husband in favour of his wife is a transfer of property—*Bibi Saira v. Bibi Saliman*, 2 P.L.T. 577, 63 I.C. 111 (113).

Transfer includes a settlement by which the settlor conveys all his interest in the property to trustees, or a surrender by a Hindu widow of her life-interest in favour of the reversioner. See *Natha v. Dhunbaiji*, 23 Bom. 1. A *waqf* is a transfer; and no person can make a *waqf* of his entire property without making arrangement for the payment of his debts. A *waqf* created as a device for defeating creditors is voidable. The Mahomedan law also is to the same effect. Consequently, the provisions of sec. 53 apply to *waqf* created with intent to defraud creditors. Sec-

tion 2 (d) does not prevent this section from applying to the case—*Ahmad Husain v. Kallu Mian*, 1929 A.L.J. 460, A.I.R. 1929 All. 277 (278), 117 I.C. 97; *Bismillah v. Tahsin Ali*, 1930 A.L.J. 616, A.I.R. 1930 All. 462 (465), 124 I.C. 722. Before the amendment of this section in 1929 a *waqfnama* made by the settlor with intent to defeat or delay his creditors would only be voidable at the option of the creditors so defeated or delayed. Until so avoided the deed would remain valid—*Zafrul Hasan v. Farid-ud-Din*, A.I.R. 1946 P.C. 177, 40 C.W.N. 115, (1944) A.L.J. 517. See in this connection *Har Prasad v. Md. Usman*, A.I.R. 1942 All. 2.

Where a suit was originally instituted under O. 21, r. 63, C. P. Code, an application for amendment of the plaint so as to bring it in conformity with the requirements of the present section was allowed—*Durai-swami v. Nataraja*, A.I.R. 1953 Mad. 619, (1953) 1 M.L.J. 322. See also *Purna Chandra v. Sarojendra*, A.I.R. 1953 Cal. 251, 56 C.W.N. 740.

Immoveable property :—See Notes 17 and 18 under sec. 3.

Moveable property :—This section is restricted to immoveable property (25 Bom. 202, at p. 209) and has no application to *moveables*. In India, there is no statutory provision restraining the fraudulent transfer of moveable property, but the general principle of justice, equity and good conscience as enunciated in this section may be extended to cases relating to transfer of moveable property—*Chidambara v. Sami Aiyar*, 30 Mad. 6 (9); *Kunhu v. Raru Nair*, 46 Mad. 478 (481); *Ah Foon v. Hoe Lai*, 9 Rang. 614, A.I.R. 1932 Rang. 13; *Motilal v. Kashibai*, A.I.R. 1938 Nag. 249, 172 I.C. 396.

256. Intent to defeat or delay creditors :—The word “intent” implies “aim” and thus connotes not a casual or merely possible result but rather connotes the one object for which the effort is made, and thus has reference to what has been called the *dominant* motive, without which the action would not have been taken—*Bhagwant v. Kedari*, 25 Bom. 202 (226). The intent in order to render a transfer voidable must be an intent so to impair the estate as to render it incapable for remaining assets to satisfy its general liabilities. If the untransferred assets suffice to meet all claims, a single creditor cannot prevent the transferor from dealing as he pleases with the surplus—*Chettyar Firm v. Ma Than*, A.I.R. 1934 Rang. 308, 153 I.C. 191. Intention is a question of fact and not of law—*Mathura v. Jagdeo*, A.I.R. 1928 All. 61 (62), 50 All. 208, 107 I.C. 33. Where the partition takes between the husband and the wife at a time when the husband is heavily indebted and all the tangible property is given to the wife leaving property of a flimsy character for the husband, the partition is hit by this section—*Sm. Rattan Devi v. Jagadhar Mal*, A.I.R. 1956 Punj. 46. Where the mortgaged property is sufficient to satisfy the mortgage debt, any transfer by way of gift or otherwise cannot be said to be with a view to defraud or defeat the mortgagee, and the mere fact that the transfer was without consideration cannot raise a presumption of intention to defraud—*Mt. Saraswati v. Mahabir*, A.I.R. 1928 All. 476 (478), 109 I.C. 272. Where a transfer is challenged as void under this section what the Court has to consider is whether the action of the transferor on the date of the trans-

fer was intended to defeat or delay the creditors, and not whether the creditors have been defeated since. The fact that all the creditors have been paid off since the date of the transfer is however immaterial—*Deokali v. Ram Devi*, A.I.R. 1941 Rang. 76, 1940 P.L.R. 777. But on this last point see *Abdul Rahman v. Sultan Begam*, *infra*. The relevant period of time for judging the intention of the transferor is the date of the transfer. The Court must consider whether on that date the transferor had the intention to defeat or delay and not whether the creditors have been defeated since—*Bibi Kura Begum v. Jainandon Prasad*, A.I.R. 1955 Pat. 370; *Uman Sult v. Union of India*, I.L.R. (1965) 2 Mad. 250.

If the intention of the vendors was to put their property beyond the reach of creditors by converting it from land to cash (which can easily be concealed) it would bring the case within sec. 53, because that is the most obvious and effective method of defeating and delaying creditors—*Palamalai v. S. I. Export Co.*, 33 Mad. 334 (336). But the mere fact that a transfer was made to defeat an anticipated execution is not a good reason for holding that the intent was to defeat or delay the creditors of the transferor, if there is other property left to meet the claim of the creditors—*Bhagwant v. Kedari*, 25 Bom. 202 (224); *Ram Raj v. Lal Chandra*, A.I.R. 1941 Oudh 205, 1941 O.W.N. 56, 1941 O.L.R. 210. So also, the mere fact that three decrees were outstanding against the transferor when he made a gift of his property to his son and grandson, would not lead to the inference that the gift was intended to defeat the execution of the decrees, unless it was proved that after the gift the transferor had no other property left to satisfy the decrees—*Jwala Sing v. Fatta*, 19 A.L.J. 87, 60 I.C. 825. But a transfer of *all* the properties of the transferor, soon after a decree has been passed against him, must be deemed to have been made with the intention of defeating the creditors—*Natha v. Dhunbaiji*, 23 Bom. 1 (11). See also *Phoosi v. Radhey Shyam*, A.I.R. 1951 Aj. 41. Each case must be decided on its own facts. Where a gift was made orally by a judgment-debtor after the decree-holders had obtained their decree and the reasons given by the donee for the gift were both inconsistent and inadequate, these facts were enough to raise the presumption that the gift was made with intent to defeat or delay the creditors. The mere fact that the judgment-debtor had other property to meet the decree did not prevent the application of the section—*Md. Haidar v. Sajdar Jah*, A.I.R. 1938 Oudh 230 (231), (1938) O.W.N. 922. So also the mere fact of the general knowledge that the transferor was in financial difficulties would not by itself establish want of good faith on the part of the transferee—*Rajbari Bank v. Rani Harshamukhi*, A.I.R. 1947 Cal. 154, 51 C.W.N. 36. Where a husband executed a *hiba-bil-uwaz* in favour of his wife in lieu of dower, conveying all his moveable and immoveable properties including the household effects, and it appeared that the couple had been married for 15 years and no explanation was forthcoming as to why the donor thought of making the gift just at the time when a suit had been instituted against him by one of his creditors and it was also found that no physical possession of the property had been conveyed to the donee, *held* that the gift was made with the object of defrauding creditors—*Aminā v. Sheo Prasad*, 8 A.W.N. 794, 134 I.C. 415, A.I.R. 1931 Oudh

344. See also *Abdul Hye v. Mozaffar Hossein*, 10 Cal. 616 (P.C.); *Natha v. Dhanbai*, 23 Bom. 1. Where a person executes a deed of gift in favour of his wife the crucial question is however one of intention to defraud the creditors, and the facts that all the creditors existing at the date of the deed have been paid off before the institution of the suit and that no fresh debts were incurred by the donor for about three years after the execution of the deed, even though not conclusive, afford a very strong evidence negating the intention to defraud—*Abdul Rahman v. Sultan Begam*, A.I.R. 1941 Oudh 178, 1940 O.W.N. 1336, 1941 O.L.R. 65; see also *Mt. Bibo v. Sampuran Singh*, A.I.R. 1936 Lah. 222, 162 I.C. 922 and *Zahir Ahmed v. Devi Dayal*, 6 Luck. 397, 1931 Oudh 134, 129 I.C. 333. Where a transfer is made in order to settle a debt created by money advanced previously by the transferee, the mere fact that the transferee is relative of the transferor by marriage does not establish the fact that the transfer was bogus and entered into without consideration with a view to defeat and delay the creditors of the transferor—*Ahmed Din v. Partap Singh*, A.I.R. 1939 Lah. 438, 41 P.L.R. 373. Where the purpose of dedication to charity of a very small quantity of land of the donor was real and not illusory, it could not be said that the dedication was made with intent to defeat or delay the creditors when the bulk of the property was placed in the hands of the sons of the donor for the express purpose of paying off all his debts—*Raman, Chettiar v. Muthuswami*, A.I.R. 1941 Mad. 188. (1940) 2 M.L.J. 803, 1940 M.W.N. 1180.

In order to defeat or delay his creditors, a person can adopt two methods—(1) by making a fictitious transfer and (2) by making a real transfer. When the first method is alleged, the allegation is sufficiently rebutted by finding that the consideration passed. When the second method is pleaded, the plea cannot succeed unless it is shown that the transferee has entered into a conspiracy with the debtor to defeat or delay his creditors—*Amar Nath v. Dwarkadas*, A.I.R. 1945 All. 42, I.L.R. 1944 All. 737.

Where during the pendency of a suit the defendant applied for an adjournment, and during the adjournment conveyed all his properties, some of them at half their value, and it was found that the money obtained by the sale was utilised for paying off the whole of a debt for which he was only jointly responsible with two other persons and a debt for which no demand of payment had been made, *held* that the intention was to defeat and delay the creditors—*Chettyar Firm v. Ma Sein*, 5 Rang. 588, A.I.R. 1928 Rang. 1 (3), 105 I.C. 582. Where the object of the transferor and his transferee clearly was to defraud the creditor, the mere fact that the debt due to the creditor was eventually satisfied in its entirety out of the property left by the transferor did not make any difference; because the test to be applied in such cases is whether *at the time* the transaction sought to be impeached was entered into the intention of the parties to that transaction was to defraud or defeat the payment of debts—*Amina Bibi v. Saiyed Yusuf*, 20 A.L.J. 731, 44 All. 748, A.I.R. 1922 All. 449 (454). [This portion of the judgment is not to be found in 44 All. 748]. If there is a clear finding that a sale by a debtor was made in order to defeat the creditor's claim, it

is immaterial and unnecessary to consider that the debtor had other properties sufficient to satisfy the creditor's claim—*Meenakshi v. Ammani*, A.I.R. 1927 Mad. 657 (659), 101 I.C. 610, 38 M.L.T. 369; and the case would be stronger for the application of this section, if the other properties of the debtor are not easily available for satisfaction of the creditor's decree—*Gopi Chand v. Jodhraj*, A.I.R. 1929 All. 458, 116 I.C. 815. Where during the pendency of execution proceedings consequent on a mortgage-decree a judgment-debtor sells his property and pays the decretal amount into Court for the satisfaction of the decree-holder, no question of intent to defraud arises, and the transfer is perfectly valid—*Kanchan Mandar v. Kamala Prosad*, 21 C.L.J. 441, 29 I.C. 734. But where a judgment-debtor, soon after a money-decree had been passed against him, sold away his houses and lands without any intention of paying the judgment-creditors, *held* that the sale was voidable under this section, and the mere fact that he subsequently paid some money to some creditors through fear of arrest did not make any difference—*Palamalai v. S. I. Export Co.*, 33 Mad. 334 (337). *Muniyammal v. Thyagaraja Mudaliar*, A.I.R. 1958 Mad. 580. Where a part of the money obtained by the transferor under a conveyance was applied for the discharge of some of his debts, another part was paid to a person who was not his creditor, and the rest was kept by the transferor himself although there were other creditors, *held* that the transaction was intended to defeat these creditors and was voidable under this section—*Chidambaram v. Sami Aiyar*, 30 Mad. 6 (9).

The transfer which defeats or delays creditors is not one which prefers one creditor to another, but which removes property from the creditors for the benefit of the debtor. A debtor can pay some creditors in full leaving others unpaid. The debtor must not however retain a benefit for himself—*Nainsukhdas v. Gowardhandas*, A.I.R. 1948 Nag. 110, I.L.R. 1947 Nag. 510; *Balagurunathan Chetty v Subha Reddy*, 1 An. W.R. 79.

Where a judgment-debtor without any special pressure by his creditor transferred all his property to the creditor without receiving any cash consideration and all the consideration alleged was old debts and money paid or promised to be paid to other creditors, the transfer was regarded *prima facie* voidable—*N. S. & Co. Firm v. Attauddin*, A.I.R. 1933 Rang. 191, 148 I.C. 539; *Tej Bhan v. Chandi Shah*, A.I.R. 1938 Lah. 564. Where a person carrying on business which is to a certain extent hazardous and with opportunity of utilizing other's property for his own purpose, executes a deed of gift of his own property in favour of his wife, the effect of the deed would be to defeat or delay any claims which the other persons might have at any time against him. Such a deed of gift is therefore false and fraudulent. If he executes a deed of gift with the above intention, it cannot be given effect to as a *wakf*—*Mahammad Ali v. Mt. Bisneillah*, A.I.R. 1930 P.C. 255, 35 C.W.N. 324, 128 I.C. 647. See also *Chidambaram v. Srinivasa*, 37 Mad. 227 (P.C.); *Nilkanth v. Muktabai*, A.I.R. 1936 Nag. 166, 165 I.C. 944.

The subsequent and the prior conduct as well as the contemporaneous conduct of the transferor are all relevant and must be considered in order to decide what his motive was in transferring the property—

Rattan Chand v. Kishen Chand, A.I.R. 1938 Lah. 136 (137). Where at the date of transfer of the property to her sons the transferor owed money to the creditors and subsequently had to transfer her goods at a great loss to some of the creditors and there were still creditors who had not been satisfied, the inference was irresistible that her motive in transferring the property in favour of her sons was to screen it from her creditors—*Ibid* at p. 138. If the intention of the transfer is to defeat one of the creditors, that is not a transaction contemplated by this section; but it by no means follows that because a transfer is for the purpose of defeating one of the creditors, the intention of the transfer is not to defeat all the creditors—*Kedarwati v. Radhey Lal*, A.I.R. 1937 Pat. 609, 107 I.C. 353. S. 53 (1) applies where only a part of the property of the debtor is sold—*C. Abdul Shukoor Sahib v. Arji Papa Rao*, A.I.R. 1963 S.C. 1150.

Where a person who was indebted to B and several other creditors, made a gift of his property to a third person, and thereafter he dealt with the property as if it were his own and a few months after the gift mortgaged the property to B, the only inference was that either the gift was wholly fictitious or that it was intended to defeat or delay creditors and in particular to defraud the mortgagee B—*Mt. Kaival v. Babu Lal*, A.I.R. 1937 Lah. 819, 172 I.C. 508. Where a Mahomedan judgment-debtor transferred certain property which was subsequently attached in execution of a decree against him started prior to transfer to his wife for an alleged deferred dower and it was not shown that the judgment-debtor had ever previously attempted to pay off the dower, nor was there any particular necessity shown for making the transfer on that date, it was deemed to have been made for the purpose of defeating the judgment-creditor—*Gokul v. Khanum Nur*, A.I.R. 1936 Pesh. 216.

But an intention to defeat the creditor may well exist on the part of the vendor, yet the sale will be valid unless the vendee was also a party to the fraud—*Vinayak v. Kaniram*, A.I.R. 1926 Nag. 293, 92 I.C. 810. The mere probability or even certainty of a transfer having the effect of delaying or defeating the attachment by a judgment-creditor is not a sufficient reason for invoking sec. 53. In such a case there must either be the additional fact of the transfer being for a grossly inadequate consideration or something else would raise the presumption of fraud—*Gaya Prasad v. Murlidhar*, A.I.R. 1927 All. 714 (715), 25 A.L.J. 829, 104 I.C. 406.

The burden lies on the creditor to show that the transfer was intended to defeat or delay his claim, or at least that his claim against the transferor had been defeated or delayed by the transfer—*Md. Ishaq v. Md. Yusuf*, 8 Lah. 544, 101 I.C. 172, A.I.R. 1927 Lah. 420; *Fakira v. Majho*, 2 P.L.J. 546 (548). After the creditors have made out a *prima facie* case of intention to defraud, it is for the debtor to meet the case made out and to explain the facts—*Bachan Singh v. Banarasi Dass*, A.I.R. 1961 Punj. 361.

257. Creditors :—The term “creditor” in this section is correlative to “debtor” and signifies a person to whom a debt is due. It includes

not only those creditors who have obtained decrees, but also those whose claims have yet to be proved in a Civil Court. It also includes those creditors who become so subsequent to the transfer—*Abdallakhan v. Parshottam*, A.I.R. 1948 Bom. 265, I.L.R. 1947 Bom. 807; *District Board v. Md. Abdul Salem*, A.I.R. 1947 All. 383, (1947) A.L.J. 408; *Murli Motiram v. Rewachand*, A.I.R. 1946 Sind 137, I.L.R. 1946 Kar. 14; *Ishwar Timmappa v. Devar Venkappa*, 27 Bom. 146; *Chinamal v. Gul Ahmad*, A.I.R. 1923 Lah. 478, 73 I.C. 719; *Faiz Ali v. Harkuar*, A.I.R. 1923 Nag. 334; *Gamu v. Nathu*, A.I.R. 1926 Nag. 494; *Reese River Silver Mining Co. v. Atwell*, (1869) L.R. 7 Eq. 347.

The rule of this section is not applicable to mortgagees as such, whose debts being secured upon their debtor's property cannot be defeated out of their right by any subsequent alienation fraudulent or otherwise—*Stephens v. Olive*, 2 Br. C.C. 90; *Kanchan v. Baijnath*, 19 Cal. 336. But where the property mortgaged is not sufficient to satisfy the mortgage-debt and the debtor is personally liable, the mortgagee will be a creditor for the balance—*Harman v. Richards*, 10 Hare 81. If the mortgagee relinquishes his security for the debt or if it for any reason goes off, he will then rank as a simple creditor and will be entitled to the protection under the section—*Lister v. Turner*, 5 Hare 281.

A landlord is a creditor in respect of the rents due from his tenant—*Nagendra v. Satadal*, 26 Cal. 536. A Hindu wife who has got a claim for past maintenance is a creditor of her husband, although she has not obtained decree for maintenance—*Meenakshi v. Ammani*, A.I.R. 1927 Mad. 657 (658), 101 I.C. 610. But an auction-purchaser who is not a decree-holder is not a creditor or a subsequent transferee within the meaning of this section—*Bai Hakimbu v. Dayabhai*, 41 Bom. L.R. 1104, A.I.R. 1939 Bom. 508, 185 I.C. 655.

A creditor whose claim has become barred by limitation ceases to be a creditor and cannot sue under this section to set aside a fraudulent conveyance. See *Burforji v. Dhanbai*, 16 Bom. 1 (17).

Although the word "creditors" is used in the plural number, still this section applies with equal force and effect if a debtor transfers his property with the intention of defeating one single creditor amongst a number of creditors. This section is not limited in its application to cases where there is an intention to defeat the *general body* of creditors—*Fakir v. Majho*, 2 P.L.J. 546 (550), following *In re Moronay*, L.R. 21 Ir. 27; *Ishan Chandra v. Bishu Sardar*, 24 Cal. 825 (827). The fact that there is only one creditor and not more is no reason to exclude the application of the section, if it is clear that the transfer is fraudulent and made for the purpose of defeating or delaying him—*Naraindas v. Bhojraj*, I.L.R. 1939 Kar. 269, A.I.R. 1939 Sind 97 (99), 181 I.C. 888; see also *Md. Ishaq v. Md. Yusaf*, A.I.R. 1927 Lah. 420, 8 Lah. 544, 101 I.C. 172 and *Mt. Bibo v. Sampuram Singh*, A.I.R. 1936 Lah. 222, 162 I.C. 922; *Body of creditors of Piler Khasim Sahab v. Bhaskara Chalamiah*, (1963) 2 Andh. L. T. 224.

Where the claim of a wife to maintenance has not matured into a claim for separate maintenance, a transfer by the husband in considera-

tion of her right to maintenance cannot be regarded as a transfer to a creditor for the purposes of this section—*Brij Raj Kuar v. Ram Doyal*, A.I.R. 1932 Oudh 40, 135 I.C. 369.

The burden lies on the creditor to show that he was a creditor *at the time* of the transfer; *i.e.*, he lent money before the transfer sought to be impeached took place—*Md. Ishaq v. Md. Yusuf*, 8 Lah. 544, A.I.R. 1927 Lah. 420 (421), 101 I.C. 172.

In a suit by the creditor under this section he should ask for the amount and the relief of a declaration that the transfer by the debtor is void as regards him, because he is defrauded, defeated or delayed. But no issue under this section can be framed if the creditor asks for a decree for the amount against the transferee from the debtor and treats the transfer as a valid one—*Sarju v. Shyam Sunder*, A.I.R. 1934 All. 918, 153 I.C. 674; *Sachidanand v. Radhapat*, A.I.R. 1928 All. 234, 26 A.L.J. 524.

Subsequent creditors :—The benefit of this section is not restricted to existing creditors alone; a fraudulent transfer may equally be impeached by subsequent creditors as well as by those existing at the time it was made—*Hooseinbhai v. Haji Esmail*, 5 Bom.L.R. 255; *Thomas Pillay v. Mathuraman*, 33 Mad. 205; *Ram Chand v. Mathura Chand*, 19 A.L.J. 299, 60 I.C. 896; *Narasimham v. Narayana*, 22 L.W. 592, 92 I.C. 405, A.I.R. 1926 Mad. 66 (68); *Meenakshi v. Annmani*, 101 I.C. 610, A.I.R. 1927 Mad. 657; *Parkash Narain v. Birendra*, 7 Luck. 131, 132 I.C. 51, A.I.R. 1931 Oudh 333; *Zahir Ahmad v. Devi Dayal*, 6 Luck. 397, 129 I.C. 333, A.I.R. 1931 Oudh 134; *Magnibai Kishorjee v. Kesrimal Sawairam*, A.I.R. 1955 M.B. 159. It is not necessary that a man should be actually indebted at the time he enters into a voluntary settlement; for if a man does it with a view to being indebted at *future* time, it is equally fraudulent and ought to be set aside—*per* Lord Hardwick in *Stileman v. Ashdown*, 2 Atk. 481. So, where a transfer was executed at a time when the executant was well aware of the probability of a decree for a substantial sum being passed against him, this section would apply, although the transferor had no present debts at the time the transfer took place—*Manraj Agarwala v. Ahammad*, 47 I.C. 932 (Cal.); *Rajagopala v. Sivagami*, 20 L.W. 538, A.I.R. 1924 Mad. 779, 82 I.C. 945; *Ram Das v. Debu*, A.I.R. 1930 All. 610, (1930) A.L.J. 1278, 128 I.C. 436. Similarly, "a man is not entitled to go into a hazardous business, and immediately before doing so, to settle all his property voluntarily; the object being 'If I succeed in business I make a fortune for myself. If I fail, I leave my creditors unpaid. They will bear the loss.' This is the very thing which the statute was meant to prevent"—*per* Jessel, M. R. in *Ex parte Russel*, 14 Ch. D. 588; *Mohammad Ali v. Bismillah*, 7 O.W.N. 821 (P.C.), 35 C.W.N. 324 (329), A.I.R. 1930 P.C. 255, 128 I.C. 647; *Shantilal v. Munshi Lal*, 56 Bom. 595, 34 Bom.L.R. 862, A.I.R. 1932 Bom. 498 (504). "A man who contemplates going into trade cannot on the eve of doing so take the bulk of his property out of reach of those who may become his creditors in his trading operation."—*per* Malins V. C. in *Mackay v. Douglas*, L.R. 14 Eq. 106; see also *Freeman v. Pope*, L.R. 5 Ch. 538.

But cases in which persons of extravagant habits make settlements

of the whole of their property in favour of their son or wives, with the purpose of protecting the property against the consequences of their own improvidence, stand on a different footing. Such conveyances are well-known in English law, and Courts in India have also given effect to such voluntary conveyances. In such cases, when the settlor was *not in debt at the time* but subsequently contracted debts, the creditors have not been permitted to avoid the settlement; because it was made with the intention of saving the property from the settlor's own improvidence and not with the intention of defeating the creditors. When there was no indebtedness at the time of the settlement, no *mala fides* can be presumed merely from the possibility that it might prejudice the claim of subsequent creditors—*Sadashiv v. Trimbak*, 23 Bom. 146 (156, 157). No question of consideration arises in such case. In fact, the consideration is natural love and affection—*Ibid.* Thus, a certain person who was leading a life of dissipation transferred all his property to his wife, so that he might not be at liberty to live lavishly as before. But even after the execution of the deed, he drifted into his old bad way of life and began to contract debts. In a suit by a creditor impeaching the transfer, it was held that there having been no indebtedness of the transferor *at the time* when he executed the deed of assignment of his wife, and the consideration for the same being natural love and affection which the law regarded as good, no *mala fides* could be presumed merely from the possibility that the settlement might prejudice the claims of subsequent creditors—*Ebrahim-bhai v. Fulbai*, 26 Bom. 577 (585). See also *Md. Ishaq v. Md. Yusuf*, 8 Lah. 544, 101 I.C. 172, A.I.R. 1927 Lah. 420 (421).

In the case of subsequent creditors, *i.e.*, where there are no debts due at the time and the transferor runs into indebtedness subsequently, the presumption will be regulated by the peculiar circumstances of each particular case. If, for instance, the transfer was made to ward off the effects of a threatened litigation or in anticipation of the transferor embarking upon a commercial venture or on the eve of his going into trade, the intent to defeat or delay future creditors will be presumed. But in other circumstances the transaction will be presumed to be *bona fide*, and it will lie on the future creditors to prove that the transfer was made with intent to defeat or delay the creditors—*Md. Ishaq v. Md. Yusuf*, 8 Lah. 544, 101 I.C. 172, A.I.R. 1927 Lah. 420 (421). Where a person executes a deed of *wakf* or gift in favour of his son and it is found that all his existing creditors at that time are fully paid off, this fact affords a very strong evidence negating the intention to defraud creditors, and a subsequent creditor cannot bring a suit to set aside the transfer—*Zahir Ahmad v. Debi Dayal*, 6 Luck. 397, 7 O.W.N. 1115, A.I.R. 1931 Oudh 134 (135); see also *Shantilal v. Munshilal*, 56 Bom. 595, 139 I.C. 820, A.I.R. 1932 Bom. 498 (504). In the absence of any express intention to defraud, a voluntary deed cannot be set aside at the instance of a creditor whose debt comes into existence after its date, if all the creditors existing at the time have been paid off—*In re Kelleher*, [1911] 2 Ir. R. 1. "Where the settlor was not indebted at the time, the onus of proving the fraud is thrown on those who impeach the settlement, for fraud is not to be presumed. The mere fact of subsequent indebtedness is not evidence of a fraudulent intent against subsequent creditors"—*May's Fraudulent Conveyances*.

258. 'Voidable' :—Section 53 does not render a transaction *void ab initio*, but only voidable, and that only at the option of any person defeated, defrauded or delayed—*Krishna Kumar v. Joykrishna*, 13 C.L.J. 570, 29 I.C. 690 ; *Rangnath v. Gobind*, 28 Bom. 639 ; *Krishna Bai v. Debi Singh*, 71 I.C. 409, A.I.R. 1923 Nag. 195 ; *Malan Devi v. Amritsar National Bank*, A.I.R. 1936 Lah. 286, 162 I.C. 39 ; *Budhermal v. Verharam*, A.I.R. 1946 Sind 78, I.L.R. 1946 Kar. 98. If the transferee pays off the debt due to the creditor, the latter cannot complain that he is defeated or defrauded by the transfer and so cannot avoid it—*Krishna Bai v. Debi Singh*, (supra).

A transfer declared void under this section is not annulled altogether, but only against creditors and only to the extent necessary for satisfaction of their claims. Subject to their claims the transfer is enforceable—*Nanjamma v. Rangappa*, A.I.R. 1954 Mad. 173.

Where a sale is a real one, though for grossly inadequate consideration or fraudulent, the transaction is perfectly valid till avoided by a person given the right to do so under this section. The equitable maxim of *in pari delicto* and the related one of *ex dolo malo non oritur actio* do not apply to a transaction which the law itself is prepared to uphold and enforce, unless it falls within this section—*Narayan v. Maruti*, A.I.R. 1936 Nag. 207, 165 I.C. 76 ; *Nathusa v. Munir*, A.I.R. 1943 Nag. 42, 1943 N.L.J. 133 ; *Anantha v. Arunachalam*, A.I.R. 1952 Tr.Coch. 105 ; *Tirupathi v. Lakshmana*, A.I.R. 1953 Mad. 545, (1953) 1 M.L.J. 123.

The question whether an alienation should be set aside as being in fraud of the creditors is a pure question of fact and cannot be agitated in a second appeal—*Subramania v. Annavi*, A.I.R. 1942 Mad. 522, (1942) 2 M.L.J. 556 ; *Errachi Reddiar v. Vellayya Reddiar*, A.I.R. 1968 Mad. 256.

A Mahomedan transferred certain properties to his wife in lieu of dower, but more than two years before his adjudication as insolvent. The property was mortgaged by the wife and in execution of the mortgage-decree it was purchased by B. It was found that the transfer in favour of the wife was fraudulent. The Official Receiver thereafter applied to avoid the transfer ; *held* that the transfer in favour of the wife was voidable and not void and was liable to be set aside under this section, but only without impairing the rights of a *bona fide* transferee for valuable consideration. As the right of B had come into existence before the application for avoiding the transfer in favour of the wife was made by the Receiver, the transfer in his favour must stand—*Basharat v. Ram Rattan*, A.I.R. 1938 Lah. 73. The argument that one is entitled under the Mahomedan law to execute a deed open to challenge under sec. 53 is irrelevant for the purposes of this section—*Har Prasad v. Md. Usman*, A.I.R. 1943 All. 2, 1942 A.L.J. 645. A transfer by a Shia Muhammadan is not outside the scope of this section—*Bibikubra Begum v. Jainandan Prasad*, A.I.R. 1955 Pat. 370.

The creditor has the election of either accepting the transaction or of avoiding it ; and he may do so expressly or by implication. If he affirms the transaction expressly or does any act which amounts to an affirmation of the transaction, he loses his right of avoiding it afterwards. Once he has decided to do one thing, he loses his other option, and cannot be allowed to reprobate what he has approbated—*Sachitanand v. Radhapat*, 26 A.L.J. 524, A.I.R. 1928 All. 234 (235), 116 I.C. 86.

In a suit to set aside a deed of assignment under this section, the Court passed a decree that the deed of assignment was bogus and fraudulent and declared it as cancelled and of no effect against the creditors: *held*, the Judge intended to cancel the assignment and not merely to declare it void in part leaving it effective as between the assignor and the assignee and ineffective only against the creditors—*Ramchandra v. Vittu Govind*, A.I.R. 1941 Bom. 65, 42 Bom. L.R. 1057. In this case the proper form of decree to be passed in such cases was indicated.

For the purpose of avoiding a transfer which is voidable under this section, it is not necessary that a suit should be filed by a creditor. It is enough that he repudiates the transfer by an unequivocal declaration, such as by attachment of the properties transferred—*Ouseph v. Annamma*, A.I.R. 1951 Tr.-Coch. 237.

259. Whether 'suit' by creditor is necessary:—Under this section the avoidance by a creditor of a fraudulent transfer by the debtor need not be by a *suit*, brought on behalf of all the creditors or even by that one creditor; an open and unequivocal declaration of the intention to avoid it expressed by a creditor is sufficient in law to enable him to treat it as void and to take steps on that footing to enforce his rights as a creditor for obtaining satisfaction of his debt. Thus, where a creditor after coming to know of a prior fraudulent transfer by the debtor, made a subsequent purchase of one of the lands included in the prior transfer, ignoring the prior transfer and treating it as if it conveyed no title to the prior transferee so far as the land purchased by himself was concerned, *held* that there was a sufficiently unequivocal expression of an intention by the creditor to avoid the prior transfer to the extent to which it was necessary to give effect to his own purchase. The methods of avoidance are not restricted to proceedings against the property through attachment and sale for the purpose of recovering the debt. This section does not preclude recovery by means of any other reasonable transaction, through which, without incurring the expenses of litigation the creditor could make available the value of the property to satisfy his debt—*Sami Asari v. Adinam*, 12 L.W. 718, 61 I.C. 580 (582, 583); *Ramaswami v. Lakshmania*, A.I.R. 1936 Mad. 408, 161 I.C. 1003. See also *Nanjamma v. Rangappa*, *supra*.

Where a creditor attaches in execution the property transferred by the debtor, that is sufficient exercise of the option by the creditor to avoid the transaction—*Nauratan v. Margaret Stephen*, 3 P.L.T. 613, 68 I.C. 369, A.I.R. 1922 Pat. 572. But see *Thaher Unnissa Begum v. Shereunnissa Begum*, A.I.R. 1955 Mad. 446 where it has been held that only when a suit is instituted by a creditor for avoiding a transfer does s. 53 come into operation.

An auction-purchaser cannot be regarded as a creditor or a transferee within this section—*Nanjamma v. Rangappa*, *supra*. Where a decree-holder has elected to avoid a transfer by putting up the properties to auction sale in execution of his decree, the avoidance however enures for the benefit of the auction-purchaser—*ibid*. Subsequent creditors also are entitled under this section to avoid the transfer—*ibid*.

Defence by creditor in a suit by transferee:—If a creditor wants to

avoid a fraudulent conveyance made by his debtor he can do so not only by a properly instituted *suit*, but also by way of *defence* to a suit brought by the transferee. A *suit* to set aside the fraudulent transaction is not the only remedy; this section can be pleaded as a *defence*—*Ramaswami v. Mallappa*, 43 Mad. 760 (F.B.), 39 M.L.J. 350, 59 I.C. 947 (overruling *Palaniyari v. Appavu*, 30 M.L.J. 565; *Subrahmania v. Muthia Chettiar*, 41 Mad. 612 (F.B.); and *Muthukumara v. Alagappa*, 6 L.W. 518); *Cheruthazhath Abdulla Haji v. Cheriyaandi*, 50 I.C. 959 (per Seshagiri Aiyar J.); *Abdul Kadir v. Ali Mia*, 16 C.W.N. 717, 14 I.C. 715; *Dhansukhdas v. Jhango*, 16 N.L.R. 3; *Ram Chand v. Mathura Chand*, 19 A.L.J. 299, 60 I.C. 896; *Nilkanth v. Muktabai*, A.I.R. 1936 Nag. 166, 165 I.C. 944; *Shaukat Ali v. Sheo Ghulam*, A.I.R. 1936 All. 663, 165 I.C. 124; *Naraindas v. Bhojraj*, I.L.R. 1939 Kar. 269, A.I.R. 1939 Sind 97 (98), 181 I.C. 888; *Bibi Kubra Begum v. Jainandan Prasad*, A.I.R. 1955 Pat 370; *Ramnath Sastrigal v. Alagappa Chettiar*, A.I.R. 1956 Mad. 682. See also *Seth Ghansham Das v. Uma Pershad*, 23 C.W.N. 817 (P.C.), 50 I.C. 264 in which the Judicial Committee allowed the creditor to raise in *defence* the plea that the plaintiff's mortgage was executed collusively as a device to defeat the creditors, court can give relief to a creditor who in his written statement take his distinct pleas: (1) that the sale was void being sham and fictitious; (2) that even if real it was intended to delay or defeat creditor, hence voidable—*C. Abdul Shukoor Saheb v. Arji Papa Rao*, A.I.R. 1963 S.C. 1150.

261. Protection of transferee in good faith:—See second para of sub-section (1). This was the third para of the old section, and was intended to apply to both cases where the transfer was made with intent to defeat *creditors* and where it was made with intent to defraud *subsequent transferee*. But it has been pointed out by the *Special Committee* that "this para can hardly apply where there is a contest between a prior voluntary (gratuitous) transfer and a subsequent transfer for consideration." For this reason this para has been included only in sub-section (1) of the new section.

Every conveyance of immoveable property made with intent of defeating the claims of creditors is voidable at the instance of any person so defeated. But if such a person does not with reasonable promptitude avoid the transaction and by his laches allows the transferee to convey the same to a third person for value and such third person takes it in good faith and for consideration this para applies and the person whose claim is defeated is estopped in equity from denying such third person's title—*Phagoo v. Tulshi*, A.I.R. 1930 All. 438, 125 I.C. 506. A transfer cannot be set aside on the ground that it was made to defeat or delay the creditors of the transferor, if the transferee acted in good faith and proved consideration—*Daya Ram v. Nadir Chand*, A.I.R. 1934 Lah. 318.

This para protects a *bona fide* purchaser for valuable consideration, whether he purchases from the original fraudulent transferor or from a transferee from him—*Kunhu Pothanassiar v. Raru Nair*, 46 Mad. 478, 44 M.L.J. 527, A.I.R. 1923 Mad. 558; *Shikar Chand v. Jagmandar*, 25 A.L.J. 873, 106 I.C. 519, A.I.R. 1928 All. 29 (32); *Malan Devi v. Amritsar National Bank*, A.I.R. 1936 Lah. 286, 162 I.C. 39; *Basharat Ali v. Ram Rattan*, A.I.R. 1938 Lah. 73, I.L.R. 1938 Lah. 439, 40 P.L.R. 1000; *Man*

Singh v. B. N. Sinha, A.I.R. 1940 Lah. 198, 191 I.C. 639. A fraudulent grantee takes the entire estate of the fraudulent grantor, and a *bona fide* purchaser from the fraudulent grantee takes the entire estate, even though the deed is voidable at the instance of the creditors of the original grantor—*Shikar Chand*, *supra*. But where the original transfer was supported by no consideration, and devised by the parties to defeat the creditors of the transferor (and was therefore not merely *voidable* but *void*) and the property was afterwards assigned for value to an innocent purchaser, *held* that this last mentioned person was not protected by this para; since his assignor had acquired no interest in the property under the void transfer, he had no title to convey to his transferee, although this person was a transferee in good faith—*Basti Begam v. Benarsi Prasad*, 30 All. 297 (308), explained in *Shikar Chand's case*, *supra*.

This clause lays down that when the consideration for the transfer and good faith on the transferee's part are present, the intention of the transferor to defeat or delay his creditors is immaterial. Shephard and Brown, 7th Edn., pp. 160-161. There can however be no good faith when the transferee knows that part of the consideration is fictitious and when he assists the debtor in his device to defeat and delay his creditors. It does not matter whether part of the consideration is good, nor whether part of the motive is good—*Jamadar Singh v. Naiyab Ali*, A.I.R. 1941 Cal. 378, 45 C.W.N. 498.

The meaning of this para is that where a person acquires any property for value and in good faith, that is, without being a party to any design on the part of the transferor to defraud his creditors, his right shall not be impaired by anything contained in this section, notwithstanding that the transferor may be actuated by such desire—*Ishan Chunder v. Bishu Sardar*, 24 Cal. 825 (827, 828). If the transferee did not share the intention of the transferor to defeat or delay his creditors, he would be a transferee for good faith and for consideration and his rights would be protected under this section; but if both of them are actuated by the same common intention to defraud creditors, there is no good faith, even though full consideration has passed—*Shaukat Ali v. Sheo Ghulam*, A.I.R. 1936 All. 663, 165 I.C. 124; *Waryam Singh v. Thakar Das*, A.I.R. 1935 Lah. 404, 16 Lah. 680, 158 I.C. 254; *Muthuswami v. Ramaswami*, A.I.R. 1942 Mad. 751, (1942) 2 M.L.J. 444. A mere fraudulent intention on the part of the grantor alone will not invalidate the transfer, if it is for valuable consideration and there is no want of good faith on the part of the grantee—*Hakim Lal v. Mooshahar Sahu*, 34 Cal. 999 (1017); *Gopal v. Bank of Madras*, 16 Mad. 397; *Bhagwant v. Kedari*, 25 Bom. 202 (224). The knowledge and intention of the *transferee* are the determining factors in such a case. If he buys in good faith and for valuable consideration, his purchase cannot be set aside by reason of the transferor having sold the property for the express purpose of defeating or delaying the creditors. It is a question of fact in each case whether the transferee purchased in good faith without knowledge of the transferor's fraudulent intention—*Ibrahim v. Jiwan Das*, A.I.R. 1924 Lah. 707 (709), 75 I.C. 1043; *Daulat Ram v. Ghulam Fatima*, 89 I.C. 953, A.I.R. 1926 Lah. 25.

A deed cannot be said to have been executed in good faith, when it

was executed as a mere cloak, the real intention of the parties being that the ostensible grantor should retain the benefit to himself—*Ramasamia v. Adinarayana*, 20 Mad. 465 (466); *Natha v. Maganchand*, 27 Bom. 322 (327); *Ex parte Games*, (1879) 12 Ch. D. 314.

If the property of the debtor is transferred for consideration to a *bona fide* purchaser, then even though such transfer has the effect of putting the debtor's property out of the reach of the creditors, the transfer will nevertheless be effective and the creditors will not be entitled to have the transfer set aside or declared void—*Fakira Singh v. Majho Singh*, 2 P.L.J. 546 (550, 551), 40 I.C. 685. The transaction may defeat or delay; the transferor may intend that it should; the transferee may know that it will; the consideration may be inadequate; and yet unless the transferee himself has been wanting in good faith, his rights will not be impaired—*Bhagwant v. Kedari*, 25 Bom. 202 (226). Even where consideration has been paid, and possession delivered to the transferee, the transfer will not affect the rights of the creditor, if the transferor's intention was to defeat or delay him. But so far as the *transferee* is concerned it must be found that he participated in the intention of the transferor to defeat or delay the creditor. If the transferee had no notice of and *did not share in the fraudulent intention*, the transfer will not be set aside—*Pandurang v. Bapuji*, 71 I.C. 28, A.I.R. 1923 Nag. 103. The definition of constructive notice given in sec. 3 should not be imported into this section. So, the *mere knowledge* on the part of the transferee of an impending execution of a decree against the transferor is not sufficient to make the transferee a transferee otherwise than in good faith, when he *does not share the intention* of the transferor to defeat or delay his creditors nor participates in the commission of the fraud—*Ishan Chunder v. Bishu Sardar*, 24 Cal. 825 (828, 830); *Raizat v. Ali Bandi*, 7 O.L.J. 699, 60 I.C. 725 (727); *Bakht Bali v. Lekhrani*, 15 I.C. 509 (510); *Ah Foon v. Hoe Lai*, 9 Rang. 614, A.I.R. 1932 Rang. 13 (14). The mere knowledge on the part of the purchaser that the sale may defeat or delay the creditors is not sufficient to negative the *bona fide* of the purchaser—*Kamuni Kumar v. Hira Lal*, 23 C.W.N. 769, 51 I.C. 736; *Bhagwant v. Kedari*, 25 Bom. 202 (213). Where a mortgage was executed at a time after the first attachment had ceased and before the next attachment had come into existence, the mere knowledge that the execution was pending against the transferor for long does not necessarily make the transfer invalid as against a *bona fide* transferee for value—*V. P. L. Firm v. Chettyar Firm*, A.I.R. 1933 Rang. 169, 146 I.C. 954.

Where the circumstances raise a presumption of fraud, the burden lies on the transferee to prove good faith on his part and consideration—*Amarchand v. Gokul*, 5 Bom.L.R. 142; *Palamalai v. S. I. Export Co.*, 33 Mad. 334 (338); *R. M. A. M. Firm v. Maung San*, 6 Bur.L.J. 145, A.I.R. 1927 Rang. 331 (332), 104 I.C. 557; *Hashmat Begam v. Mohan Lal*, A.I.R. 1937 Oudh 349, 168 I.C. 53; *C. Abdul Shukoor Saheb v. Arji Papa Rao*, A.I.R. 1963 S.C. 1150.

A transferee who knows the extravagant and reckless character of the transferors ought to inquire whether they are transferring the property with the intention of defeating their creditors; but the absence of such inquiry, especially when the transferee is not aware of any debts of the

transferors, cannot be called *mala fide*—*Natha v. Dhunbaiji*, 23 Bom. 1 (14). So also, it is not the duty of the purchaser to see to the application of the purchase-money—*Deoki Nandan v. Saiyed Jawad Hussain*, A.I.R. 1928 Pat. 199 (201), 106 I.C. 356.

Under this clause, *good faith is more essential than consideration*, so that if the element of good faith is not present, the transaction will be avoided even where there is some consideration—*Narmal Das v. Chet Ram*, 11 O.C. 197; *Sundar Singh v. Ram Nath*, 7 Lah. 12, A.I.R. 1926 Lah. 167 (168), 27 P.L.R. 219, 93 I.C. 1013. It is not sufficient to render a deed valid that it should be made upon good consideration; it must also be proved that it was made in good faith; for (as Lord Coke observed in *Twyne's case*) "a good consideration doth not suffice, if it be not also *bona fide*"—*Chidambaram v. Sami Aiyar*, 30 Mad. 6 (9); *Kamini Kumar v. Hiralal*, 23 C.W.N. 769, 51 I.C. 736; *Hakim Lal v. Mooshahar*, 34 Cal. 999 (1008, 1013); *Viswananda v. Raja Venkata*, A.I.R. 1927 Mad. 278 (280), 25 L.W. 223, 99 I.C. 709; *Madan Gopal v. Lahri Mal*, 12 Lah. 194, 130 I.C. 62, A.I.R. 1930 Lah. 1027 (1028). Under this section, the Court has not only to determine whether there was consideration, but has also to consider whether the purchaser was a transferee in good faith, *i.e.*, whether or not the transferee combined with the transferor in carrying out the improper purpose of defeating the creditors—*Hamidunnissa v. Nazirunnissa*, 31 All. 170 (172). So, if the *transferee shares with the transferor the intention* of defeating the creditors of the latter, the transfer will be voidable at the option of the creditors, even though there is some consideration—*Bhikhabai v. Panchand*, 43 Bom. 707 (714), 52 I.C. 682. In ordinary circumstances, if it is proved that there was a valuable consideration adequate to the occasion, the Court will be slow to hold that there was no good faith (5 Bom. L.R. 142); but if the circumstances indicate that the transferee knew that the vendors were selling the property for the purpose of defeating and delaying their creditor, and that the transferee assisted the vendors in that purpose, *held* that he could not be deemed to be a transferee in good faith although he paid good consideration—*Palanmalai v. S. I. Export Co.*, 33 Mad. 334 (338); *Chidambaram v. Sami Aiyar*, 30 Mad. 6 (10); *Ishan Chunder v. Bishu Sardar*, 24 Cal. 825; *Ah Foon v. Hoe Lai*, 9 Rang. 614, A.I.R. 1932 Rang. 13 (14). Where the transferor acted throughout in bad faith and with the object of defeating, delaying and obstructing his creditor, and it was further found that not only was the transferor acting in fraud of his creditor but that the transferee also had knowledge of the fact and aided and abetted him in doing so, and that though there was some consideration, a substantial portion of the consideration was fictitious, *held* that the whole transaction must be treated as fraudulent and effected with the object of defeating the creditor—*Mulu Ram v. Jivandra Ram*, 4 Lah. 211 (213, 214), 72 I.C. 452, A.I.R. 1923 Lah. 423.

Thus, if a debtor with the purpose of cheating his creditors converts his lands into money, because money is more easily shuffled out of sight than land, he of course commits a gross fraud; and if his object in making the sale is known to the purchaser, and he nevertheless *aids and assists* in executing it, his title is worthless as against creditors, though he may have *paid the full price*—*per Black, C. J. in Covanhawan v. Hart*, 60 Am.

Dec. 57, cited in 34 Cal. 999 (1014); *Alagappa v. Dasappa*, 24 M.L.J. 293, 18 I.C. 332; *Palamalai v. South Indian Export Co.*, 33 Mad. 334 (336); *Kamini Kumar v. Heera Lal*, 23 C.W.N. 769, 51 I.C. 736; *Aftabuddin v. Basanta Kumar*, 22 C.W.N. 427; *Ishan Chunder v. Bishu Sardar*, 24 Cal. 825 (828); and such a transfer cannot be held to be valid on the ground that a portion of the consideration-money was applied by the transferor in payment of some debts which he owed to third persons—*Aftabuddin v. Basanta Kumar*, (supra). A gift of property by a person under embarrassed circumstances to his wife and so to make provision for their maintenance cannot be held to be *bona fide*, because although the donor is bound to maintain his wife and minor son, still such obligation is a personal obligation, and the payment of debts takes precedence over a right of maintenance—*Sundar Singh v. Ram Nath*, 1 Lah. 12, A.I.R. 1926 Lah. 167 (168), 93 I.C. 1013.

When the transferee is a *creditor* of the transferor, and accepts the transfer in satisfaction of the debt due to him, though *with the knowledge* that his doing so has the effect of defeating other creditors of the transferor, the transfer will still be considered as made in good faith and within the protection of this clause—*Ishan Chunder v. Bishu Sardar*, 24 Cal. 825 (829); *Rajani v. Gour*, 35 Cal. 1051 (1058). A creditor is a transferee in good faith if the transfer is made in satisfaction of his dues, even though he is aware that proceedings had been taken by another creditor for the recovery of his debt, if his primary object is to protect himself and not to defeat other creditors—*Maung San v. Maung Kyaw*, A.I.R. 1937 Rang. 471.

Notice:—Where one person takes a possessory mortgage of property with full knowledge and notice that another is already in possession of such property under an earlier instrument of a similar kind, he cannot be said to be acting in good faith within the meaning of this section. Even though his instrument may be registered, still his status will be affected by his own *mala fides*—*Ram Autar v. Dhanauri*, 8 All. 540 (542).

Onus:—Either under sec. 100 or under the more general rule of law, the burden is on the transferee to establish that he is a *bona fide* transferee for value without notice—*Renukabai v. Bheosan Hapsaji*, A.I.R. 1939 Nag. 132, 1939 N.L.J. 129, 185 I.C. 33 following *Bhup Narain v. Gokul Chand*, 61 I.A. 115, 13 Pat. 242, A.I.R. 1934 P.C. 68; *Errachi Riddiar v. Vallayya Reddiar*, A.I.R. 1968 Mad. 256.

262. Consideration :—The term 'consideration' in the 2nd para of sub-section (2) means valuable consideration, for if the consideration is inadequate, the presumption may arise that the transferee did not act in good faith. It is not correct perhaps to say that there is any distinction between consideration which should be valid for the purposes of the Contract Act, but not valid for the purposes of sec. 53 of this Act—*Tej Bhan v. Chandi Shah*, A.I.R. 1938 Lah. 564. No doubt in a suit under this section the question of adequacy of consideration is relevant, but that question becomes immaterial in a case where the issue framed is whether the transaction is fictitious or genuine—*Fakir Bux v. Thakur Prasad*, A.I.R. 1941 Oudh 457 (463), 1941 O.W.N. 801, 194 I.C. 588; *Jagadamba v. Ram Khelwan*, A.I.R. 1942 All. 344, 1942 A.L.J. 399.

"Valuable consideration means some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other"—*pér* Lush, J., in *Currie v. Misa*, L.R. 10 Ex. 153 (162), cited in *Mahammadunnissa v. Bachelor*, 29 Bom. 428 (433). A time-barred debt forms no consideration for a transfer—*Rangilbhai v. Vinayak*, 11 Bom. 666 (674, 677); *Narayana v. Viraraghava*, 23 Mad. 184 (189); but see *contra*—*Motimal v. Manghomal*, A.I.R. 1930 Sind 284, 127 I.C. 701. Where a Muhammadan relinquished his share in the family property in order to facilitate the appointment of the Collector as guardian of the minor nephew of the surrenderer, held that the relinquishment was not a gratuitous gift unsupported by consideration. The consideration of the relinquishment was the Collector's undertaking the guardianship of the minor and the responsibility of taking charge of the minor's property—*Mahammadunnissa v. Bachelor*, *supra*.

Prima facie when the execution of a mortgage or other conveyance is proved, it is not necessary to prove as against a third person that the consideration passed, and proof that the consideration mentioned did not pass is of no avail to show that the interest was not conveyed. Such proof is only important when, taken with other circumstances, it tends to show that the instrument was a mere sham and not intended to convey any interest—*Maung Din v. Ma Hnim*, A.I.R. 1925 Rang. 227, 3 Rang. 71, 89 I.C. 436.

Where a mortgage effected for consideration of old debts during the pendency of suit by creditors was challenged to be a sham transaction, it was held by the Privy Council that if the debts for which the mortgage was granted cannot be displaced as *bona fide* debts, and if the mortgage in its authenticity and its execution cannot be impugned, then the consolidation of the debts at the particular period was a piece of family policy not contrary to law, although open to full scrutiny in judicial proceedings—*Muthia v. Palaniappa*, A.I.R. 1928 P.C. 139 (143), 51 Mad. 349, 32 C.W.N. 821, 55 I.A. 256, 109 I.C. 625.

The personal liability of the manager of a joint Hindu family cannot prevail against a settlement for consideration, *viz.*, allotment of a share for the maintenance of his wife though subsequent in time to the incurring of the liability—*Mt. Raj Kuar v. Din Dayal*, A.I.R. 1931 Oudh 325, 135 I.C. 895. If the transfer is made for valuable consideration with the full intention that the title should pass and if no benefit is intended to be retained to the grantor, then the transfer will be valid as against an attaching creditor, even though the object of the transfer might have been to defeat an impending execution and the transferee has also knowledge of the same—*Mohideen v. Mt. Mustaffa*, A.I.R. 1930 Mad. 665 (667-68), 126 I.C. 604.

If it is proved that the transferee paid what was the full value of the property transferred to him, the Court will lean towards holding that the transferee acted *bona fide* in the transaction—*Ah Foon v. Hoe Lai*, 9 Rang. 614, A.I.R. 1932 Rang. 13 (15), 135 I.C. 641. A transfer is not void under this section where there is nothing to show that the transfer was not made entirely in good faith, that is to say, that there was not full consideration for the transfer, even though the transferee may have got a

preference over other creditors or possible creditors—*Tan San v. U Kya*, A.I.R. 1933 Rang. 162, 145 I.C. 330. Where the greater part of the consideration has been paid, the fact that a small portion of it is still due to the vendor is not sufficient to vitiate the sale for want of consideration—*Natha v. Maganchand*, 27 Bom. 322 (328). If the consideration was not grossly inadequate, the mere fact that full consideration was not paid would not be a ground for holding that the transaction was fraudulent—*Devkinandan v. Jawad Hussain*, A.I.R. 1928 Pat. 199 (201), 106 I.C. 356.

If the transfer was made for a grossly inadequate consideration, the presumption may arise that the transfer was fraudulent and that the transferee did not act in good faith—*Chettiyar Firm v. Ma Mai*, A.I.R. 1937 Rang. 51, 167 I.C. 599. But this presumption holds good in case of a sale, but not in case of a mortgage, for with regard to a mortgage it cannot be said that consideration is grossly inadequate, seeing that a mortgage can be for any amount regardless of the value of the property—*Banwari v. Bhag Mal*, 12 Lah. L.J. 107, A.I.R. 1931 Lah. 213. Where it is alleged that a sale is effected for an inadequate consideration only to defraud the decree-holder creditor of the judgment-debtor vendor, the only evidence that can be available is the various suspicious circumstances from which an inference can be drawn that the sale was made with a view to defraud the creditor—*Appalaraju v. Krishnamurthy*, A.I.R. 1932 Mad. 182, 139 I.C. 582. It is not necessary, however, for the Court to find that the consideration was "grossly inadequate" in order to come to a conclusion that sec. 53 applies—*Kedarwati v. Radhey Lal*, A.I.R. 1937 Pat. 609, 170 I.C. 353.

Partial consideration:—Where a portion of the consideration for a mortgage is fictitious, the whole instrument ought not to be considered fictitious; it must be upheld to the extent to which it is supported by consideration—*China Pitchia v. Pedukotiah*, 36 Mad. 29 (30), 11 I.C. 868. But when a debtor with a view to defeat or delay his creditors colludes with one of them and creates a mortgage in his favour for a consideration which is partly fictitious and partly made up of a true money debt due to that creditor on the footing that the transaction as a whole was a collusive transaction intended to defeat and delay creditors, the transaction should be set aside as a whole, and the creditor who is a party to the fraud cannot be allowed the protection of the transaction to the extent of his prior debt discharged thereby—*Javvadi Narasimamurti v. Maharaja of Pittapur*, (1941) 2 M.L.J. 99, A.I.R. 1941 Mad. 690 (693), 1941 M.W.N. 573; see also *Sama Rao v. Doraiswami*, 24 M.L.J. 266, 18 I.C. 768 and *Rajabhadar v. Thiruvengada*, A.I.R. 1928 Mad. 20, 106 I.C. 651; *Jamadar Singh v. Naiyab Ali*, 45 C.W.N. 498, A.I.R. 1941 Cal. 378. Where only a small part of the consideration is a barred debt, it cannot be held on that account that there was no consideration and that the deed is void *in toto*. It is valid to the extent of the consideration which is valid—*Natha v. Magan Chand*, 27 Bom. 322 (328). Where the considerations for a mortgage are separable, part being valuable, and part fictitious for the purpose of defeating or delaying the creditors, the transfer is valid and enforceable with regard to the part which is for valuable consideration, and is inoperative so far as the consideration is fictitious. Thus, a mortgage was executed for a total sum of Rs. 8,500. It was found that Rs. 4,853 was

actually advanced by the mortgagee and the evidence as to the balance Rs. 3,647 was extremely suspicious and seemed to be for the purpose of delaying another creditor who had obtained a decree on a *hatchita*; held that there ought to be a mortgage-decree on the footing of Rs. 4,853, being the principal money secured—*Rajani Kumar v. Gourkishore*, 35 Cal. 1051 (1057, 1058); *Loorthi v. Gopalasami*, 46 M.L.J. 125, A.I.R. 1924 Mad. 450 (453), 80 I.C. 147. But in some other cases it has been held that the two parts of such a single transaction are not separable and ought not to be separated; therefore the transfer in fraud of creditors which is partly supported by consideration is *wholly* void, and is not good to the extent to which consideration passed—*Sama Row v. Doraisami*, 24 M.L.J. 266 (269), 18 I.C. 768 (dissenting from 35 Cal. 105); *Chidambaram v. Sami Aiyar*, 30 Mad. 6 (11); *Visvananda v. Raja Venkata*, 1927 M.W.N. 1, 25 L.W. 223, 99 I.C. 709, A.I.R. 1927 Mad. 278 (280) (dissenting from 36 Mad. 29); *Bhikhabhai v. Panchand*, 43 Bom. 707 (715), 21 Bom. L.R. 770, 25 I.C. 682; *Madan Gopal v. Lahri*, 12 Lah. 194, A.I.R. 1930 Lah. 1027 (1029); *Rajabhadar v. Thiruwengada*, A.I.R. 1928 Mad. 20, 106 I.C. 651. See also *Narayana v. Viraraghavan*, 23 Mad. 184, in which part of consideration was fictitious, and the transfer was held to be void *in toto*. If a transfer though in part for valuable consideration is as regards the other part only an arrangement to defeat creditors, it is wholly void against the creditors and cannot be upheld to the extent to which it is supported by consideration. It is fraud that vitiates the transaction. The only exception the law contemplates is in favour of a transferee in good faith and for consideration—*Warryam Singh v. Thakur Das*, A.I.R. 1935 Lah. 404, 16 Lah. 680, 158 I.C. 254; *Motilal v. Mt. Kashibai*, A.I.R. 1938 Nag. 249, 172 I.C. 396; *Gokul v. Khanum Nur*, A.I.R. 1936 Pesh. 216; *Bhagwan v. Rajindra*, A.I.R. 1923 Pat. 564, 77 I.C. 1; *Appalaraju v. Krishnamurthy*, A.I.R. 1932 Mad. 182, 135 I.C. 582. In such a case if the transferee has paid off prior mortgages in favour of himself and another person, the mortgages will stand though the sale be invalid—*Peruri v. Peruri*, A.I.R. 1932 Mad. 182, 135 I.C. 582. But when there is no pre-existing debt, the mere fact that some considerations passed under a mortgage which on the evidence has been held to be in fraud of creditors will not justify the view that the mortgage can be held to constitute a valid security to the extent of the contemporaneous advance—*Mathu Vasu v. Velu Muruga*, (1939) 2 M.L.J. 362, A.I.R. 1939 Mad. 745 (749), 1939 M.W.N. 633; see also *Bai Hakimbu v. Dayabhai*, 41 Bom. L.R. 1104, A.I.R. 1939 Bom. 508 (513), 185 I.C. 655.

If, however, a portion of the consideration has been applied in paying off a *mortgage-debt* of the transferor, the transfer is valid to that extent. The principle is that when a transfer of immoveable property is set aside on the ground that it was intended to defeat or delay the creditors, the transferee is entitled to get credit only for the *mortgage-debt* binding on the property that he may have discharged as part of the consideration for the transfer, *but not for the money-debts* of the transferor discharged by him—*Gangama v. Veerappa*, A.I.R. 1931 Mad. 513 (520), 131 I.C. 833.

Dower :—A dower-debt due by the wife from her husband is a valuable consideration, consequently a transfer of property by the husband to the wife in satisfaction of her dower-debt is a perfectly legitimate transaction, and

no Court has any power to disturb it—*Suba Bibi v. Balgovind*, 8 All. 178; *Bibi Saira v. Bibi Saliman*, 2 P.L.T. 577, 63 I.C. 111 (113); *Mahadeo Lal v. Bibi Maniram*, 12 Pat. 297, 145 I.C. 213, A.I.R. 1933 Pat. 281 (283). If there is a real dower-debt due to the wife, equal to or exceeding the value of the property transferred, the transfer cannot be impeached if it is a genuine transfer and the transferor reserves no benefit for himself—*Mahadeo Lal v. Bibi Maniram*, *supra*. A gift by a Muhammadan husband of a portion of his property to his wife could not be impeached under this section, when it was found that part of the wife's dower-debt was still due and it was further shown that the husband still retained in his possession other immoveable property to meet the claims of his creditors—*Amina Bibi v. Md. Ibrahim*, 4 Luck. 343, 114 I.C. 504, A.I.R. 1929 Oudh 520 (521); *Umrao Singh v. Kaniz Fatima*, 1901 A.W.N. 67.

Permission to marry a second time:—In a Madras case, permission to marry a second time has been held to be a good consideration. A transfer of all the properties of a person in favour of his children by his first wife at a time when he was about to marry a second wife, and in consideration of his being permitted to do so by the relatives of his first wife is not a transfer in fraud of creditors and is not voidable, even though the transferor was heavily indebted at the time—*Kapini Goundan v. Sarangapani*, 3 L.W. 287, 34 I.C. 744 (745).

263. Preference of one or some creditors:—Para 3 of sub-section (1), which has been newly added, lays down that nothing contained therein shall affect the law of insolvency. The *Special Committee* remarks:—

"To make sub-section (1) more comprehensive we have provided, as is done in section 172 of the English Law of Property Act, 1925, that nothing contained in sub-section (1) shall affect the law of insolvency for the time being in force. Thus, a voluntary transfer, though it may be good under sub-section (1), may be avoided in insolvency proceedings under the circumstances mentioned in section 55 of the Presidency-towns Insolvency Act, 1909, and section 53 of the Provincial Insolvency Act, 1920. Similarly, a transfer is not necessarily void under sub-section (1) because it amounts to an assignment of all the transferor's property for the benefit of a particular creditor or of particular creditors [*Alton v. Harrison*, (1869) L.R. 4 Ch. 622 (626)], but it may operate as an act of insolvency under section 9 of the Presidency-towns Insolvency Act and section 6 of the Provincial Insolvency Act, or it may be void as amounting to a fraudulent preference within the meaning of section 56 of the Presidency-towns Insolvency Act and section 54 of the Provincial Insolvency Act."

It is a well-known principle of English law, which has been consistently followed in India, that except in cases falling under the law relating to insolvency, a conveyance is not voidable because it secures a preference to one creditor or some of the creditors, to the exclusion of the others. Section 53 renders void only those transfers which are made for the purpose of defeating *all* the creditors of the transferor to the benefit of the debtor, but it does not render void a transfer which is made merely for the purpose of preferring *one* creditor to another. Thus, a debtor purported to convey his properties for adequate consideration for the purpose of *paying off some only of his creditors*, and it was proved that the debts

were genuine debts and were in fact discharged out of the consideration for the conveyance, and the consideration for the deed represented the value of the properties transferred; *held* that the transfer was not voidable at the instance of the other creditors—*Hakim Lal v. Mooshahar*, 34 Cal. 999 (1019), affirmed by the Privy Council in *Musahar v. Hakim Lal*, 43 Cal. 521; *Body of creditors of Piler Khasim Saheb v. Bhaskar Chatamiah*, (1963) 2 Andh. L.T. 224. A preference of one creditor to the detriment of another is no ground for impeaching the deed, even if the debtor was intending to defeat an anticipated execution by another creditor. In a case in which no consideration of the law of Bankruptcy applies, there is nothing to prevent the debtor paying one creditor in full and leaving others unpaid, although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts. But the debtor must not retain a benefit for himself—*Musahar v. Hakim Lal*, 43 Cal. 521 (524) (P.C.); *Muthia Chetty v. Palaniappa*, 51 Mad. 349 (P.C.), 109 I.C. 626, A.I.R. 1928 P.C. 139; *Ma Pawa May v. Chettyar Firm*, 7 Rang. 624 (P.C.), 34 C.W.N. 6 (10), A.I.R. 1929 P.C. 279, 120 I.C. 645; *Badri v. Hazari*, A.I.R. 1930 Oudh 93, 5 Luck. 625, 125 I.C. 163; *Atmaram v. Dayaram*, A.I.R. 1929 Sind 94, 115 I.C. 330; *Marwadi, etc., Firm v. Sripathi*, A.I.R. 1927 Mad. 1114, 101 I.C. 568; *Motilal v. Kashibai*, A.I.R. 1938 Nag. 249, 172 I.C. 398; *Lalit Mohan v. Anil Kumar*, 43 C.W.N. 1036; *Mila v. Mangal*, A.I.R. 1938 Lah. 156; *Chettyar Firm v. Chettyar Firm*, A.I.R. 1937 Rang. 531; *Dewan Chand v. Punjab & Kashmir Bank*, A.I.R. 1937 Lah. 220, 170 I.C. 68; *Parmanand v. Jairamdas*, A.I.R. 1938 Sind 215 (216); *Ram Ratan v. Mt. Akhtari Begum*, 14 Luck. 621, A.I.R. 1939 Oudh 230 at p. 231, 1939 O.W.N. 398; *Nathusa v. Munir*, A.I.R. 1943 Nag. 42, 1943 N.L.J. 133; *Haque Brothers Private Ltd. v. Mohendra Nath Sarma*, A.I.R. 1966 Assam 36. The transfer of property to one creditor for a price far in excess of the debt due to him and the retention of the excess amount for his own benefit indicates an intent to defeat or delay the other creditors, especially when he has no other property left—*Bai Hakimbu v. Dayabhai*, 41 Bom. L.R. 1104, A.I.R. 1939 Bom. 508 (512), 185 I.C. 655; see also *Mina Kumari v. Bijoy Singh*, 44 I.A. 72, 44 Cal. 602. Apart from the law of bankruptcy a creditor may take a transfer although he is fully aware that the other creditors are thereby defeated and even when proceedings at their instance are pending. The principle is this: What the law contemplates is the defeating or delaying of creditors, by which is meant the whole body of creditors, and so long as there is even a single creditor who takes the benefit, it cannot be said that the transfer amounts to a fraud; all the creditors not having been defrauded, the preference of one creditor to another even though fraudulent in the law of insolvency cannot be impeached under the general law—*Dasamsetti v. Official Receiver*, A.I.R. 1935 Mad. 250, 68 M.L.J. 57; *C. Abdul Shukoor v. Arji Papa Rao*, A.I.R. 1963 S.C. 1150. The provisions of para 2 of sub-section (1) do not come into operation until the provisions of para 1 of that sub-section have been fulfilled—*Parmanand v. Jairamdas*, *supra*. The circumstance that the debtor's action is prompted by revenge against a creditor who got him imprisoned for his debt is irrelevant—*Mila v. Mangal*, *supra*. The mere fact that one creditor is preferred to another does not in itself render the transaction in favour of the preferred creditor voidable under this section, if the debtor reserves no benefit to himself.

A debtor, for all that is contained in sec. 53, T. P. Act, may pay his debts in any order he pleases, and may pay and creditor he chooses—*Mina Kumari v. Bijoy Singh*, 44 Cal. 662 (P.C.) ; *Palamalai v. South Indian Export Co.*, 33 Mad. 334 (337) ; *Muthia v. Palaniappa*, 45 Mad. 90. A.I.R. 1922 Mad. 447, 70 I.C. 432, 41 M.L.J. 594 ; *Kalu v. Randhir*, 21 O.C. 97, 46 I.C. 330 (331) ; *Amina Bibi v. Md. Ibrahim*, 4 Luck. 343, 114 I.C. 504, A.I.R. 1929 Oudh 520 (521) ; *Madan Gopal v. Lahri Mal*, 12 Lah. 194, 130 I.C. 62, A.I.R. 1930 Lah. 1027 (1028) ; *Uttamrao v. Gangaram*, 27 N.L.R. 382, A.I.R. 1932 Nag. 33. The meaning of the statute is that the debtor must not retain benefit for himself ; it has no regard whatever to the question of preference or priority among the creditors of the debtor. See the above cases and *Mahadeo v. Bibi Maniram*, A.I.R. 1933 Pat. 281, 12 Pat. 297, 145 I.C. 213 ; *Daya Ram v. Nader Chand*, A.I.R. 1934 Lah. 318, 150 I.C. 640. A settlement which preferred certain creditors and intended to defeat others might be good under the statute—*Middleton v. Pollock*, (1876) 2 Ch. D. 104 (108), cited in 34 Cal. 999 (1010). In one sense it may be considered fraudulent for a man to prefer one of his creditors to the rest and give him a security which left his other creditors unprovided for ; but that is not the sense in which the law understands the term 'fraudulent.' The law leaves it open to a debtor to make his own arrangements with his several creditors and to pay them in such order as he thinks proper—*per* Baron Ralf in *Eveleigh v. Purssord*, 2 M. & R. 541 ; *Mina Kumari v. Bijoy Singh Dudhuria*, 44 Cal. 662 (P.C.).

A transfer of property made by a Mahomedan husband in favour of his wife in lieu of real dower debt equal to the value of the property transferred, though it affects the body of creditors by reason of the fact that one creditor is preferred, does not affect the validity of the transfer where there is no question of insolvency—*Rameshwar v. Mt. Aftab*, A.I.R. 1936 All. 803, (1936) A.L.J. 906, 166 I.C. 56 ; *Razina Khatun v. Abida Khatun*, A.I.R. 1937 All. 39, I.L.R. (1937) All. 153, 166 I.C. 619 ; *Amina v. Md. Ibrahim*, *infra* ; *Kasturchand v. Mt. Wazir Begam*, A.I.R. 1937 Nag. 1, I.L.R. (1937) Nag. 291, 167 I.C. 48 ; *Mt. Amina v. Lachmichand*, A.I.R. 1934 Lah. 705 ; *Mahadeo v. Bibi Maniram*, A.I.R. 1933 Pat. 281, 12 Pat. 297, 145 I.C. 213 ; *Amina v. Md. Ibrahim*, A.I.R. 1929 Oudh 520 (521) 4 Luck. 343, 114 I.C. 504 ; *Kulsum Bibi v. Shaiyam Sunder*, A.I.R. 1936 All. 600, 164 I.C. 515 ; *Fakir Bux v. Thakur Prasad*, A.I.R. 1941 Oudh 457 (462, 463), 1941 O.W.N. 801, 194 I.C. 588 ; *Ram Ratan v. Akhtari Begam*, 14 Luck. 621, A.I.R. 1939 Oudh 230 (232), 1939 O.W.N. 398. A dower can be fixed at a period later than the marriage and the fact that the dower is unascertained and has to be determined by the Court does not change the wife's position as one of the creditors of her husband—*Bansidar v. Mt. Nawab Jahan*, A.I.R. 1938 Oudh 44 (45), 171 I.C. 887 ; *Amina v. Md. Ibrahim*, A.I.R. 1929 Oudh 520 (521), 4 Luck. 343, 114 I.C. 504. A marriage settlement made before and in consideration of marriage is protected but where there is an intention in the minds of both the parties to the marriage to defeat and delay creditors of the settlor the settlement is voidable—*Alamelu Achi v. Meenakshi Achi*, A.I.R. 1960 Mad. 536.

Where the transfer is made in favour of a creditor for a pre-existing debt, the knowledge of the creditor that the transfer is likely to defeat or delay the other creditors does not make the transfer voidable under

this section—*Gobind Ram v. Chhogmal*, A.I.R. 1934 Lah. 161 (162), 152 I.C. 472. Unless the debt advanced to the mortgagor at the time of execution of the deed can be considered as a part of his pre-existing liability to the mortgagee, no preference can be claimed for that debt over the debts of other creditors. What is protected is the preference of one creditor over the others for his pre-existing liabilities and not for those that are being freshly incurred—*Warryam Singh v. Thakar Das*, A.I.R. 1935 Lah. 404, 16 Lah. 680, 158 I.C. 254.

An agreement by which an insolvent who obtained his personal but not his final discharge without notice to the Official Assignee or his other creditors, settles the claim of one creditor and by which the creditor agrees not to oppose his final discharge, is void as in fraud of creditors and as inconsistent with the policy of insolvency law—*Naoraji v. Siddick*, 20 Bom. 636.

Where a debtor conveyed his property to one of his creditors in satisfaction of the debt due to him, and the creditor knew that his taking the conveyance had the effect of defeating or delaying the other creditors, still the transfer would not be voidable under this section, if it is for good consideration and retains no benefit for the debtor—*Hakim Lal v. Mooshahar*, 34 Cal. 999 (1015); *Bhagwant v. Kedari*, 25 Bom. 202 (213); *Rajani v. Gaurkishore*, 35 Cal. 1051 (1058); *Motilal v. Uttam*, 13 Bom. 434 (441); *Solema v. Hafez*, 54 Cal. 687, A.I.R. 1927 Cal. 836 (839); *Suba Bibi v. Balgobind*, 8 All. 178 (180); *Mukundi v. Bulaki*, 124 P.L.R. 1911, 9 I.C. 1037; *Bibi Saira v. Bibi Saliman*, 2 P.L.T. 577, 63 I.C. 111 (113). A debtor may make preference amongst his creditors even to the extent of transferring all his property to one creditor to the exclusion of the others. The object of sec. 53, T. P. Act is not equality of distribution of the property of the debtor among the creditors, as in the case of a Bankruptcy Act. Consequently a debtor may openly prefer a particular creditor to the rest, and may transfer property to him for the *bona fide* purpose of discharging his debt, and such transfer is not void against the preferred creditor. If there is no secret trust between the debtor and that creditor in favour of the former, but the sole object of the transfer is to pay or secure the payment of a debt, the transaction is a valid one—*Hakim Lal v. Mooshahar*, 34 Cal. 999 (1015, 1016); *Mushahar v. Hakim Lal*, 43 Cal. 521 (P.C.). A preferential transfer of property to one creditor cannot be declared fraudulent as to the other creditors although the debtor in making it intended to defeat their claims, and that creditor had knowledge of such intention. If the only purpose of the debtor is to pay off a debt to that creditor and the property is not worth materially more than the amount of the debt, the transaction is not fraudulent. If, however, the transfer is not in reality a preference of an actual debt, but is a mere colourable device to place the debtor's property beyond the reach of his other creditors, or if the transaction extends beyond the necessary purpose of a mere preference, so as to secure some benefit or advance for the debtor himself or for some one in whom he is interested, or to unnecessarily hinder and delay other creditors, the transfer is fraudulent—*Hakim Lal v. Mooshahar Sahu*, 34 Cal. 999 (1018); *Chidambaram v. Sami Aiyar*, 30 Mad. 6 (11); *Loorthia v. Gopalasami*, 46 M.L.J. 125, 80 I.C. 147, A.I.R. 1924 Mad. 450 (453); *Nagarathna v. Chidambaram*, 1928 M.W.N. 617, A.I.R. 1928 Mad.

860 (864), 113 I.C. 129; *Labhu Ram v. Charnu*, 30 P.L.R. 306, 116 I.C. 317, A.I.R. 1929 Lah. 409 (413); *Visvananda v. Raja Venkata*, 25 L.W. 223, A.I.R. 1927 Mad. 278, 99 I.C. 709. Thus, if a barred or irrecoverable debt is set up as part of the consideration for the property transferred to the creditor, or if the value of the property transferred to the creditor is greatly in excess of the amount of the debt due to the creditor, it will be presumed that the transfer was made with intent to defeat the other creditors—*Rangilbhai v. Vinayak*, 11 Bom. 666 (674, 677); *Hanifa Bibi v. Punnamma*, 17 M.L.J. 11; *Narayana v. Viraraghava*, 23 Mad. 184 (189); see also *Loorthia v. Gopalasami*, supra.

It is not opposed to sec. 53 for a creditor to take a mortgage or sale of the debtor's property when he finds that the debtor is unable to pay him, but the transaction would become voidable if in order to help the debtor the creditor takes the mortgage or sale for a larger amount than his debt on the understanding that the rest of the consideration is to be for the debtor's benefit, and the mortgage or sale should be used as a shield against other creditors. The transaction is voidable only when both the transferee and the transferor share the fraudulent intention. Where the transaction is void under this section, the transferee cannot claim a charge on the property for the part of the consideration paid by him unless the consideration has gone towards satisfying an encumbrance on the property—*Visvananda v. Venkata*, A.I.R. 1927 Mad. 278, 99 I.C. 709.

The reason for the distinction between an ordinary transferee (who purchases for a present consideration) and a creditor-transferee (who purchases in satisfaction of pre-existing debt) is thus stated: "A person who purchases for a present consideration is in every sense a volunteer; he has nothing at stake, no self-interest to serve; he may with perfect safety keep out of the transaction. Having no motive or interest prompting him to enter into it, if yet he does enter, knowing the fraudulent purpose of the grantor, the law very properly says that he enters into it for the purpose of aiding that fraudulent purpose. But not so with him who takes the property in satisfaction of a pre-existing indebtedness; he has an interest to serve; he can keep out of the transaction only at the risk of losing his claim. The law throws upon him no duty of protecting other creditors. He has the same right to accept a voluntary preference that he has to obtain a preference by superior diligence; he may know the fraudulent purpose of the grantor, but the law sees that he has a purpose of his own to serve; and if he goes no further than is necessary to serve that purpose the law will not charge him with fraud by reason of such knowledge."—*Lockrain v. Rastan*, 81 N.W. 60, 9 North Dakota 434, cited in 34 Cal. 999 (1018); *Chetty Firm v. Maung Po*, 7 Bur. L.T. 257, 23 I.C. 341.

263A. Fraudulent transfer :—A fraudulent transfer should be distinguished from a fictitious transfer which is in fact no transfer at all, while in the former case there is a transfer but on account of a conspiracy between the parties to the transfer to defeat the claims of others it can be avoided by them—*Jagadamba v. Ram Khelwan*, A.I.R. 1942 All. 344, 1942 A.L.J. 399. Such a transaction, even if it be directed to defrauding one creditor alone, would still be one in fraud of creditors voidable by the creditor sought to be defrauded or delayed—*Ousepp v. Annamma*, A.I.R.

1951 Tr.-Coch. 237. See also *Ratnibai v. Khemraj*, A.I.R. 1944 Nag. 133, I.L.R. 1944 Nag. 125. But the creditors are not entitled to get at what the friends of the debtor have. It would be no fraud for a debtor to say to his friend "do not give it to me; if you do, it will just go to my creditors. Keep it and I will ask you to give it to me when the creditors have been finished with. I am filing my petition"—*ibid.* A surrender by a Hindu widow may operate as transfer within the meaning of sec. 53—*Chidambara Goundar v. Senniappa Goundar*, A.I.R. 1965 Mad. 337.

When after execution of a mortgage binding on all the members of the joint family, the parties effect a partition without providing for the satisfaction of the mortgage debt, the partition is fraudulent—*Jivram v. Kantilal*, A.I.R. 1950 Bom. 247, 52 Bom. L.R. 104. Where the object of the partition is to enable a sharer to defeat his creditors, *i.e.*, to assign to him properties which the creditors would not be able to touch and which would enable the sharer to keep them for himself, the transaction is fraudulent—*Vinayak v. Moreshwar*, A.I.R. 1944 Nag. 44 (F.B.), I.L.R. 1944 Nag. 342. See also *Mooppanar v. Velu*, A.I.R. 1947 Mad. 203, (1946) 2 M.L.J. 404; *Nainsukhdas v. Gowardhandas*, A.I.R. 1948 Nag. 110, I.L.R. 1947 Nag. 510; *Chana v. Mankubai*, A.I.R. 1950 Kutch 57; *Murli Motiram v. Rewachand*, A.I.R. 1946 Sind 137, I.L.R. 1946 Kar. 14. The mere fact that one of the members received a larger share under the partition does not however render it collusive or fraudulent—*Bankey Behari v. Brij Rani*, A.I.R. 1944 Oudh 314, (1944) O.W.N. 410. For cases where the partition was held not to be fraudulent see the following: *Schwebo v. Subbiah*, A.I.R. 1944 Mad. 381, I.L.R. 1945 Mad. 138; *Ganpatrao v. Bhimrao*, A.I.R. 1950 Bom. 278, I.L.R. 1950 Bom. 114; *Isabi v. Abdulla*, A.I.R. 1950 Tr.-Coch. 60 (F.B.).

When an insolvent has made a real transfer in fraud of creditors, he cannot remove the transferee unless the transfer is first annulled under the present section—*Girija v. Kiran*, A.I.R. 1947 Pat. 471, 26 Pat. 253. See in this connection—*Bhatia Damodar v. Receiver*, A.I.R. 1952 Sau. 47.

The *onus* to prove the fraudulent intent is on those who challenge the transaction. When they establish that intent, the transferee will have to show that he had acted in good faith—*Rajbari Bank v. Rani Harshanukhi*, A.I.R. 1947 Cal. 154, 51 C.W.N. 36. A defendant can contend that the plaintiff in a suit to recover money due under a decree assigned to him cannot do so as the transaction was fraudulent—*Kosuru v. Chevern*, A.I.R. 1942 Mad. 714, (1942) 2 M.L.J. 491. When possession is delivered to an auction purchaser on the basis of a collusive and fraudulent decree the other creditors can sue for a declaration that the decree and all other proceedings are void—*Thiruvengada Mudaliar v. T. Narayana Reddiar*, A.I.R. 1959 Mad. 141.

264. Effect of fraud inter parties :—"There is no real conflict", it has been observed by the Judicial Committee, "between the two maxims [*nemo allegans turpitudinem suam audiendus est*—no one alleging his own baseness ought to be heard] and *in pari delicto potior est conditio possidentis*—in equal fault the condition of the possessor is the more favourable. The principle underlying both is the same; one embodies the general rule and the other an exception to the same rule. It is one

of the fundamental doctrines of all civilized system of jurisprudence that Court of law shall not lend its aid to enforce a transaction which is tainted with fraud. A person who has polluted his hands by being a party or privy to a fraudulent transaction shall not be allowed to approach the fountain of justice 'with his own infamy on his lips' and obtain relief on such a transaction. The moment he relies on such an agreement he will be told *nemo allegans suam turpitudinem audiendus est*. This is the general rule. But its right application to all cases regardless of the attendant circumstances might result at times in giving effect directly or indirectly, to the fraudulent design of its authors, and thus defeat the very object for which the rule was framed. In order to avoid such consequences several exceptions to the rule have been recognized. One such exception arises in the familiar case in which the fraudulent transaction is still executory and the purpose of the fraud has not yet been effected. In such a case one of the parties to the fraud is allowed to approach the Court, repudiate the transaction and recover money or property handed over to the opposite party in furtherance of the transaction. In such circumstances public policy requires that *locus penitentie* be given to one or other of the parties and he be allowed to retrace his steps, state the true facts before the Court, and by revoking the authority of his confederate to carry out the fraudulent scheme, defeat the purpose of the contemplated fraud"—*Petherpermal v. Muniandy*, 35 Cal. 551 (566) (P.C.), 35 I.A. 98, 12 C.W.N. 562. See also *Bai Devmani v. Ravishankar*, A.I.R. 1929 Bom. 147, 53 Bom. 321, 116 I.C. 236.

This question therefore should be discussed in its two aspects : (a) where the fraud is inchoate, *i.e.*, where it is merely attempted but not carried into effect, as for instance, where the apparent transferor merely executes a sham sale-deed, but no property, is actually conveyed to the apparent transferee and no creditor has been defrauded thereby; (b) when the fraud is accomplished or perfected, *i.e.*, where in consequence of the execution of the sham conveyance, the property could not be seized by the creditors, so that the creditors have been actually defrauded by reason of the transaction.

(a) *Where the fraud is inchoate*, the apparent transferor will be entitled to sue for a declaration that the deed of transfer was in the nature of a *benami*, and that nothing has been actually transferred to the grantee. "In India, where the benami system is common, it has been recognised by our Court that there may be a sham conveyance, which, though registered and delivered to the grantee, not being intended to pass the property but merely to be used as a blind to deceive creditors or others, conveys no estate to the nominal grantee"—*Sadashiv v. Trimbak*, 23 Bom. 146 (170). Where the purpose for which the assignment is made is not carried into effect and nothing is done under it, the mere intention to effect an illegal object does not deprive the assignor of his right to recover the property back from the assignee who has given no consideration for it—*Symes v. Hughes*, (1870) L.R. 9 Eq. 475 (cited in 33 Cal. 967, 982); *Pether Permal v. Muniandy*, 35 Cal. 551 (P.C.); *Dhirendra v. Chandra Kanta*, 36 C.L.J. 82, 68 I.C. 648, A.I.R. 1923 Cal. 154; *Jadu Nath v. Rup Lal*, 33 Cal. 967 (969); *Chenvirappa v. Puttappa*, 11 Bom. 708 (718); *Rangammal v. Venkatachin*, 18 Mad.

378; *Maung Po Zu v. Maung Po Kwa*, 65 I.C. 322, A.I.R. 1921 L.B. 58, 11 L.B.R. 323; *Bansidhar v. Ajodhya*, 27 O.C. 175, 82 I.C. 333, 1 O.W.N. 248, A.I.R. 1925 Oudh 120; *Rajani Kanta v. Abani Kanta*, A.I.R. 1926 Cal. 850, 94 I.C. 33. Where a colourable conveyance is executed for the purpose of enabling the transferor to defraud his creditors, the transferor is entitled to recover back his property before the fraud is actually carried out, and there is a *locus penitentiae* until a creditor has been actually defrauded—*Govinda Kuar v. Lala Kishun Prosad*, 28 Cal. 370; *Sham Lal v. Amarendra*, 23 Cal. 460; *Tirupathi v. Lakshmana*, A.I.R. 1953 Mad. 545, (1953) 1 M.L.J. 123; *Laxmi Bai v. Lal Chand*, A.I.R. 1952 U.P. 69.

Mere intention not carried into effect ought not to be sufficient to deprive the party of the assistance of the Court in enforcing his rights; and if he either abandons his fraudulent purpose before it is accomplished or pays his debts to the full value of the property conveyed, the fraud should be regarded as purged—*Raghupati v. Nrishingha*, A.I.R. 1923 Cal. 90, 36 C.L.J. 491, 71 I.C. 1. Thus, when in order to save his properties from being sold in execution of a decree from which he had preferred an appeal, the owner executed a sham deed of relinquishment in favour of another person (who was aware of the sham nature of the transaction) but being successful in the appeal sued that person for a declaration that the deed of relinquishment was colourable and did not convey title, it was held that the plaintiff was entitled to succeed. In such an event, a Court of Equity cannot rightly hold that the plaintiff must suffer because he had an improper motive, since no one has been defrauded thereby—*Jadu Nath v. Rup Lal*, 33 Cal. 967 (979). If in such a case, the Courts were to refuse aid to the plaintiff, they would be assisting in a fraud, for they would be giving an estate to a person (transferee) when it was never intended that he should have it—*Debia Chowdrani v. Bimola Soonduree*, 21 W.R. 424; *Jadu Nath v. Rup Lal*, 33 Cal. 967 (983).

When a sole surviving co-parcener or all the co-parceners then in existence save property by resorting to benami transactions, it will not be open to the subsequent born co-parceners to recover that very property especially when it is in the hands of alienees from the ostensible owner—*Lacha Reddi v. Venkamma*, A.I.R. 1956 Andhra 225.

In these cases, the transferee also will not be entitled to bring a suit to recover possession of the property, in respect of which he has no true right or title. When a transfer to defeat creditors is made in favour of the transferee by the collusive act of the transferor, the transferee will not be helped by the Court in getting possession of the property thus transferred, though the transferor in spite of his fraudulent conduct is allowed to be benefited thereby—*Raghavalu v. Adhinarayan*, 32 Mad. 323. See also *Babaji v. Krishna*, 18 Bom. 372; *Preo Nath v. Kazi Mahamed*, 8 C.W.N. 620. Here the Court will not assist the plaintiff (transferee) on ground of public policy, to recover a property or enforce a contract in respect of which he has no true title or right—*Yaramati v. Chundru*, 20 Mad. 326 (330); *Raghupati v. Nrishingha*, supra.

It should be noted that in *Chenvirappa v. Puttappa*, 11 Bom. 708

and *Yaramati v. Chundru*, 20 Mad. 326, the Judges did not make any distinction between cases where the fraud was inchoate and cases where the fraud was perfected, and they have laid down as a general rule that (even in cases where the fraud is inchoate) the transferor will not be allowed to come into Court alleging his own fraud and ask the Court to set aside the fraudulent deed or make a declaration to protect him from the threatened consequences of his own act. But these cases have been dissented from by the Calcutta High Court in *Jadu Nath v. Rup Lal*, 33 Cal. 967 (969).

(b) *Where the fraud is perfected, i.e.,* where the creditors have been actually defrauded, the transferor will not be entitled to recover back the property from the transferee on the ground that conveyance was a merely colourable one. He cannot, in such a case, escape from the consequence of his fraud—*Yaramati v. Chundru*, 20 Mad. 326 (331); *Honappa v. Narsappa*, 23 Bom. 406 (413); *Rajani Kanta v. Abani Kanta*, A.I.R. 1926 Cal. 850, 94 I.C. 33; *Sarup Narain v. Madho Singh*, 30 I.C. 253, 18 O.C. 131; *Banshidhar v. Ajudhia*, 27 O.C. 175, A.I.R. 1925 Oudh 120, 82 I.C. 333; *Lalji v. Bachchoo*, 9 O.W.N. 275, A.I.R. 1933 Oudh 6; *Lachman Das v. Mulchand*, A.I.R. 1923 All. 411, 71 I.C. 441; *Maung Tin v. Ma Mai Myint*, 65 I.C. 459, 11 L.B.R. 83; *Maung Po Zu v. Maung Po Kwa*, 65 I.C. 322, 11 L.B.R. 323, A.I.R. 1921 L.B. 58; *Brahmayya v. Kamisetti*, A.I.R. 1924 Mad. 849, 47 M.L.J. 652, 82 I.C. 14; *Gascoigne v. Gascoigne*, (1918) 1 K.B. 223; *Rupai Devi v. Bamdeb*, A.I.R. 1953 Pat. 199, 31 Pat. 787; *Anantam Veeraju v. Velluri Venkayya*, A.I.R. 1960 Andh. Pra. 222. Where the intended fraud has been carried into effect, the Court will not allow the true owner to resume the individuality which he has once cast off in order to defraud others—*Jadu Nath v. Rup Lal*, 33 Cal. 967 (978). Where the illegal purpose has been answered by defeat of third person's rights, a claim for reconveyance will be properly dismissed. The transferee will not be treated as a trustee holding for the benefit of the transferor. The *particeps criminis* stands on a quite different footing from an innocent third party, and if he has actually parted with the direct ownership of the property, he cannot at the same time have annexed to the ownership a trust in his own favour, the necessary effect of which would be to give success to a conspiracy for defeating the law—*Chenvirappa v. Puttappa*, 11 Bom. 708 (713, 718, 719). To lay down that when the illegal purpose has been fully or partially carried out, the transferor is nevertheless entitled to claim relief, would not only remove the risk of the sham transferor losing his property, which operates as a check upon knavery, but would also stain the administration of justice and make the Courts active instruments for securing to the guilty plaintiff the fruits of his successful fraud—a position which, it is hardly necessary to say, is absolutely indefensible—*Rangammal v. Venkatachari*, 18 Mad. 378; *Honopa v. Narsappa*, 23 Bom. 406 (413). Where the plaintiff with the object of defeating the claims of his creditors executed a colourable conveyance of his property in favour of another person, and the transferee successfully resisted the creditors of the plaintiff from seizing the property in execution of their decree, and then conveyed the property to a third person who took possession, *held* that the plaintiff would be precluded from maintaining a suit for recovery of the property. If in such a case

the Court was to grant relief to a wrong-doer, it would be making itself a party to the fraud—*Gobordhan v. Ritu Roy*, 23 Cal. 692; *Banka Behari v. Rajkumar*, 27 Cal. 231; *Govinda Kuar v. Lala Kishen Prosad*, 28 Cal. 370; *Munisami v. Subbaraya*, 31 Mad. 97. *Sidlingappa v. Hirasa*, 31 Bom. 405. Where in order to defeat an execution by a judgment-creditor, the judgment-debtor invited his landlord to distrain and sell for rent not really due, the tenant should not be assisted by the Court in recovering the money realised by the sale—*Sims v. Tuffs*, 6 Carr. & P. 207 (cited in 11 Bom. 708, 713).

If, however, the transferor remained in possession of the property inspite of the execution of the sham conveyance, the transferee will not be permitted to bring a suit for possession of the property on the strength of the conveyance—*Yaramati v. Chundru*, 20 Mad. 326 (332). See *Immant Appa Rao v. Gollapalli*, A.I.R. 1962 S.C. 370 where it has been held that the transferor can plead fraud by way of defence, and this principle has been applied by the Madras High Court in *Kanthammal v. D. Venkata Krishna Reddiar*, A.I.R. 1968 Mad. 362. In such a case if the transferee illegally ousts the transferor and enters into possession under the shadow of the fraudulent deed, he will not be allowed to do so and possession will be restored to the transferor—*Hafizulla v. Ally Mulla*, A.I.R. 1936 Rang. 405, 164 I.C. 914. But generally speaking the defrauding party will not be allowed to disclaim his fraud for the purpose of resiling from his position and the party fails who first has to allege the fraud in which he participated—*Ali Ahmed v. Shamsunnissa*, A.I.R. 1938 Cal. 602, 42 C.W.N. 1059.

It has been decided that where there is no difference in degree of guilt, in a case in which fraud has been perpetrated, of the plaintiff and the defendant the duty of the Court is not to assist either party—*Vilayat v. Mesran*, 45 All. 369. But a Full Bench of the Lahore High Court has held that in a suit by a benamidar to recover possession of property from the beneficiary the latter is not precluded from pleading that both the parties were in *pari delicto* and thus showing the real nature of the transaction—*Quadir Baksh v. Hakam*, A.I.R. 1932 Lah. 503 (F.B.), 13 Lah. 713, 139 I.C. 17. Where the object of the mortgage deed was to defraud a third person and the mortgagee was cognizant of and indeed a party to the intended fraud, the circumstance would not operate to estop the mortgagor from pleading the real nature of the transaction against the claim of the mortgagee upon the instrument—*Arunachalam v. Rangaswami*, A.I.R. 1936 Mad. 88, 59 Mad. 289, 159 I.C. 729.

265. Suit to set aside transfer must be a representative suit :—Para 4 of this section, which has been newly added, enacts that a suit instituted by a creditor to set aside a fraudulent transfer shall be instituted *on behalf of all the creditors*, because a transferee should not be exposed to a multiplicity of suits at the instance of various creditors.

N. W. F. Province :—The rule of procedure laid down in this section does not apply to the N.-W.F. Province. Hence a suit under Or. XXI, r. 63, C.P.C., by a decree-holder for a declaration that the judgment-debtor had interest in certain property is not bad, although not institut-

ed for the benefit of the creditors—*Kamal v. Gurcharan*, A.I.R. 1936 Pesh. 158, 164 I.C. 153.

A suit to set aside a transfer on the ground that it was made with intent to defeat or delay the creditors should be brought on behalf of all the creditors. It is not competent to any of the creditors to institute such a suit. The proper test to apply in determining whether a suit comes within the purview of this section is to see whether if the plaintiff succeeds the property claimed in the action would be available to the general body of creditors—*Fakir Bux v. Thakur Prasad*, A.I.R. 1941 Oudh 457 (465), 1941 O.W.N. 801, 194 I.C. 588. In a suit under this section the plaintiff has to accept the genuineness of the deed as an initial fact and has to prove that the transfer, though genuine, was made with a view to defeat or delay the creditors of the transferor—*Ibid*.

It is competent for *one creditor alone* to sue to set aside the fraudulent transfer, without impleading the other creditors of the transferor; but he must sue not in his individual capacity but in a *representative capacity*, i.e., he must sue *on behalf of himself as well as all the other creditors*; and the decree will enure to the benefit of all the creditors—*Ishwar Gimappa v. Devar Venkappa*, 27 Bom. 146 (150); *Hakim Lal v. Mooshahar Shahu*, 34 Cal. 999 (1006); *Chatterput v. Maharaj Bahadur*, 32 Cal. 198, 217 (P.C.); *Shantilal v. Munshilal*, 56 Bom. 595, 139 I.C. 820, A.I.R. 1932 Bom. 498 (504); *Ebrahimbai v. Fulbai*, 26 Bom. 577 (581); *Burjorji v. Dhanbai*, 16 Bom. 1 (19); *Natha v. Maganchand*, 27 Bom. 322; *Palaniandi v. Appavu*, 30 M.L.J. 565, 34 I.C. 778 (*per Courts Trotter J.*); *Sunder Singh v. Ram Nath*, 7 Lah. 12, A.I.R. 1926 Lah. 167 (168), 93 I.C. 1013; *Champo v. Shankar Das*, 74 P.R. 1912, 14 I.C. 232, 165 P.L.R. 1912; *Sri Thakurji v. Iarsingh Narain*, 6 P.L.J. 48 (50), A.I.R. 1921 Pat. 53, 63 I.C. 788; *Chetty Firm v. Maung Po*, 7 Bur. L.T. 257, 23 I.C. 341; *Deo Kali v. Ram Devi*, A.I.R. 1941 Rang. 76, 1940 R.L.R. 777. And hence the death of some of the creditors who were the parties originally to such a suit does not cause an appeal therein to abate, though the legal representatives were not substituted in time—*Sunder Singh v. Ram Nath*, (*supra*). This rule is based on perfectly sound and intelligible principle. To allow one creditor (in his individual capacity) to impeach the validity of a conveyance would expose the transferee to several attacks by different creditors, each of whom might litigate the same question in a different suit, and it is not inconceivable that the Court might arrive at different conclusions in different suits brought at the instance of the different creditors—*Hakim Lal v. Mooshahar*, 34 Cal. 999 (1007); *Magnibai Kishorjee v. Kesrimal Sewairam*, A.I.R. 1955 M.B. 159. In England also it has been held that if an action is brought to set aside a conveyance on the ground that it is voidable under statute 13 Eliz. c. 5, it should be by a creditor on behalf of himself as well as all other creditors of the settlor—*Reese River Silver Mining Co. v. Atwell*, (1869) L.R. 7 Eq. 347; *Daniell's Chancery Practice*, pp. 201, 490; *Seton on Decrees*, p. 1372; *May on Voluntary Conveyances* (2nd Edn.), p. 525.

The contrary view taken in *Pokker v. Kunhammad*, 42 Mad. 143 (146, 149) and by Seshagiri Ayyar J. in *Palaniandi v. Appavu*, 30 M.L.J. 565, by Sadasiva Ayyar J. in *Ramaswami v. Mallappa*, 43 Mad. 760 (769) (F.B.), and by Venkatasubba Rao J. in *Narasimham v. Narayan*, 22 L.W. 592, 92

I.C. 405, A.I.R. 1926 Mad. 66, is no longer correct. Consequently the opinion expressed in *Lal Singh v. Jai Chand*, 12 Lah. 262, A.I.R. 1931 Lah. 70 (71), 130 I.C. 778, that the omission to sue by one creditor does not bar the general body of creditors, no longer holds good.

Under the amended section a suit instituted by a creditor to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor must be instituted for the benefit of all the creditors, that is to say, the suit must be instituted according to the provisions of Or. 1, r. 8, C.P.C. Where the suit is not so instituted the plaintiff is not entitled to claim the benefit of sec. 53—*Ekkari v. Sidheshwar*, A.I.R. 1936 Cal. 783, 62 C.L.J. 548; *Nandramdas v. Zulika Bibi*, A.I.R. 1943 Mad. 531, (1943) 2 M.L.J. 1. If a suit is not brought for the benefit of all the creditors, though the claim in it proceeds on the principle of sec. 53, it is not a suit within that section—*Radhika v. Hari*, A.I.R. 1933 Cal. 812, 37 C.W.N. 1141, 57 C.L.J. 399. When all the persons jointly interested are made parties O. 1, r. 8 does not however apply—*Jaina Md. v. Official Assignee*, A.I.R. 1946 Mad. 25, I.L.R. 1946 Mad. 486. See also *Budhermal v. Verharam*, A.I.R. 1946 Sind 78, I.L.R. 1946 Kar. 98. The suit, however, need not be a representative one when the allegation in the plaint is that the transfer is fictitious—*Premraj Seth v. Ramawatibai*, 1957 M.P.L.J. 107.

Provisions of Or. 21, r. 63, C. P. Code is not incompatible with the present section and a suit brought under that rule is incompetent for want of the Court's permission under Or. 1, r. 8, C. P. Code—*Madina Bibi v. Ismail Darga Association*, (1940) 1 M.L.J. 872, A.I.R. 1940 Mad. 789, I.L.R. 1940 Mad. 808, *Ayyamperumal Chettiar v. Palaniandi Chettiar*, (1958) 2 M.L.J. 540. Where there is no other creditor than the one in execution of whose decree the proceedings under O. 21, r. 63 have arisen, the suit for declaration brought by that creditor will satisfy the requirements of the present section, because the plaintiff being the sole creditor the suit is instituted on behalf of all the creditors—*Fazalul Rahim v. Nawal Kishore*, A.I.R. 1952 All. 226 (F.B.); *Bhaskara Chalamiah v. Body of Creditors of Piler Khasim Saheb*—A.I.R. 1965 Andh. Pr. 68. When relief is granted to a claimant in a claim proceeding on the basis of transfer in his favour, the decree holder can challenge the validity of the transfer by a suit under Or. 21, r. 63 and the suit need not be a representative one—*Ganeshmal v. Meghraj*, A.I.R. 1967 Raj. 283. Even a single creditor can institute a suit under sec. 53 when there are no other creditors of the transferor—*State of Punjab v. Giani Bir Singh*, A.I.R. 1968 Punjab 479 following *Bhaskar's case*, A.I.R. 1965 Andh. Pra. 68.

Section 53 can be pleaded in defence by a creditor who has been defeated or delayed and it is not necessary that he must bring a representative suit on behalf of all the creditors—*Shaukat Ali v. Sheo Ghulam*, A.I.R. 1936 All. 663, 165 I.C. 124; *Ratan Chand v. Kishen Chand*, A.I.R. 1938 Lah. 136. He may plead the section as a personal defence to the suit against him. The addition of para 4 to sub-section (1) of sec. 53 does not make any difference—*Bai Hakimbu v. Dayabhai*, 41 Bom. L.R. 1104, A.I.R. 1939 Bom. 508 (513), 185 I.C. 655; see also *Jagat Kishore v. Kula Kamini*, A.I.R. 1941 Cal. 233, 72 C.L.J. 420. In a suit by the claimant-transferee under Or. 21, r. 63, C.P.C. the attaching creditor can avoid the

transfer even by way of defence to such suit—*C. Abdul Shukoor v. Arji Papa Rao*, A.I.R. 1963 s. 1150 ; *Ahmed Ali Khan v. Veerayya*, A.I.R. 1959 Andh. Pra. 280.

Whether the plaintiff has brought the suit in his individual capacity or whether the suit is of a representative character, depends upon the nature of the averments made in the plaint, the pleadings, and the decree that is ultimately passed. Where it is found that though the pleadings raised the larger issue between the transferor and the body of creditors, still the suit was not for benefit of the creditors as a whole and the plaintiff was content with merely a money-decree in his favour and did not claim a decree in terms of Form No. 13, Appendix D to Sch. I. C. P. Code, held that the suit was not brought in a representative capacity—*Rahimtulla v. Rasulkhan*, 29 N.L.R. 246, A.I.R. 1933 Nag. 169.

An objection as to the frame of the suit on the ground of non-joinder of other creditors must be taken in the Court of first instance and ought not to be allowed to be raised in the appellate Court. If however the objection be taken for the first time in the appellate Court and the objection prevails, the plaintiff ought to be allowed an opportunity to amend the plaint, so as to frame the suit as one on behalf of himself and all the other creditors of the transferor—*Hakim Lal v. Mooshahar*, 34 Cal. 999 (1007) ; *Chetty Firm v. Maung Po*, 7 Bur. L.T. 257, 23 I.C. 341 ; *Burjorji v. Dhunbai*, 16 Bom. 1 (20) ; *Ekkari v. Siddeswar*, supra.

Suit by decree-holder-creditor:—It has been held in some cases that a *judgment-creditor* who has got a decree on his debt is entitled to proceed in his individual capacity, and is not bound to bring a representative proceeding. Thus, it is said that an attaching judgment-creditor whose attachment has been raised on the claim petition of a transferee of the attached property, is not bound to bring a representative suit on behalf of all the creditors of the judgment-debtor to set aside the transfer as fraudulent under sec. 53 of the T. P. Act, but is competent to institute a suit to establish his right to proceed against the property under O. 21, rule 63, C. P. Code. The attaching judgment-creditor has a statutory right of suit given to him under O. 21, rule 63, C. P. Code, and that suit must necessarily be one brought by himself alone and is not a representative suit—*Pokker v. Kunhammad*, 42 Mad. 143 (146, 153), 36 M.L.J. 231, 51 I.C. 714 ; *Chettyar Firm v. Ma Sein*, 5 Rang. 588, A.I.R. 1928 Rang. 1 (3) ; 105 I.C. 582 ; *Chinamal v. Gul Ahmad*, 73 I.C. 719, A.I.R. 1923 Lah. 478. This view was based on the following rule of English law : "In an action to set aside an alienation under the statute (13 Eliz. c. 5) a creditor should sue on behalf of himself and all other creditors of the grantor, except where he has recovered *judgment for his debt*, in which case he can obtain an order declaring the alienation as void against him and containing consequential directions for the satisfaction of his debt alone, *without mention of any other creditors, or their debts*"—*Halsbury's Laws of England*, Vol. XV, p. 89.

But this view is no longer good law, because the 4th para expressly lays down that the term 'creditor' includes a *decree-holder* whether he has or has not applied for execution of his decree. "We also do not agree with the view expressed by the High Court of Madras that a decree-holder

is not a creditor and that he may therefore bring a suit on his own behalf to set aside the transfer."—*Report of the Special Committee*. It has been held in *Bandaru v. Alluri*, A.I.R. 1962 Andh. Pr. 25 that a suit under sec. 53 cannot be instituted by a decree-holder.

A suit by a creditor to set aside an adverse claim order may in certain circumstances be in essence a suit under this section, but when one creditor merely resists a claim, his resistance in those summary proceedings cannot be deemed to be on behalf of all the creditors—*Pethuraju v. Muthuswami*, A.I.R. 1942 Mad. 128, (1941) 2 M.L.J. 784, 1941 M.W.N. 982; following *Jagannath v. Ganesh*, 18 All. 413.

Suit by auction-purchaser :—A suit by the *auction-purchaser* of the property sold in execution of a decree obtained by a creditor of the judgment-debtor, for declaration that a conveyance by the judgment-debtor is fraudulent, and for possession, is not a suit under sec. 53 at all, and need not be instituted in a representative capacity on behalf of all the creditors. The test to be applied under this section is, whether if the plaintiff succeeds in the action the property claimed in the action would be available to the general body of creditors. If it would not, then the action cannot by any possibility be regarded as an action under sec. 53. In a suit by the auction-purchaser, it is obvious that the property claimed would not be available to the general body of creditors but would go to the plaintiff alone who has purchased it at an execution sale. The suit is really a suit for possession, and the prayer for declaration is only to remove a cloud thrown on the plaintiff's title—*Sri Thakurji v. Narsing Narain*, 6 P.L.J. 48 (50, 51), 2 P.L.T. 217, 63 I.C. 788. Where a fraudulent transfer of his house made by the judgment-debtor in favour of his son after the passing of a decree against him is avoided by the decree holder and the house is attached by the decree-holder in execution of his decree the judgment-debtor has no *locus standi* to raise an objection to the attachment under sec. 60 (1) (ccc) Code of Civil Procedure because the transfer in so far as the parties to it are concerned is still a good and valid transfer though it would not affect the rights of the decree holder—*Ranga Mal v. Kasturi Mal*, A.I.R. 1961 Punj. 423.

Suit by attaching creditor :—When a suit is brought by an attaching creditor under Or. XXI, r. 63, C. P. C. to establish his right to attach and bring to sale certain property and it is necessary to avoid a transfer of the property on the ground that the transfer has been made with intent to defeat or delay the creditors of the transferor, the suit must be brought in the form of a representative suit on behalf of or for the benefit of all the creditors of the transferor and the provision of Or. I, r. 8, C.P.C. will be applicable, and the transferee as well as the judgment-debtor will be necessary defendants to such a suit—*Maung Tun v. Maung Sin*, A.I.R. 1934 Rang. 332, 12 Rang. 670, 153 I.C. 942; *Magnibai Kishorejee v. Kesrimat Sawairam*, A.I.R. 1955 M.B. 159; *C. Abdul Shukoor v. Arji Papa Rao*, A.I.R. 1963 S.C. 1150. *Contra in U Maung v. Chettier Firm*, A.I.R. 1934 Rang. 200, 152 I.C. 506, where it was held that sec. 53 was not applicable. When the suit of the attaching creditor does not involve the avoidance of any transfer, the section has no application and the suit need not be brought as a representative suit—*Chidanubaram v. R. M. & C. Firm*, A.I.R. 1934 Rang. 302, 12 Rang. 666, 152 I.C. 855.

It has been held by the Bombay High Court that a suit brought under Or. XXI, r. 63, C.P.C. by a judgment-creditor who has been defeated at the instance of an intervenor in proceeding taken in execution of his decree, need not necessarily be a representative suit under sec. 53—*Shrimal v. Hiratal*, I.L.R. (1938) Bom. 445. There is no rule of law, it has been held by the Patna High Court, that a plaintiff, who has been sought to be defeated by a fraudulent and colourable transfer which is a sham transaction, is limited to the remedy of this section, and there is no bar to the plaintiff succeeding on the strength of his title after obtaining a declaration that the nominal transfer was a colourable and sham transaction—*Sheo Gobind v. Ram Asray*, A.I.R. 1939 Pat. 5, 19 P.L.T. 697.

Suit against insolvent after order of adjudication:—After an order of adjudication is made, the effect of which is to vest the administration of the insolvent's estate under the control of the Court, it is not open to a creditor of the insolvent to sue under this section to set aside a transfer made by the insolvent, without obtaining the leave of the Court as provided by sec. 16 (2) of the Provincial Insolvency Act (1907) *Vasudeva v. Lakshminarayana*, 42 Mad. 684 (686). But the same High Court has ruled that there is nothing in the Provincial Insolvency Act to prevent the creditors and the Official Receiver from proceeding under section 53 of the Transfer of Property Act if they wish; and the fact that they have another remedy under sec. 53 of the Provincial Insolvency Act, 1920 (sec. 36 of the Prov. Ins. Act of 1907) does not deprive them of their right of suit under sec. 53 of the T. P. Act—*Official Receiver v. Bastiao Souza*, 23 L.W. 643, A.I.R. 1926 Mad. 826, 95 I.C. 300. In a suit by a creditor impeaching a transfer by his debtor as being fraudulent under this section or in an appeal from a decree passed in such suit, the Receiver, when the debtor has been subsequently adjudged insolvent, is a necessary party, and such a suit or appeal is incompetent when the Receiver is not made a party, even if he does not himself wish to institute the suit—*Din Mohammad v. Walait Begam*, A.I.R. 1938 Lah. 856.

A suit by a creditor under this section to set aside an alienation made by the debtor before he is adjudged an insolvent is maintainable without the leave of the Insolvency Court. But if the creditor desires to make the Official Assignee or the Official Receiver a party, he can only do so with the consent of the Insolvency Court—*Chidambaram v. Sella Kumara*, I.L.R. 1942 Mad. 1.

Onus:—The burden of proof in a suit under this section is on the plaintiff who wishes to avoid the transfer—*Mohideen v. Md. Mustappa*, A.I.R. 1930 Mad. 665, 126 I.C. 604; even if he be the Official Receiver—*Ram Ditta Mal v. Official Receiver*, A.I.R. 1934 Lah. 365, 15 Lah. 294, 147 I.C. 1026; *V. E. A. R. M. Firm v. Maung Ba*, 5 Rang. 852 P.C. 32 C.W.N. 28, A.I.R. 1927 P.C. 237; *Appathuari v. Vellayan*, A.I.R. 1932 Mad. 302, 55 Mad. 748, 62 M.L.J. 236; *Chan Wan v. Chettyar*, A.I.R. 1941 Rang. 108, 1940 R.L.R. 659; *Ram Raj v. Lal Chandra*, A.I.R. 1941 Oudh 205, 1941 O.W.N. 56, 1941 O.L.R. 210; *Mt. Bibo v. Sampuran Singh*, A.I.R. 1936 Lah. 222, 162 I.C. 922; *Abdul Rahman v. Sultan Begam*, A.I.R. 1941 Oudh 178, 1941 O.L.R. 65; *Javvadi Narasimhamurti v. Maharaja of Pittapur*, (1941) 2 M.L.J. 99, A.I.R. 1941 Mad. 690 (693), 1941 M.W.N. 513. When a *prima*

facie case has been established on that basis, then the burden shifts to the alienee to show that he is a transferee in good faith for valuable consideration—*Javvadi Narasimhamurti v. Maharaja of Pittapur*, supra; see also *Narayana v. Viraraghavan*, 23 Mad. 184; *Har Prasad v. Md. Usman*, A.I.R. 1943 All. 2 1942 A.L.J. 645. The vendee, who personally knows the whole circumstances of the case, should be examined. It is an error to rely on the abstract doctrine of burden of proof—*Mohideen v. Mustappu*, supra. See also *Gopal v. Sheokumar*, A.I.R. 1937 Nag. 85, 169 I.C. 954.

Limitation :—A suit under this section by a creditor for a declaration that the transfer by the debtor is intended to defeat or delay the creditors and is therefore not binding upon them is governed by Art. 120 and not by Art. 91, Limitation Act, 1908, and limitation starts against him when he is fixed with the knowledge about the fraudulent character of the transaction. The fact that the plaintiff knew some facts which would raise suspicion is not enough—*Marthandu v. Basappa*, A.I.R. 1951 Mad. 388, (1950) 2 M.L.J. 653; *Abdallakhan v. Parshotham*, A.I.R. 1948 Bom. 265, I.L.R. 1947 Bom. 807; *Ahmed Ali Khan v. Veerayya*, A.I.R. 1059 Andh. Pra. 280. It is true that the creditor has to challenge the transfer only within 6 years, but where the creditor has occupied the position of a defendant, no time limit affects his defence—*Man Singh v. B. N. Sinha*, A.I.R. 1940 Lah. 198, 191 I.C. 639.

266. Presumption of fraudulent intention :—The second para. of the old section contained a rule of evidence, indicating the circumstances under which the fraudulent intention might be presumed. This para has been omitted from the present section.

It is evident that by omitting the second para of the old section, the Legislature intends to lay down that the intent to defraud, defeat or delay must not be presumed merely from the effect of the transfer or from absence or inadequacy of consideration, but is to be established by looking to *all the circumstances* surrounding the execution of the conveyance. See next Note.

A transaction cannot be assumed to be fraudulent. Where there is no evidence to show the extent of debts and also of property, it cannot be concluded that the transaction is fraudulent—*Rukiayia v. Radha Kishan*, A.I.R. 1944 All. 214, I.L.R. 1944 All. 325. If the transfer is to a creditor in payment of his debts, it cannot be impugned as fraudulent unless the real object of the transfer is to place the property beyond the reach of the creditors for the benefit of the debtor—*Nathusa v. Munir*, A.I.R. 1943 Nag. 42, 1943 N.L.J. 133. But it is otherwise where a person, who is indebted to a considerable extent and is apprehensive of further liabilities in future, makes a gift of the bulk of his properties in favour of a near relative—*Nandaramdas v. Zulika Bibi*, A.I.R. 1943 Mad. 531, (1943) 2 M.L.J. 1.

267. Indicia of fraud :—It is a truth confirmed by experience that in the great majority of cases fraud is not capable of being established by positive and tangible proofs. It is by its very nature secret in its movements. It is therefore sufficient if the evidence given is such as may lead to the inference that fraud must have been committed. In the generality of cases circumstantial evidence is the only resource in dealing with ques-

tions of fraud—*Parkash Narain v. Birendra Bikram*, 7 Luck. 131, A.I.R. 1931 Oudh 333, 132 I.C. 51; *Rattan Chand v. Kishen Chand*, A.I.R. 1938 Lah. 136; *Hashmat Begam v. Mohan Lal*, A.I.R. 1937 Oudh 349, 168 I.C. 53. Fraud may be presumed from the following circumstances: (1) where the transferor disposes of his entire estate, without any exception, including his wearing apparel; (2) where he remains in possession of the property although possession is professedly transferred; (3) where the transfer is made in anticipation of or pending a suit; (4) where the transfer is made in secret; (5) where there is a trust between the parties (for "fraud is always apparelled and clad with a trust, and trust is the cover of fraud"); (6) where the deed contains a statement that the transfer is made honestly, truly and *bona fide*—*Twyne's case*, 3 Coke's Rep. 80, 1 Sm. L.C. 1, cited in *Bhagwant v. Kedari*, 25 Bom. 202 (218). Similarly, the absence or gross inadequacy of consideration, the indifference of the purchaser as to the enforcement of any claim he may have had as to inspection or valuation before purchase, the continuance of the transferor in possession and control after the sale, the secrecy in making the arrangement, and the attempt to include in it all available assets, must always be considered in determining the existence of good faith of the transaction—*Bhagwant v. Kedari*, 25 Bom. 202 (228). Where it was found that the vendor having many debts to pay sold away all his property reserving nothing, that the vendee purchased the property without even taking care to value it, that the consideration consisted of debts some of which had become time-barred and others had not then become due, that the properties remained in the possession of the vendor who paid the assessment of the same, and that the consideration was grossly inadequate, *held* that the sale-deed was fictitious and the transaction was a colourable one intended to defraud creditors—*Nana v. Rautmal*, 22 Bom. 255. The embarrassed circumstances of the vendor, the fact that the sale was hurried on after his house had been attached, and when the attachment of the lands was imminent, the hurried registration, the sale of other lands for a suspicious consideration, the hasty manner in which the price was fixed without any valuation of the arrears and other things he was taking over in addition to the lands, all these go to show that the transaction was effected for the purpose of defeating the creditors and that there was no good faith on the part of the transferee—*Palamalai v. South Indian Export Co.*, 33 Mad. 334 (337, 338). So also, the motive with which a purchase is entered into, the position of the parties to the transaction and their relation to one another, the possession of the property concerned and of the title-deeds thereof, the source and adequacy of the purchase-money, and the previous and subsequent conduct of the parties to the transaction, all afford valuable data for determining the intention of the parties, and nature of the interest, if any, sought to be created—*Ahmudi Begam v. Raja Udit Narain*, 17 O.C. 173, I.C. 264. Thus, in a case before the Privy Council, the secrecy and haste with which the mortgage-deed was executed, the subsequent negotiations for a composition with creditors on a payment by them to get the mortgage revoked, the non-production of material books, the unsatisfactory nature of the evidence as to the settlement of the accounts on which the mortgage was based, the relation of the parties and the reservation of the entire usufruct of the immoveable properties for the wife and children of the debtor, were held by their Lordships to prove irresistibly

that the mortgage was in fraud of creditors—*Ghansham Das v. Uma Pershad*, 23 C.W.N. 817 (P.C.), 50 I.C. 264. As to the case of a trust-deed which has been held to be a fraudulent deed executed with the intent of shielding the properties from the claims of the creditors of the sons, see *Jagat Kishore v. Kula Kamini*, A.I.R. 1941 Cal. 233, 72 C.L.J. 420.

When once it is established that the mortgagee has set up as true an item of consideration which to his knowledge was false and that the transaction as a whole was intended to defeat and delay creditors, the inference is irresistible that the mortgagee himself was a party to the scheme of fraud—*Javvadi Narasimhamurti v. Maharaja of Pittapur*, (1941) 2 M.L.J. 99, A.I.R. 1941 Mad. 690 (693), 1941 M.W.N. 513.

Where a debtor in insolvent circumstances gives security to a creditor in pursuance of a previous contract, the security is not, however, an act of fraudulent preference—*Narayana v. Official Receiver*, A.I.R. 1934 Mad. 294, 150 I.C. 389.

If there be only one creditor, then the act of the debtor in transferring all his property to a stranger with a view to secrete the same and defeat the creditor will be fraudulent and the transfer can be set aside if the transferee has notice of the circumstances and of the debtor's evil design—*Mohideen v. Md. Mustappa*, A.I.R. 1930 Mad. 665, 126 I.C. 604. But if the transferor is in fact indebted to the plaintiff, the mere fact that the transfer to him has the effect of giving preference will not render the transaction fraudulent—*Madan Gopal v. Lahri Mal*, A.I.R. 1930 Lah. 1027, 130 I.C. 62. The mere fact that debts are due from the transferor is not itself sufficient to establish a fraudulent intention; it must be proved that at the time of the transfer, motive for the transaction was to defeat or delay the creditors—*Rattan Chand v. Kishen Chand*, A.I.R. 1938 Lah. 136.

If the evidence shows that the transactions were not *bona fide*, that they were made gratuitously and presumably to defraud the plaintiff, he can impeach the transfers, and the mere fact that mutation had been effected in favour of the so-called transferees is immaterial—*Parkash-Narain v. Birendra*, 7 Luck. 131, A.I.R. 1931 Oudh 333, 132 I.C. 51, 8 O.W.N. 593.

Pleading as to fraud:—The use of such general words as "fraud" or "collusion" are ineffectual to give a fraudulent colour to the particular statements of fact in the plaint. The particular circumstances in which the fraud has been committed or from which fraud can be inferred should be clearly set forth in the plaint. It is not necessary that the plaint should disclose the evidence by which fraud is to be established—*Creet v. Gangaraj*, A.I.R. 1937 Cal. 129, I.L.R. (1937) 1 Cal. 203, 170 I.C. 214. The fraudulent intention of transfer has got to be proved by the creditor—*Chettyar Firm v. Ma Than*, A.I.R. 1934 Rang. 308.

Waiver of the right to challenge alienation:—Where in a case of alienation a person entitled to challenge it is present at the mutation proceedings but does not object in spite of opportunity to object he cannot challenge the alienation subsequently—*Ram Sarup v. Ram Saran*, A.I.R. 1926 Lah. 650; *Shatchitananda Tiwari v. Radhapat*, A.I.R. 1928 All. 234. But if a creditor after filing an objection at the mutation proceedings

merely drops it later on he is not debarred from suing—*State v. Giani Bir Singh*, A.I.R. 1968 Punj. 479.

268. Transfer with intent to defraud subsequent transferees :— See sub-section (2). The old section contained the words “*prior or subsequent transferees*”. The word ‘prior’ has now been omitted, because it is redundant. On the same ground the words ‘co-owners or other persons having an interest in such property’ have also been omitted.

The amendment in this section was made to clarify the law and not to alter it. The mere fact that there was intent to defraud does not, as against a subsequent transferee render the transaction void—*Nathusa v. Munir*, A.I.R. 1943 Nag. 129, I.L.R. 1943 Nag. 42.

A person who purchases the property of the fraudulent transferor at a sale held in execution of a decree obtained by a creditor of the transferor, is not a subsequent transferee within the meaning of this section, because he is not a transferee by act of parties but by operation of law, and also because he was not the person intended to be defrauded by the transferor—*Vasudev v. Janardan*, 39 Bom. 507, 29 I.C. 497 (498); *Awadhut v. Punjabi*, 53 I.C. 205. In this connection see the cases of *Sami Asari v. Adinam*, 12 L.W. 718, 61 I.C. 580 (583), and *Sri Thakurji v. Narsingh*, 6 P.L.J. 48 (50), though these cases do not strictly fall under this sub-section.

269. Sub-section (2), Second para :—This para is new, and has been inserted for the following reasons :—

“Coming now to transfers made with intent to defraud subsequent transferees for value, we have already referred to the English cases by which it was determined that every voluntary conveyance of immoveable property was void as against a subsequent purchaser for value. These decisions, as stated above, were followed by Sale, J. in 22 Cal. 185, but the law in England was altered by section 2 of the Voluntary Conveyances Act, 1893 (56 and 57 Vict., c. 21), by which it was provided that a voluntary conveyance, *if made bona fide and without any fraudulent intent, should not be deemed fraudulent* (within the meaning of 27 Eliz., c. 4) *by reasons of any subsequent purchase for value*. Section 2 of the Voluntary Conveyances Act has been reproduced in sec. 173 of the English Law of Property Act, 1925. We think that a similar provision should be made and we have done so accordingly in sub-section (2).”—*Report of the Special Committee*.

The expression subsequent transferee does not include a purchaser at a Court sale—*Mahendra Mahto v. Suraj Prasad Ojha*, A.I.R. 1958 Pat. 568. If a transferor having no debts on the date of transfer makes a gift of his property to his wife and children the gift is not fraudulent—*Johrilal v. Gordhan*, I.L.R. (1962) 12 Raj. 517.

53A. Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,
 Part performance. *and the transferee has in part performance of the contract,*

taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract ;

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

This section has been newly added by sec. 16 of the Transfer of Property Amendment Act (XX of 1929).

270. Previous law :—Before the enactment of this section there were three views as to the rights of the vendor and vendee in cases where the vendor delivered possession of immoveable property worth Rs. 100 or upwards to the vendee but executed no registered conveyance.

One view was that the express words of the statute must prevail and that no title was created by mere delivery of possession, in the absence of a registered deed. Another view was that even in the absence of a registered instrument of conveyance, the vendor against whom the purchaser could maintain a suit for specific performance of an oral or unregistered written agreement for sale was disentitled from recovering possession from the purchaser, provided that the Court deciding the question of ejectment had jurisdiction to decree specific performance and the circumstances were such as to entitle the defendant to such a decree in the suit. This view is based upon the English case of *Walsh v. Lonsdale*. A third view would refuse to the vendor (or to a purchaser taking from him with notice of the prior transaction) any right to eject even though the time has elapsed within which a suit for specific performance is allowed by the Limitation Act.

In the case of *Pir Bux v. Md. Tahar*, A.I.R. 1934 P.C. 235, 39 C.W.N. 34, 60 C.L.J. 370, 151 I.C. 325 the Privy Council again considered the law as it stood before the insertion of sec. 53A and held that an averment of the existence of sale whether with or without averment of possession following upon the contract was not a relevant defence to an action of ejectment. If the contract was still enforceable the defendant might found upon it to have the action stayed, and by suing for specific performance obtain a title which would protect him from ejectment. But if it was no longer enforceable, its part performance would not avail him to any extent. [In this case their Lordships followed *Ariff v. Jadunath*, A.I.R.

1931 P.C. 79, 58 Cal. 1235 and *Currimbhoy v. Creet*, A.I.R. 1933 P.C. 29, 60 Cal. 980, 141 I.C. 209]. These cases have been followed in *Nemtulla v. Tyeballi*, A.I.R. 1935 Bom. 208, 37 Bom. L.R. 82, 156 I.C. 779; *Mukteswar v. Barakar Coal Co.*, A.I.R. 1934 Pat. 246, 152 I.C. 498; *Saya Hman v. Saya Hla*, A.I.R. 1935 Rang. 448.

Object of the new section:—By section 4 of the Statute of Frauds (1677) (29 Car. II, c. 3) it is provided that no action or suit shall be maintained on an agreement relating to land which is not in writing signed by the party to be charged with it. The strict application of the provision led to great hardship in cases where a parol agreement relating to land had been partly performed by one party and yet he could not sue the other party for specific performance. Thus, the latter party was enabled to practise a fraud upon the former. In such cases the Courts intervened on equity and enforced specific performance, holding that part performance took the cases out of the Statute of Frauds. The general ground upon which the doctrine is based is prevention of fraud. It is said that where one party has executed his part of the agreement in the confidence that the other party would do the same, it is obvious that, if the latter should refuse, it would be a fraud upon the former to suffer this refusal to work to his prejudice (*see* Story on Equity, section 1045).

The object of inserting this new section was to alter the statute law by partial incorporation of the English doctrine of part performance—*Durgapada v. Nrishingha*, 62 Cal. 492, A.I.R. 1935 Cal. 541, 39 C.W.N. 416, 159 I.C. 20; *Dhanrajmal v. Hazarimal*, A.I.R. 1943 Sind 81, I.L.R. 1942 Kar. 513. The right conferred by this section can be invoked only by way of defence—*Prabodh Kumar v. Dantmara Tea Co.*, A.I.R. 1940 P.C. 1; *Dammulal v. Mohd. Bhai*, A.I.R. 1955 Nag. 306; *Karoi Mal v. Paramanand*, A.I.R. 1955 Punj. 252; *Susheelamma v. Palla Bucha Reddy*, (1969) 1 Andh. L.T. 150.

The doctrine of part performance embodied in this section is an equitable doctrine. The object of this section is to prevent a transferor or his successor-in-interest from taking any advantage on account of the non-registration of the document, provided the transferee has performed his part of the contract and in pursuance thereof has taken possession of some immovable property—*Labhu v. Shib Ram*, A.I.R. 1939 Lah. 57.

The doctrine of part performance was enunciated by the court of Equity in England in order to give relief to persons hit by the Statute of Frauds, 1677, which inter alia provided that no action might be brought upon any contract for sale or other dispositions of land or any interest in land unless the agreement was in writing and signed by the party to be charged. The Law of Property Act, 1925 has re-enacted the above provisions of the Statute of Frauds.

The object of the Statute of Frauds was to prevent fraud and perjuries. But, in practice, it encouraged dishonest dealings. The equitable doctrine of part performance seeks to prevent such dishonest dealings. Under this doctrine the court will in certain cases allow a contract of a nature required to be proved by writing, to be proved by parol evidence, when the party seeking to enforce the contract has done acts in performance of his obligation under the contract. The attitude adopted by the court of equity is that it would be fraudulent for a defendant to take advantage of the

absence of writing if he has stood by and allowed the plaintiff to alter his position for the worse by doing acts in performance of his obligation under the contract. If, for instance, P agrees to let out a plot of land to Q, and if Q enters into possession of and improves the land, it would be fraudulent, at least, inequitable for P to refuse to grant the lease on the ground that the agreement is not in writing. Equity grants a decree for specific performance of the contract against P.

Reference may be made to the recent decision of the House of Lords in *Mason v. Clarke* [1955] A.C. 778, (1955) 1 All. E.R. 914. There R was the tenant from year to year under a company in respect of a part of an estate known as Hothorpa. By an oral agreement the company granted to M the right to catch and kill rabbits on the said estate for one year on receipt of £100. R kicked out the snares laid by M and prevented M from exercising his right of rabbiting (*profit a prandre*). On M's action for injunction and damages Held: that M could maintain the action against R in trespass since M had entered into possession of a *profit a prandre* under an oral agreement, that the act of setting snares by M was in part performance of the oral agreement, and that therefore the fact that there was no sufficient written memorandum of that agreement for about two months and a half was immaterial.

270A. Essentials of the section :—The essentials of this new section are—(1) a contract to transfer immoveable property ; (2) the contract must be for consideration ; (3) it must be in writing signed by or on behalf of the transferor ; (4) the terms can be ascertained from the writing ; (5) the transferee has taken possession or is already in possession of the property ; (6) he has done some act in furtherance of the contract, and (7) has performed or is willing to perform his part of the contract—see *Ma Thet v. Ma Se*, 13 Rang. 17. See also *Shravan v. Garbad*, A.I.R. 1943 Bom. 406, 45 Bom. L.R. 874 ; *Yenugo Achayya v. Eranki Venkatasubba Rao*, 1956 Andhra W.R. 830.

271. Scope :—This section, which imports in India the equitable doctrine of part performance only partially, does not give the transferee any right on which he can found a suit as a plaintiff, but only a right which is available to him as defence in order to protect his possession. It does not confer any title on the transferee who takes possession in pursuance of a written, but unregistered contract. Accordingly he cannot maintain a suit for declaration of his title or that the transferor or other person has no title to the property—*Dantmara Tea Co. v. Probodh Kumar Das*, 41 C.W.N. 54 ; *Luchwar Lime & Stone Co. v. Secretary of State*, A.I.R. 1936 Pat. 372 (378), 15 Pat. 460, 163 I.C. 501 ; *Mt. Nasiban v. Md. Sayeed*, A.I.R. 1936 Nag. 174, 164 I.C. 557 ; *Bajrangi v. Rupnarain*, A.I.R. 1949 Pat. 464 ; *Hari Prasad v. Abdul Haq*, A.I.R. 1951 Pat. 160 ; *Gulab Chand v. Madholal*, A.I.R. 1953 Aj. 47 ; *Ram Protap v. National Petroleum Co.*, A.I.R. 1950 Cal. 213, 54 C.W.N. 58 ; *Bholai v. Lakhi Kanta*, A.I.R. 1949 Ass. 8 ; *Parul Bala v. Saroj Kumar*, A.I.R. 1948 Cal. 147, 82 C.L.J. 273 ; *Bhulkoo v. Hiriyabai*, A.I.R. 1949 Nag. 10, I.L.R. 1949 Nag. 534. This section can be used only as a shield and not as a sword—*Kashi Nath v. Makchhed*, A.I.R. 1939 All. 504, 1939 A.L.J. 384, 184 I.C. 233 relying on *Currimbhoy & Co. v. Creet*, 60 I.A. 297, 60 Cal. 980, 37 C.W.N. 265, where it has been held that under sec. 53A "a defendant in an action of ejectment may, in certain circumstances, effectively plead possession under an un-

registered contract of sale in defence to the action". In the appeal from *Dantmara Tea Co. v. Probodh Kumar Das*, supra, their Lordships of the Judicial Committee observed: "The amendment of the law effected by the enactment of sec. 53-A conferred no right of action on a transferee in possession under an unregistered contract of sale." Their Lordships agree with the view expressed by Mitter J., in the High Court that the right conferred by sec. 53-A is a right available only to the defendant to protect his possession—*Probodh Kumar Das v. Dantmara Tea Co.*, 66 I.A. 293, 44 C.W.N. 145, I.L.R. (1940) 1 Cal. 250, A.I.R. 1940 P.C. 1 (2); see also *Ram Jiawan v. Hanuman Prasad*, A.I.R. 1940 Oudh 409, 1940 O.W.N. 782, 190 I.C. 143; *Kashiprasad v. Bedprasad*, A.I.R. 1940 Nag. 113, 1939 N.L.J. 216, 189 I.C. 111; *Ramrao v. Shrimant*, I.L.R. 1940 Bom. 480, A.I.R. 1940 Bom. 281, 42 Bom. L.R. 601; *Ram Lal v. Bibi Zohra*, A.I.R. 1939 Pat. 296 (303), 182 I.C. 618; *Probodh Kumar Das v. Dantmara Tea Co.*, 45 C.W.N. 132; *Veera Raghava v. Gopalrao*, A.I.R. 1942 Mad. 125, (1941) 2 M.L.J. 707, 1941 M.W.N. 944; See also *Pearey Lal v. Prithi-Singh*, A.I.R. 1945 All. 422, I.L.R. 1945 All. 910; *Narayan v. Rajkishore*, A.I.R. 1951 Pat. 613; *Ewaj Ali v. Firdous Jehan*, A.I.R. 1944 Oudh 212, (1944) O.W.N. 228; *Delhi Motor Co. v. Basrurkar, U.A.*, A.I.R. 1968 S.C. 794. In a later Privy Council case Lord Atkin, who delivered the judgment, said: "Now whether sec. 53-A applies at all to an agreement to transfer a partial interest in property, such as a right to win minerals or cut timber or the like, is a question which on this occasion it is not necessary to determine. It is at least possible that it only applies to an agreement to sell or otherwise dispose of the entirety of a piece of real property. But the words of the section make it quite plain that the section does not operate to create a form of transfer of property which is exempt from registration. It creates no real right: it merely creates rights of estoppel between the proposed transferee and transferor, which have no operation against third persons not claiming under those persons—*S. N. Banerjee v. Kuchwar Lime & Stone Co.*, (1942) 46 C.W.N. 374 (P.C.). Consequently, when the dispute arises in Court after sec. 53-A came into force the purchaser is entitled to press it into his service even though the sale may have taken place prior to its coming into force—*Balaram v. Kewalram*, A.I.R. 1940 Nag. 396 (400), 1940 N.L.J. 499, 199 I.C. 881; see also *Mulji Sicca v. Nurmohammad*, I.L.R. 1938 Nag. 432, A.I.R. 1938 Nag. 377, 181 I.C. 126; *Jahangir Begum v. Golam Ali Ahmed*, A.I.R. 1955 Hyd. 101.

No doubt it is settled law that sec. 53-A is available by way of defence only, but a suit by a vendee under Or. 21, r. 103, C. P. Code being a suit by way of defence because in such a suit the vendee is merely asking to protect the rights which he is entitled to under sec. 53-A, it is open to the vendee to rest his case on this section, even though he is a plaintiff—*Mt. Firdos Jahan v. Md. Yunus*, 15 Luck. 43, A.I.R. 1940 Oudh 1 (5), 1939 O.W.N. 876 relying on *Ram Chunder v. Maharaj Kunwar*, 1939 A.L.J. 692, A.I.R. 1939 All. 611, I.L.R. 1939 All. 809. See also *Ewaj Ali v. Firdous Jehan*, A.I.R. 1944 Oudh 212, (1944) O.W.N. 228; *Gulab Chand v. Madholal*, A.I.R. 1953 Aj. 47. A suit by the transferee against an attaching creditor under O.21, r. 63, C. P. Code is not however one between him and the transferor. So the transferee as a plaintiff cannot avail himself of the provisions of the present section—*Padmanabha v. Appalanara-*

samma, A.I.R. 1952 Or. 143. But see *Manak Chand v. Lal Shanker*, A.I.R. 1956 Ajmer 22.

The English doctrine of part performance is not available in India by way of defence to a suit for ejectment except under provisions of this section and in cases to which it applies—*K. K. Das v. Amina Khatun*, I.L.R. (1940) 1 Cal. 161, A.I.R. 1940 Cal. 356, 44 C.W.N. 247; *Tantooram v. Chandrika*, 1960 M.P.L.J. 673. This section has imported a modified form of the English doctrine of part performance into this country. The basis of the doctrine is not contract, but the acts subsequent to the contract—*per* Nasim Ali J. in *Nakul v. Kalipada*, I.L.R. (1938) 2 Cal. 328, A.I.R. 1939 Cal. 163 (166), 42 C.W.N. 630. It is not the law that this section applies only to the case where a contract can be specifically enforced. On the other hand, it will be brought into aid when the specific performance of a contract is barred or the contract is otherwise unenforceable—*Bharat Chandra v. Md. Ramjan*, 45 C.W.N. 489; *Jahangir Begum v. Gulam Ali Ahmed*, A.I.R. 1955 Hyderabad, 101.

In order to attract the provision of this section it is necessary that there should be a completed agreement and that possession has been delivered in part performance of that agreement—*Kuchwar Lime & Stone Co. v. Secretary of State*, *supra*. If there is an agreement for sale in respect of a property in the possession of the agent of the owner between the owner and a benamdar for the agent, the possession of the agent subsequent to the agreement is not in part performance of the contract—*Gandi Anant Ramulu v. Asif Ahmed*, (1964) 2 An. W.R. 5.

The general provisions contained in this Chapter apply to transfers of agricultural holdings unless they are specifically excluded by the Bengal Tenancy Act. Particularly, sec. 53A deals with rights arising out of incomplete contracts of transfer—a matter not dealt with by Bengal Tenancy Act. Consequently, this section applies to transfers of occupancy holdings otherwise governed by the Bengal Tenancy Act. Where a person has been put in possession of an occupancy raiyati holding in pursuance of an unregistered *kobala* supported by consideration, he can, in a suit by a subsequent transferee under an unregistered *kobala*, successfully protect his possession by setting up the right given by this section, although his right to obtain specific performance of the contract of transfer may have been time-barred and although there was no transfer in accordance with sec. 26C of the Bengal Tenancy Act. "It is contended", observed S. K. Ghose, J. "that sec. 26C not only provides for the registration but also for bringing in a third party, namely the landlord, to whom notice has to be issued and certain fees are to be paid. But where these conditions are not complied with, it only means that the transfer has not been completed in the manner prescribed therefor by law, which again satisfies one of the conditions for the application of sec. 53A of the Transfer of Property Act"—*Nokul v. Kalipada*, 42 C.W.N. 630 (633). Again in the same case his Lordship observes: "As a result of this section (section 53A) the defendant has now got a statutory right which is limited by two conditions, viz., that the contract must be in writing and further that it is available only as a defence or to use a convenient expression, as a passive equity and not as an active equity. . . . If the transferee is entitled to specific performance of contract of a lease, it is provided for by sec. 27A of the

Specific Relief Act. In such a case it is not necessary for him to resort to sec. 53A of the Transfer of Property Act, and since the provisions of that section confer a right which is only available to a defendant to protect his possession, no question of limitation arises thereunder since there is no bar of limitation to a defence. This is consistent with what was said in *Pir Buksh's case* [(1934) 61 I.A. 338, 39 C.W.N. 34] and we ourselves said in the case of *Dantmarā Tea Co. v. Probodh Kumar Das*, (supra)" at p. 635. See also *Kuchwar Lime & Stone Co. v. Secretary of State*, supra.

Under this section a minor may be regarded as a transferor. Thus where the mother of a Hindu minor enters into a contract of sale on behalf of the minor and the contract is one which is within her competence as guardian to enter into so as to be binding upon the minor, the latter is the "transferor" within the meaning of this section—*Subramanyam v. Subba Rao*, A.I.R. 1947 P.C. 95, 75 I.A. 115, 52 C.W.N. 706. Overruling *Subramanyam v. Subba Rao*, A.I.R. 1944 Mad. 337. See also *Amrco v. Babarao*, A.I.R. 1951 Nag. 403, I.L.R. 1950 Nag. 25; *Manglu v. Sukru*, A.I.R. 1950 Or. 217, I.L.R. 1950 Cut. 107. Where the father as manager of a joint family consisting of the father and his minor sons executes a contract of sale of the joint family property for the benefit of the family and the transferee is put into possession of the property after he has paid the consideration the transferee can resist the claim of the sons for possession, because under Hindu law the father can enter into a contract on behalf of his minor sons—*Padmanavaraju v. Lakshmi Kumar Raju*, A.I.R. 1967 Andh. Pra. 237 (F.B.). See also *Labchand Shankarlal v. Sharifabi*, A.I.R. 1963 Bom. 215. When the manager of a joint Hindu family enters into an agreement to sell the family property for legal necessity the manager is the transferor within the meaning of sec. 53A—*G. Govindaraju Mudaliar v. Vinayaka Mudaliar*, A.I.R. 1963 Mad. 310.

The difference between the protection given by this section and the right conferred by sec. 27A of the Specific Relief Act is that the former creates a defence while the latter a ground of claim. What sec. 53A creates is a defence by prohibiting the enforcement of a right by the transferor while sec. 27A gives a right to the transferor and transferee to enforce specifically the contract by compelling registration where there is a part performance—*Hari Prasad v. Hanumantrao*, A.I.R. 1937 Nag. 74 (76); *Md. Rowther v. Tinnevely Municipal Council*, A.I.R. 1938 Mad. 746 (748), 48 M.L.W. 74. In granting relief under the present section the question whether a contract is specifically enforceable or not has no bearing at all. S. 12 of the Specific Relief Act is also quite distinct from the present section—*Sobharam v. Totaram*, A.I.R. 1952 Nag. 244. A transferee in possession under a contract of sale in a suit for specific performance of the contract cannot also avail himself of the provisions of the present section—*Parul Bala v. Saroj Kumar*, A.I.R. 1948 Cal. 147, 82 C.L.J. 273.

The legislature has by sec. 27A, Specific Relief Act recognized that the equity of part performance is an active equity as in English law and enables the plaintiff to support an independent action. The section however has no application to contracts executed before 1st April, 1930, though in such a case the defence under the present section is available to a person who has an agreement of lease in his favour—*Maneklal v. Hormusji*, A.I.R. 1950 S.C. 1, (1950) S. C. R., 75, 52 Bom. L.R. 521.

In order to invoke the doctrine of part performance as embodied in

sec. 53A, it is, however, necessary that the possession relied upon as part performance must be referable to the agreement only and not to anything else—*Bahadur Singh v. Jyotirupa*, 40 C.W.N. 476. Thus, the possession of a Receiver caused to be appointed by a decree-holder in execution proceedings is not possession in part performance of a contract so as to make this section available and to cure the effect of non-registration of the decree—*Sambhuram v. Gulzarilal*, 40 C.W.N. 974. The absence of an averment in the written statement that the defendant is ready and willing to perform his part of the contract is not fatal—*Karthikeya Mudaliar v. Singaram Pillai*, A.I.R. 1956 Mad. 693; *Malikajappa v. Bhimappa*, A.I.R. 1966 Mys. 86.

Where there is no agreement or where the agreement has been abandoned, sec. 53A does not apply—*Cooverji v. Vasant & Co.*, A.I.R. 1935 Bom. 91, 154 I.C. 583; *Venkatasubbayya v. Rasayya*, A.I.R. 1957 Andhra Pr. 58. So also in cases of void agreements, e.g., under sec. 6 (a)—*Lalita Prasad v. Sarman*, A.I.R. 1933 Pat. 165 (172), 14 P.L.T. 27. This section does not apply to a family arrangement or a partition which does not involve a transfer of property—*Mt. Jileba v. Mt. Parmesra*, A.I.R. 1950 All. 700, 1950 A.L.J. 477; *Gopinath v. Hangsnath*, A.I.R. 1950 Ass. 129; *Radhakristnayya v. Sarasamma*, A.I.R. 1951 Mad. 213, I.L.R. 1951 Mad. 607. But relinquishment being a transfer the principle of part performance applies to it—*Lakshmibai v. Bhoja*, A.I.R. 1953 Hyd. 114. In land acquisition proceedings a claimant who is in possession in part performance of a contract to transfer can rely on Sec. 53A—*Maharaj Kumar Irfan Rasul Khan v. U. P. Govt.*, I.L.R. (1960) 2 All. 71.

Para 3.—Para 3 of this section makes it a condition that the transferee has performed or is willing to perform his part of the contract. It means complete performance or complete willingness, so far as he is concerned. It is not sufficient compliance with this condition that the transferee should have performed his part of the contract to some extent—*Becharadas v. Borough Municipality of Ahmedabad*, 43 Bom. L.R. 603, A.I.R. 1941 Bom. 346 (348) dissenting from *Suleman v. Patell*, 35 Bom. L.R. 722, A.I.R. 1933 Bom. 381, 145 I.C. 557 where it has been held that it is not necessary that the transferee's willingness should continue throughout the period of the agreement, if there are substantial acts of part performance. See in this connection *Probodh Kumar Das v. Dantmara Tea Co.*, 45 C.W.N. 132. This readiness and willingness must be pleaded, otherwise the contract is not a valid one—*Pusaram v. Deorao*, A.I.R. 1947 Nag. 188, I.L.R. 1946 Nag. 991.

Para 4.—This section debars the transferor from exercising rights which he would have apart from the agreement. There is, however, an exception to this disablement in the words "other than a right expressly provided by the terms of the contract". But the transferor can derive no rights from this section which are inconsistent with the conditions subject to which the section comes into operation. Since it is a condition precedent that the transferee shall have performed his part of the contract or should be willing to perform his part, the material time being the time when the section is sought to be made use of, a suit for damages for breach of a contract can never be founded upon this section—*Becharadas v. Borough Municipality of Ahmedabad*, supra. See in this connection *Ram Protap v. National Petroleum Co.* A. I. R. 1950 Cal. 23, 54 C.W.N. 53.

By this section no rights are conferred at all on the transferor—*Municipal Board v. Moradhuj*, A.I.R. 1940 All. 340, 189 I.C. 819.

Objection under this section will not be entertained for the first time in a second appeal—*Sailajananda v. Lakhichand*, A.I.R. 1951 Pat. 502, 30 P.L.T. 388.

271A. Application :—The doctrine of part performance would equally apply to a lease, and defects, if any, of the requirements of sec. 107, *post* would be cured by sec. 53A—*Jumman v. Jaganath*, A.I.R. 1939 Oudh 85 (86), 1939 O.W.N. 102, 179 I.C. 635 ; *Deochand v. Parvatibati*, A.I.R. 1952 Nag. 115. Under section 27A, Specific Relief Act, such a person can claim specific performance of the contract also which for want of registration may not afford a basis for a claim of title, *ibid*. See also *Kochuvareed v. Mariappa*, A.I.R. 1952 Tr.-Coch. 10. A lease was invalid for not being signed by both the lessor and the lessee as required by sec. 107, *post* and the lessee was in possession by virtue of this lease. Subsequently, the defendant demolished a part of the building on the land and the plaintiff brought a suit for injunction for restraining the defendant from interfering with any of the rights of the plaintiff as lessee, *held* by Thom. C.J. and Ganga Nath J., that it was the defendants who were seeking to enforce their rights under the contract of lease and the plaintiff was only seeking to debar them from doing so and was thus merely protecting his rights: there was therefore nothing in sec. 53A which disentitled the plaintiff from maintaining the suit—*Ram Chunder v. Maharaj Kunwar*, I.L.R. 1939 All. 809, A.I.R. 1939 All. 611, 1939 A.L.J. 692. The correctness of this decision seems to be questionable in view of the later Privy Council decisions mentioned in Note 271. Where a previous lessee holds possession of land under an *unregistered* lease and has been continuously paying the fixed rent to his landlord, a suit by a subsequent lessee to dispossess him does not lie—*Banarasi v. Ali Mahammad*, A.I.R. 1936 Lah. 5, 157 I.C. 839. See also *Wakefield v. Sayeeda Khatun*, A.I.R. 1937 Pat. 36 (37), 15 Pat. 786, 166 I.C. 797 ; *Shyam Sundar v. Din Shah*, A.I.R. 1937 All. 10 (12), I.L.R. 1937 All. 312, 166 I.C. 540 ; *Ashutosh v. Nalinakshya*, A.I.R. 1937 Cal. 467, 64 C.L.J. 558, 170 I.C. 267. Where a lease-deed for a period of five years was unregistered and the lessee alleging himself as a monthly tenant vacated the premises after giving notice, in a suit by the lessor for damages for breach of agreement, it was held that under this section the lessor could enforce his claim—*Suleman v. Patell*, A.I.R. 1933 Bom. 381, 145 I.C. 557. But see *Ramji Lal v. Secretary of State*, A.I.R. 1936 Oudh 306, 162 I.C. 712, where it has been doubted if this section apply to a case in which only rent is claimed after the house has been vacated and held that it does not apply to a tenancy from month to month. See also *In re Jambad Coal Syndicate*, A.I.R. 1936 Cal. 628, 62 Cal. 394, 163 I.C. 845, where it has been held that landlord cannot recover rent either under this section or under sec. 49 of the Registration Act as amended in 1929 on the basis of an unregistered lease if it requires registration. In *Mulji Sicca & Co. v. Nur Mahammad*, A.I.R. 1938 Nag. 377, the principle was applied in the case of an unregistered license.

A lease being a transfer of immoveable property, this section applies to it—*Ramchandra v. Subraya*, A.I.R. 1951 Bom. 127, I.L.R. 1951 Bom. 692; *Sayi v. Subbanna*, A.I.R. 1946 Mad. 310, (1946) 1 M.L.J. 92. Where a

person is inducted to land under an agreement to lease which cannot be said to be a valid lease, and the tenant performs his part of the contract by paying rent to the lessor, the tenant can take the benefit of this section—*Hadu v. Ramdulal*, A.I.R. 1944 Pat. 35, 9 Cut.L.T. 27; *Md. Sadruddin v. Gulam Mohiuddin*, A.I.R. 1953 Hyd. 97. But sec. 53A has no application to a case where the document is not a contract of transfer by the lessor but is a Kabuliyat executed by the lessee, *Rammarain Pasi v. Sukhi Tiwari*, A.I.R. 1957 Pat 24; *Chandra Nath v. Chulai Pashi*, A.I.R. 1960 Cal. 40.

A formal lease is not required. All that is necessary is that an agreement in writing signed by the transferor can be gathered from the evidence—*Maneklal v. Hormusji*, A.I.R. 1950 S.C. 1, 1950 S.C.R. 75, 52 Bom. L.R. 521. If the agreement to lease is suppressed by the plaintiff the defendant can prove the agreement by oral evidence—*Karthikēya Mudaliar v. Singaram Pillai*, A.I.R. 1956 Mad. 693. Where the defendant proves that there is a written and signed contract of lease and in accordance with the terms thereof he has taken possession and built a factory on the land and also that he was paying rent to the plaintiffs in accordance with that agreement, the defendant is entitled to retain possession—*ibid.* Such an agreement though not registered is admissible under sec. 49, Registration Act as evidence of part performance—*ibid.* See also *Qamar Jahan v. Banshi Dhar*, A.I.R. 1942 Oudh 231, (1941) O.W.N. 1395; *Bijoli Prova v. H. C. Dutta*, 71 C.W.N. 681. But where under an unregistered lease for 5 years the lessee takes possession of the premises in performance of the contract and remains in possession for the full period, he is bound to vacate the premises on the expiry of the period—*Ram Pratap v. National Petroleum Co.*, A.I.R. 1950 Cal. 23, 54 C.W.N. 58. Where the contract has been partly performed, a suit for damages for its breach does not require to be rested upon the present section—*ibid.* Where under an *hukum nama* the grantee was given a right to dig mica mines with certain *kudalis* and to appropriate the mica dug out, the *hukum nama* did not come within the purview of this section—*Traders & Miners Ltd. v. Dhirendra*, A.I.R. 1944 Pat. 261, 23 Pat. 115. Where there is a completed contract of lease, the leased deed though invalid as lease on account of not being signed by the lessee, is sufficient to attract sec. 53A—*Ramakrishna Singh v. Mahadei Halwai*, A.I.R. 1965 Pat. 467. If A executes a patta in favour of B for 25 years but the patta is neither registered nor signed by B and if B enters into possession, his possession cannot be disturbed for 25 years, not because he is a tenant, but because of part performance—*Lal Behari Sasmal v. Kanak Kanti Roy*, A.I.R. 1962 Cal. 502.

For the application of this section to sale see *Kaura Ram v. Chaman Lal*, A.I.R. 1934 Lah. 751, 154 I.C. 1088. In a case where the vendee entered into possession in part performance of a contract of sale, the Rangoon High Court held that although he was not entitled to a declaration of his right as plaintiff, he was entitled to the possession of the property as against third persons—*Mastram v. Ma Ohn*, A.I.R. 1934 Rang. 284, 154 I.C. 769; *Somi Reddy v. Ranganayakalu*, (1967) 2 Andh. W.R. 2. A Mahomedan for himself and as guardian of a Mahomedan minor purported to enter into a contract for sale of a property belonging to them to a person who was in possession of the property as a tenant. There was no evidence to show that the tenant continued in possession after the alleged contract

of sale: *held* that sec. 53A did not apply—*Bharat Chandra v. Md. Ramjan*, 45 C.W.N. 489. A transferee in possession of the property by way of part performance cannot maintain a suit under Or. 21, r. 103 C.P.C. against the auction-purchaser of such property—*Maruti Gurappa v. Krishna Bala*, A.I.R. 1967 Bom. 34.

P was a mortgagee by a registered deed dated 1930 of a certain piece of land from M. M and his wife had mortgaged the same land in 1928 by an unregistered deed to D for Rs. 1,000 with possession. The unregistered deed allowed redemption on repayment of the principal sum. P obtained a mortgage-decree against M and subsequently sued D for possession and ejectment: *held* that sec. 53A applied and the suit by P for possession and ejectment could not, as it stood, succeed. P was however entitled to redeem the land on payment of Rs. 1,000 to D. He was merely debarred from enforcing any claim other than that arising out of the contract itself—*Daw Yi v. Maung Po*, A.I.R. 1939 Rang. 175, 182 I.C. 651. But where a mortgagee holding possession of a property under a possessory mortgage leased out the property to the mortgagor under a rent-note which the mortgagor alleged to be a nominal transaction and that he had been in possession ever since the date of the mortgage, in a suit by the mortgagee on expiry of the lease, it was *held* that the doctrine of part performance could not be invoked in favour of the mortgagee—*Mt. Nasiban v. Md. Sayeed*, A.I.R. 1936 Nag. 174, 164 I.C. 557. The doctrine of part performance cannot ordinarily be applied to a mortgage—*Salla Venkata Reddy v. Bheemreddy*, A.I.R. 1963 Andh. Pra. 238. But it can be applied to a usufructuary mortgage—*Ram Reddi v. Venka Reddy*, A.I.R. 1963 Andh. Pra. 489.

Where under a mortgage the mortgagee has only a right to foreclose and the mortgagor gives possession to the mortgagee of the mortgaged property in satisfaction of his debt, the possession taken by the mortgagee cannot be said to be in part performance of the contract—*Balkrishna v. Rangnath*, A.I.R. 1951 Nag. 171, I.L.R. 1951 Nag. 618. Where after executing an unregistered sale deed in favour of the mortgagee in possession the mortgagor sells the mortgaged property to another person having notice of the prior unregistered sale, the mortgagee can resist the suit for redemption by the mortgagor and the subsequent transferee—*Devisahai Premraj v. Gurind Rao*, A.I.R. 1965 M.P. 275.

Where the transfer-deed is a registered one, this section does not apply—*Tarak v. Jagdish*, A.I.R. 1954 Pat. 41. It is doubtful whether under this section a party can institute a suit for declaration that he has become owner of the property under an invalid deed of partition which however has been acted upon—*Ram Kishan v. Salig Ram*, A.I.R. 1946 All. 476. If there is an arrangement between two parties that one will take the movables and the other will take the house and the latter continues in possession pursuant to this arrangement his possession is protected by sec. 53A—*Hussain Babu v. Shivnarayan*, A.I.R. 1966 Madh. Pra. 307.

This section applied where the transfer was made before the Act but the suit was brought after the Act came into force—*Fateh Md. v. Ghoria Bibi*, A.I.R. 1953 Aj. 19; *Kanbi Karshan v. Kanbi Harkha*, A.I.R. 1953 Sau. 56; *Jahangir Begum v. Gulam Ali Ahmed*, A.I.R. Hyd. 101.

In the Punjab:—Unless this section can be taken as embodying some

general rule of equity which would prevail in India apart from the provisions of the T. P. Act, it can have no force in the Punjab to which it has not been applied—*Mt. Shankri v. Milkha Singh*, A.I.R. 1941 Lah. 407 (410) (F.B.). A later Full Bench have however held that sec. 53A being based on the equitable principles which were previously applicable to the whole of India including the Punjab and even after the enactment of that section which is not applicable to the Punjab, the principles embodied in the section are applicable to the Punjab—*Milkha Singh v. Mt. Sankari*, A.I.R. 1947 Lah. 1 (F.B.), I.L.R. 1947 Lah. 449.

This section would not apply to Kutch—*Gangabai v. Malbai*, A.I.R. 1950 Kutch 64.

Section does not supersede registration :—This section merely lays down that the transferor will not be entitled to eject the transferee under the circumstances mentioned herein. But it does not give any title to the transferee. That title will have to be completed by execution and registration of a deed of transfer. See *Ram Gopal v. Tulshi*, 51 All. 79 (F.B.), 26 ALJ. 952, 116 I.C. 861, A.I.R. 1928 All. 641, where this subject is very fully discussed. See also *Pearey Lal v. Prithi Singh*, A.I.R. 1945 All. 422, I.L.R. 1945 All. 910.

Value of unregistered document :—The unregistered document embodying the terms of the contract shall be received in evidence for the purpose of proving part performance. The proviso to sec. 49 of the Registration Act, newly added by the T. P. Amendment Supplementary Act XXI of 1929, runs as follows :—

"Provided that an unregistered document affecting immoveable property and required by this Act or by the Transfer of Property Act to be registered may be received as evidence of a contract in a suit for specific performance under Ch. II of the Specific Relief Act or as evidence of part performance of a contract for the purposes of sec. 53A of the Transfer of Property Act, or as evidence of any collateral transaction not required to be effected by a registered instrument." See *Suleman v. Patell*, 35 Bom. L.R. 722, A.I.R. 1933 Bom. 381 (385) and *Dalip Singh v. Jagat Singh*, A.I.R. 1938 Lah. 721; *Maneklal v. Hormusji*, A.I.R. 1950 S.C. 1, 1950 S.C.R. 75, 52 Bom. L.R. 521. Where possession is delivered in pursuance of an unregistered sale-deed, it is admissible to prove part performance—*Girija v. Girdhari*, A.I.R. 1951 Pat. 277, 29 Pat. 628; *Egam Malliah v. Gondia Malliah*, (1957) 1 Andhra W.R. 366; *Nanasaheb v. Appa*, A.I.R. 1957 Bom. 138. Sec. 91. Evidence Act and sec. 54, T.P. Act do not prohibit this—*Nagayya v. Sayanna*, A.I.R. 1951 Hyd. 42; *Murlidhar v. Tara Dye*, A.I.R. 1953 Cal. 349. But see *Ananda v. Murli*, A.I.R. 1945 Oudh 120, (1944) O.W.N. 496, where it has been held that in a case where the parties deliberately committed a fraud on registration, the unregistered document cannot be looked at for giving effect to a plea under the present section.

The above words in the newly added Proviso to sec. 49, Registration Act do not deprive the Province of Punjab of the benefit of the Proviso simply because the T. P. Act is not in force in that Province—*Milkha Singh v. Mt. Shankari*, A.I.R. 1947 Lah. 1 (F.B.), I.L.R. 1947 Lah. 449.

An unregistered Kobala is invalid as a document of title. But for purposes of proving the requisite contract in writing under sec. 53-A or the terms thereof, it may be received in evidence. There is nothing in sec. 91, Evidence Act, which would exclude such proof. Mere non-registration would not affect the admissibility of the Kobala to prove the requisite contract to transferee, which is not *per se* registrable—*Manjural Haque v. Mewajan Bibi*, A.I.R. 1956 Cal. 350. Where the mortgagee is put in possession under a mortgage by conditional sale containing a provision for reconveyance on payment of the consideration after six years and the mortgagor after six years relinquishes all his rights by an unregistered deed on receipt of additional consideration, a subsequent suit for redemption can be resisted by invoking sec. 53A—*Habib Myan v. Mahemud Mir*, A.I.R. 1959 Madh. Pra. 221.

272. No Limitation :—“There is some conflict of decisions in the Indian Courts with regard to the period within which equitable relief can be given to parties to a transaction when there has been no registered instrument. One view is that such relief can be given only within the period during which a suit for specific performance would lie, the other view being that such relief can be given even after that period has expired. It seems to us that the first view, to which we propose to give effect by adding section 30A, to the Specific Relief Act, 1877, does not go far enough, in all cases, to afford the relief which the equities arising out of part performance require. Because, even after the period of limitation, when part performance has taken place, the parties stand in the same relation to each other as they did within the period of limitation and the equities which arose within that period remain the same. In fact, the longer the possession in part performance, the higher will be the equities. We, therefore, think that, in order that the relief may be effective, it ought to be available at all times during which the transferee is in possession in part performance of the contract and subject to the other conditions which we have proposed. In 46 Mad. 919 and 23 C.W.N. 284, the Courts took the view that the relief was available even after the period of limitation for specific performance was over. We feel that, in order that the relief may be real, it ought to be available as between the parties to the transaction even after such period of limitation.”—*Report of the Select Committee.*

This section supersedes 27 C.W.N. 159, 24 C.W.N. 643 and 33 C.L.J. 437 (cited under “*second view*” in Note 270) so far as they lay down that part performance can be pleaded as defence so long as a suit for specific performance is not barred by limitation. It also overrules the view taken in 46 Bom. 722 (cited under “*third view*” in Note 270) that the vendee will not get a conveyance from the vendor after the expiry of the period of limitation for a suit for specific performance. See also *Bholai v. Lakhi Kanta*, A.I.R. 1949 Ass. 8; *Amroo v. Babarao*, A.I.R. 1951 Nag. 403, I.L.R. 1950 Nag. 23; *Nana Saheb v. Appa*, A.I.R. 1957 Bom. 138.

It has been held under this section that Art. 113 of the Limitation Act does not apply. “Limitation does not” observed Nasim Ali J., “generally apply to a plea in defence; see *Sri Kishan Lal v. Mt. Kashmiro*, [20 C.W.N. 957 (P.C.); 31 M.L.J. 362]; *Somi Reddy v. Rangnayakalu* (1967) 2 An. W.R. 2. Section 53A has imported in a modified form the English doctrine of part performance into this country. It confers only a passive

right to a defendant to protect his possession. Art. 113 Limitation Act certainly cannot apply to such a right"—*Nokul v. Kalipada*, 42 C.W.N. 630 at. p. 636; *Somireddi v. N. Ranganaikulu* (1967) 2 Andh. L.T. 133. But in order to have the protection of sec. 53A, possession must be taken in part performance of the contract before the enforcement of the contract is barred by time—*Raju Roy v. Kashinath Roy*, A.I.R. 1956 Pat. 308.

272A. Whether retrospective :—Section 16 of the Transfer of Property Amendment Act XX of 1929 by which this new section was inserted is not one of the sections specifically mentioned in sec. 63 of the aforesaid Act which deals with the retrospective operation of the amendments. It says : "and nothing in any other provisions of this Act (Act XX of 1929) shall render invalid or in any way affect, anything already done before the first day of April 1930, in any proceeding pending in a Court on the date." It is therefore clear that sec. 53A does not affect anything already done in any proceeding pending in a Court on 1st April, 1930—See *Ram Krishna v. Jainandan*, A.I.R. 1935 Pat. 291, 14 Pat. 672 (F.B.) ; *Muthuswami v. Laganatha*, A.I.R. 1935 Mad. 404, 41 M.L.W. 600 ; *Hari Prasad v. Hanumantrao*, A.I.R. 1937 Nag. 74 ; *Mukteswar v. Barakar Coal Co.*, A.I.R. 1934 Pat. 246, 152 I.C. 498 ; *Durgapada v. Nrishingha*, A.I.R. 1935 Cal. 541, 62 Cal. 492, 39 C.W.N. 416, 159 I.C. 20. *Maneklal v. Hormusji*, A.I.R. 1950 S.C. 1, S.C.J. 317 ; *Kankamma v. Krishnamma*, A.I.R. 1943 Mad. 445 (F.B.), I.L.R. 1943 Mad. 831 ; *Naidu v. Naidu*, A.I.R. 1945 Mad 171, (1945) 1 M.L.J. 158 ; *Mahalakshmi v. Venkatarreddi*, A.I.R. 1944 Mad. 556, (1944) 2 M.L.J. 103 ; *Narayana v. Karibasappa*, A.I.R. 1951 Mys. 126.

But there is a great divergence of judicial opinion on the question whether the section, apart from pending actions, is retrospective or not in its operation. In the following cases it has been held that the section is not retrospective ; *Kanji v. Shunmugam*, A.I.R. 1938 Mad. 734, 63 M.L.J. 571, 139 I.C. 510 ; *Cooverjee v. Vasant etc. Society*, A.I.R. 1933 Bom. 91, 36 Bom. L.R. 1245, 154 I.C. 583 ; *Gauri Shankar v. Gopal Das*, A.I.R. 1934 All. 710, 151 I.C. 388 ; *Ramji Lal v. Secretary of State*, A.I.R. 1936 Oudh 306, 162 I.C. 712 ; *Tauquir Ali v. Ram Ratan*, A.I.R. 1941 Oudh 41, 1940 O.W.N. 753, 190 I.C. 85 ; *Jagadamba Prasad v. Anadi Nath*, A.I.R. 1938 Pat. 337, 19 P.L.T. 594, 176 I.C. 273 ; *Krishnabai v. Parwatibai*, A.I.R. 1936 Nag. 282, 165 I.C. 934 ; *Katireddi v. Koonam*, A.I.R. 1936 Mad. 916, 71 M.L.J. 639, 166 I.C. 535 ; *Baldeo Singh v. Md. Akhtar*, A.I.R. 1939 Pat. 488, 20 P.L.T. 399. In *Md. Serajul Haque v. Dwijendra Mohan*, A.I.R. 1941 Cal. 33, Mr. Justice Biswas seems to have been inclined to agree with the judgment of Wort, J. in *Jagadamba Prasad v. Anadi Nath*, supra but felt bound by the decision of the Division Bench in *Md. Hosein v. Jamini*, infra ; *Veera-brahmacharyulu v. Monduru Venkata*, A.I.R. 1961 Andh. Pra. 31.

On the other hand it has been held in the following cases that the section is retrospective ; *Gajadhar v. Bachan*, A.I.R. 1934 All. 768, 153 I.C. 717 ; *Suleman v. Patell*, A.I.R. 1933 Bom. 381, 145 I.C. 557 ; *Benarsi v. Ali Mahammad*, A.I.R. 1936 Lah. 5, 157 I.C. 839 ; *Shyam Sundar v. Din Shah*, A.I.R. 1937 All. 10, I.L.R. (1937) All. 312, 166 I.C. 540 ; *Md. Hushen v. Jamini*, A.I.R. 1938 Cal. 97, 42 C.W.N. 38, I.L.R. (1938) 1 Cal. 607, 176 I.C. 41 ; *Ashutosh v. Nalinakshya*, A.I.R. 1937 Cal. 467, 64 C.L.J. 558, 170 I.C. 267 ; *Wakefield v. Sayeeda Khatun*, A.I.R. 1937 Pat. 36, 15 Pat.

786, 166 I.C. 797 ; *Ko Po v. Maung Lu*, A.I.R. 1937 Rang. 402 ; *Tukaram v. Atmaram*, A.I.R. 1939 Bom. 31, 40 Bom. L. R. 1192.

It is submitted that this latter view is correct. For a discussion of the question see Note 1A. In a recent case Jack J. of the Calcutta High Court has expressed the opinion that the section is not retrospective. Besides this being *obiter*, it does not appear that the earlier cases of this High Court was brought to the Judge's notice—*Mahendra v. Prafulla*, (1938) 43 C.W.N. 34 ; A.I.R. 1938 Cal. 795 (796).

After this note of the present editor in the last edition the following cases have appeared in support of the above proposition, namely—*Tukaram v. Atmaram*, I.L.R. 1939 Bom. 71, A.I.R. 1939 Bom. 31, 40 Bom. L.R. 1192 ; *Jagad Bhusan v. Panna Lal*, A.I.R. 1941 Cal. 287 and *Rustomji v. Bai Nath*, I.L.R. 1940 Bom. 50, A.I.R. 1940 Bom. 90, 41 Bom. L.R. 1310. In the last cited case Beaumont, C.J., discusses the question elaborately giving additional reasons in support of the above proposition. For a detailed commentary on this question, see Note 1A pp. 3-7.

272B. Para 2 :—“Contract”—This section does not apply where there is not a contract in writing, but an oral contract—*Dhanrajmal v. Hazarimal*, A.I.R. 1943 Sind 81, I.L.R. 1942 Kar. 513 ; *Ajabsingh v. Jhabbulal*, A.I.R. 1948 Nag. 67, I.L.R. 1947 Nag. 449 ; *Katihar Jute Mills, Ltd. v. Calcutta Match Works, Ltd.* A.I.R. 1958 Pat. 133. Sec. 53A cannot be invoked if a material portion of the contract in writing is orally varied—*Yasodammal v. Janaki Ammal*, A.I.R. 1968 Mad. 294. A document which not only refers to the previous oral agreement but incorporates all the terms of the oral agreement can be set up as a defence, but not a document which merely refers to the previous oral agreement without incorporating its terms—*Allam Gangadhara Rao v. Gollapalli Gangarao*, A.I.R. 1968 Andh. Pra. 291. Where by reason of non-compliance with the statutory formalities the Government resolution could not be regarded as an effectual grant passing title in the land, it was also not an enforceable contract—*Collector v. Municipal Corpn.* A.I.R. 1951 S.C. 469, 1951 S.C.J. 752. In this case it was held by the Supreme Court that the decision in *Ariff v. Jadunath*, A.I.R. 1931 P.C. 79 did not apply to the facts of the case. As to an act in furtherance of the contract, see *Gopalan v. Kanaran*, A.I.R. 1953 Mad. 925 ; *Gopinath v. Hangsnath*, A.I.R. 1950 Ass. 129.

This section applies only when the “contract” is a valid and completed contract. A person cannot seek the benefit of the section on the basis of a contract forbidden by law or of negotiations which had not matured into a contract—*Bharat Chandra v. Md. Ramjan*, 45 C.W.N. 489. A contract between a person and the cantonment infringing certain provisions of the Cantonment Act, 1924 cannot be set up to sustain the plea of part performance—*Akrammea v. The Secunderabad Municipal Corporation*, A.I.R. 1957 Andhra Pra. 859 ; *Jitendra Nath v. Commissioner of Badhuria Municipality*, A.I.R. 1967 Cal. 423. Again this section contemplates reliance upon an entire contract. When part of the alleged contract is not valid, the contract cannot be split up and the section brought in aid of the part which is valid—*ibid.* It cannot however be said that a document which is primarily a receipt is always insufficient for the purpose of this section—*Mt. Firdos Jahan v. Md. Yumus*, 15 Luck. 43, A.I.R. 1940

Oudh 1, 1939 O.W.N. 876 ; see also *Shira Khatun v. Maung Pan*, A.I.R. 1939 Rang. 206, 1939 R.L.R. 575, 182 I.C. 523. Where an agreement to sell land by a tenant is entered into without the sanction of the competent authority required for such transfer and possession is given to the transferee, such possession is not protected by sec. 53-A—*Muprial Raghavachari v. Sunkeypalli Ramakrista Reddy*, I.L.R. (1965) Andh. Pra. 1226. Where a landlord agrees in writing to sell the demised property to the tenant and the tenant continues in possession pursuant to such agreement, the landlord is precluded from filing a suit for eviction—*Annamalai Goundan v. Venkatasami Naidu*, A.I.R. 1959 Mad. 354. If a lease is executed by the lessor alone and the lessee is put in possession, the lessor can invoke sec. 53-A—*Mahadei Haluai v. Ram Krishna Singh*, A.I.R. 1960 Pat. 353.

Possession:—This section requires that the transferee has either been put in possession or has continued in possession in part performance of the contract. Where he was never put in possession or allowed to continue in possession, actual or constructive, the section does not apply—*Subba Rao v. Raju*, A.I.R. 1950 F.C. 1, 1949 F.L.J. 398, (1950) 1 M.L.J. 752 ; *Nila Padhan v. Gokulananda*, A.I.R. 1952 Or. 118. Where the transferor has put the transferee in possession in part performance of the contract, the latter can enforce a right expressly provided by the terms of the contract, and the fulfilment of all the conditions mentioned in this section is not a condition precedent to the enforcement of such right—*Muralidhar v. Tara Dye*, A.I.R. 1953 Cal. 349. But see *Venkatasubbayya v. Rosayya*, A.I.R. 1957 Andhra Pr. 58, where it has been held that the defendant can non-suit the plaintiff only if he has complied with the conditions laid down under sec. 53-A. This section does not require that the contract must contain a direct covenant regarding transference of possession. If the transferee is already in possession and some act is done in furtherance of the contract, that is sufficient—*Ewaz Ali v. Firdous Jehan*, A.I.R. 1944 Oudh 212, (1944) O.W.N. 228 ; *Ratanlal v. Kishanlal*, A.I.R. 1952 Raj. 141. See in this connection *Gopinath v. Hangsnath*, A.I.R. 1950 Ass. 129 ; *Anandiravan v. Anandiravan*, A.I.R. 1950 Tr.-Coch. 81 and *Gopalan v. Kanran*, A.I.R. 1953 Mad. 925. Where the transferee is admittedly put in possession, the fact that subsequently he loses possession cannot deprive him of his rights under the section—*Yenugo Achayya v. Eranki Venkata Subba Rao*, 1956 Andhra W.R. 830. Where a property is leased by A and B to a partnership of which B is a partner and there is an agreement by the partnership to transfer their leasehold interest to a company, no advantage of sec. 53-A can be taken by the company against A at all and as against B in his capacity as one of the owners of the property—*Stewart & Co. Ltd. v. C. Mackerich*, A.I.R. 1963 Cal. 198. If the tenant of a house agrees to purchase the house but the house is purchased by P with knowledge of the tenant's agreement P can obtain a decree for ejectment during the pendency of the suit by the tenant for specific performance because the tenant cannot invoke sec. 53-A—*Bhagwandas v. Surajmal*, A.I.R. 1961 Madh. Pra. 237.

It is not necessary under this section to show that the transferor has delivered possession. It is only necessary to show that the transferee has taken possession or continued in possession in part performance of the

contract and has done some act in furtherance of it—*Mt. Firdos Jahan v. Md. Yunus*, supra. Where a vendee in pursuance of a contract of sale of a house paid earnest money and did other acts such as repairs and payment of Municipal tax, it can be said that the vendee took possession of the house in part performance of the contract—*Ibid*; see also *Tauquir Ali v. Ram Ratan*, A.I.R. 1941 Oudh 41 (43), 190 I.C. 85. But the act of part performance must not be an act preparatory to the completion of the contract, and acts introductory to and previous to the agreement cannot be treated as acts of part performance—*Kukaji v. Basantilal*, A.I.R. 1955 M.B. 93. But see *Vithal Das v. Mohanlal*, 1967 Raj. L.W. 413, where it has been held that payment of consideration amounts to part performance.

272C. Para 4:—“Or any person claiming under him”—In this section the person claiming under the transferor is a person who claims under a title derived subsequently to the date of the transfer and not anterior to that date—*Hemraj v. Rustomji*, A.I.R. 1953 S.C. 503. The words “claiming under the transferor” are wide enough to include an attaching creditor of the proposed purchaser, who has contracted to purchase the property from the judgment-debtor—*Gokarakonda v. Surapureddi*, A.I.R. 1943 Mad. 706, (1943) 2 M.L.J. 300. Where the plaintiffs in a suit for declaration of title and recovery of possession of certain immoveable property are persons claiming, under the transferor as his heirs, this section can be set up as a defence—*Madhuban v. Basanta*, A.I.R. 1947 Pat. 424, 25 Pat. 764. A person is said to claim under another person when he is either an assignee from that person or is his legal representative. The step daughter of a widow or the transferee of the former is not a person claiming under the widow—*Bhupat v. Jagad*, A.I.R. 1943 Cal. 344, I.L.R. (1943) 1 Cal. 56. Where the plaintiffs remained in possession without title adversely to the lessor until their title became perfect they are not claiming under the lessor—*Raju Roy v. Kashinath Roy*, A.I.R. 1956 Pat. 308. If possession is delivered to the mortgagee on the basis of an unregistered mortgage and the mortgagor becomes insolvent, the mortgagee can invoke sec. 53-A against the Receiver in proving his debt—*Pt. Chhotu Ram v. Khairaiti Ram*, A.I.R. 1960 Punj. 604.

The test of determining whether the words “or any person claiming under him” (i.e., the transferor) apply to a Hindu reversioner, is whether the acts of the widow bind the reversioner or not. If her acts bind the property, they must bind the reversioner in the same manner and to the same extent as the acts of an absolute owner would bind his heir. The reversioner may not be her heir, but is certainly her successor—*Balaram v. Kewalram*, A.I.R. 1940 Nag. 396 (399, 400), 1940 N.L.J. 499, 199 I.C. 881; *Ramchhod v. Manubai*, A.I.R. 1954 Bom. 153; *Babba Suramma v. Smt. Peddireddi Chandramma*, A.I.R. 1959 Andh. Pra. 568; *Karunakar v. Mahakuren*, A.I.R. 1960 Orissa 170. But see *Jagad Bhusan v. Panna Lal*, A.I.R. 1941 Cal. 287, where the purchaser from a Hindu widow's daughter was held not to be claiming under the widow and *Satyanarayanamurthy v. Tadi Subramanyam*, A.I.R. 1959 Andh. Pra. 534, where it has been held that a transferee under a contract to transfer by the Karta of a Hindu joint family cannot avail of sec. 53A against a member of the joint family who has not signed the agreement to transfer. It has also been held by the Mysore High Court that where a deed of transfer is executed by the

father in respect of joint family property the transferee cannot invoke sec. 53A against the sons who were not parties to the transaction—*Nanjedevanu v. H. V. Rama Rao*, A.I.R. 1959 Mysore, 173. If N marries C's wife's sister's daughter and helps C in cultivation on an assurance that N will inherit the entire property of C, N cannot avail of sec. 53A in defending his possession against the heirs of C suing N for recovery of possession—*Ramchandrayya v. Satyanarayana* (1964) 1 S.C.J. 109. Where D executes two agreements of sale in respect of the same property, first in favour of T and second in favour of P, and possession is given to P and the sale deed is executed in favour of T, P is entitled to obtain an injunction restraining D and T from disturbing P's possession—*Ramappa v. Tayavva*, A.I.R. 1968 Mys. 32.

273. There must be a written document :—The first para of this section contains the words "by writing", and thereby requires the agreement to be in writing. In many of the cases cited in Note 270 above, the doctrine of part performance was applied even though there was no *written* document. The following cases may be cited as instances—*Salamat v. Masha Allah*, 40 All. 187, 43 I.C. 645; *Bapu Apaji v. Kashinath*, 41 Bom. 438; *Desaibhai v. Ishwar*, 44 Bom. 586; *Maung Myat v. Ma Dun*, 2 Rang. 285; *Maung Tun v. Maung Dun*, 2 Rang. 313; *Ma Htay v. U Tha Hline*, 2 Rang. 649 (652, 653); *Dada v. Bahiru*, 29 Bom. L.R. 1419, A.I.R. 1927 Bom. 627.

These cases are no longer good law. Under the present section, the doctrine can be applied only when there is a *written* document from which the terms of the contract can be ascertained with reasonable certainty—*Aziz Ahmad v. Alauddin*, A.I.R. 1933 Pat. 485; *U Lu Pe v. Oo Kim*, A.I.R. 1933 Rang. 136 (138); *Suleman Haji v. Patell*, 35 Bom. L.R. 722, 145 I.C. 557, A.I.R. 1933 Bom. 381 (384); *Ma Mya v. Annamalai*, A.I.R. 1934 Rang. 127, 7 Rang. 59, 151 I.C. 227; *A. P. Bagchi v. Mrs. Morgan*, A.I.R. 1937 All. 36, 166 I.C. 897; *Bechardas v. Borough Municipality of Ahmedabad*, A.I.R. 1941 Bom. 346 (348), 43 Bom. L.R. 603; *Narayan v. Guru Prasad*, A.I.R. 1952 Nag. 246; *Shravan v. Garbad*, A.I.R. 1943 Bom. 406, 45 Bom. L.R. 874; *Narasayya v. Ramchandrayya*, A.I.R. 1956 Andhra 209. The words "signed on his behalf" must mean signed by a person who has authority to bind or represent the transferor—*Ibid*. Such written agreement may, of course, be the embodiment of what has already been agreed upon orally and may also refer to payment by the purchaser and receipt by the vendor of the purchase-money, but it must essentially be a written agreement. Unless a document can be held to be an agreement or contract of sale, it will not, by the mere fact that from it the terms necessary to constitute the transfer can be ascertained with reasonable certainty, be sufficient to satisfy the requirements of sec. 53A—*Maung Po v. Maung Po*, A.I.R. 1938 Rang. 49, 174 I.C. 169. The section does not apply to oral sales—*Krishnabai v. Parwati Bai*, A.I.R. 1936 Nag. 282, 165 I.C. 934; *Subodh v. Bhagwandass*, A.I.R. 1947 Cal. 353, 50 C.W.N. 851; *Balkrishna v. Rangnath*, A.I.R. 1951 Nag. 171, I.L.R. 1950 Nag. 618. A distinction, however, must be drawn between a writing which is a reduction into writing of a previous oral agreement which will fall within sec. 53-A and writing in which there is a mere reference to a previous oral

agreement—*Maung Ohn v. Maung Po*, A.I.R. 1938 Rang. 356; *Shravan v. Garbad*, supra.

Where the terms of a contract has been reduced to the form of a document, it takes the place of the oral contract—*Radhabai v. Nayadu*, A.I.R. 1951 Nag. 285, I.L.R. 1950 Nag. 799. But the mere admission by the transferor in mutation proceedings that the land has been sold to the vendee, even though in writing, is not a written contract—*Dharameshwar v. Lakhyadhar*, A.I.R. 1950 Ass. 107. The doctrine of part performance does not apply to a gift—*Dayaram v. Ghasia*, 1958 M.P.L.J. (Notes) 155; *Serandaya Pillai v. Sankaralingam Pillai*, (1959) 2 Mad. L.J. 502.

273A. Proviso :—This Proviso saves the right of a transferee for consideration who has no notice of the contract. Therefore, where the plaintiff claimed possession of the property under a good contract of sale earlier in date to the defendant's contract and the defendant was not a transferee for value and he took his contract with the knowledge of the plaintiff's earlier contract, this section did not apply—*Hemraj v. Rustomji*, A.I.R. 1953 S.C. 503. See also *Moolji Sicca & Co. v. Nur Mohammad*, infra. But when actually the transferee has such notice, the informality of the manner in which he acquired that notice or information is not material—*Gopalan v. Kanaran*, A.I.R. 1953 Mad. 925. Where A obtains possession of a piece of land in pursuance of an agreement to sell executed by P and Q, two joint owners, but the deed of sale is executed by P alone in respect of his share, an assignee from A with possession cannot invoke sec. 53A in a suit for recovery of possession by Q—*K. Dharma Rao v. K. Satyavathi*, A.I.R. 1969 Andh. Pra. 129. Sec. 53A creates no real right, it merely creates rights of estoppel, which are not available against a third person—*S. N. Banerjee v. Kuchwar Lime and Stone Co. Ltd.*, A.I.R. 1941 P.C. 128. Where the defendant fails to prove the elements necessary to sustain claim under the main provision of sec. 53A, he cannot defeat the suit by a vendee by merely proving that the vendee purchased with notice of the defendants' contract to purchase—*Prova Rani v. Lalit Mohon*, A.I.R. 1960 Cal. 541.

A person having notice of the same cannot, however, resist the claim of the right of a person to defend his possession under the unregistered contract—*Moolji Sicca & Co. v. Nur Mohammad*, A.I.R. 1938 Nag. 377. The burden of proof as to notice is on the person claiming the benefit of the doctrine of part performance—*Ko Ma v. Ma May*, A.I.R. 1935 Rang. 12, 154 I.C. 474; *Sasirekhamma v. Suranuma*, A.I.R. 1952 Or. 163. A mortgaged with possession his house with B. Subsequently A sold the house to B in consideration of the mortgage debt and the amount spent by B on the improvement and repair of the house. The deed was not registered. A sold his equity of redemption to C under a registered sale deed. C sued B for redemption. The trial court gave a decree for possession on payment of the mortgage money plus the amount spent by B for repairs and improvements and the decision of the trial court was upheld on appeal and thereafter by the High Court. The suit was decreed as B, the mortgagee failed to prove that C was not a *bona fide* purchaser for value and that he had notice of the earlier transaction in favour of B. The suit was decreed also on the ground that B failed to show that he continued in possession of the mortgaged property in part performance

of the contract of sale—*Kukaji v. Basantilal*, A.I.R. 1955 Madhya Bharat, 93. But the Mysore High Court has taken the view that if a mortgagee purchaser under an unregistered deed of sale has paid either the whole or part of the consideration, the same can be said to be in pursuance of the contract of sale—*Chikkannaswamy v. Hayat Khan*, A.I.R. 1955 Mys. 38.

273B. Moveable property :—This section does not apply to moveable property *Bhobi Dutt v. Ramalalbyammal*, A.I.R. 1934 Rang. 303, 152 I.C. 431.

CHAPTER III OF SALE OF IMMOVEABLE PROPERTY.

54. "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and partpromised.
"Sale" defined

Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.
Sale how made.

In the case of tangible immoveable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.
Contract for sale.

It does not, of itself, create any interest in or charge on, such property.

As to the limitation to the territorial operation of paras 2 and 3 of this section, see sec. 1, *supra*. Section 54 extends to every cantonment in British India—see sec 287 of the Cantonments Act, 1924.

Scope :—The provisions of this section are overridden by sec. 31 (1) of the Orissa Tenancy Act, 1913. Thus every transfer of an occupancy holding or a portion thereof by sale irrespective of the value of the property is compulsorily registrable under that section—*Paramananda v. Sankar*, A.I.R. 1951 Or. 11, I.L.R. 1950 Cut. 322.

274. Applicability of section to Mahomedans :—This section applies to Mahomedans as well as to Hindus. Mahomedans have no more right to transfer immoveable property without complying with the provisions of the Transfer of Property Act than any member of the other community, and to allow them to do so would in effect be repealing the pro-

visions of this Act so far as the Mahomedan community is concerned—*Ghafuruddin v. Hamid Husain*, 10 A.L.J. 154, 16 I.C. 679.

But some cases have laid down that for the purposes of *pre-emption*, this section need not be entirely applied to Mahomedans, so that if a sale is invalid under this section but valid under the Mahomedan Law, the pre-emptor would get a right of pre-emption. Thus, a property worth Rs. 300 can be sold only by a registered deed under the second para of this section, but under the Mahomedan law delivery of possession of the property would be sufficient to complete the sale. Therefore, if the property is orally sold and possession delivered, there would be a valid sale under the Mahomedan law, which would give rise to a right of pre-emption, though the sale is invalid under this Act—*Abdullah v. Ismail*, 46 Bom. 302, A.I.R. 1922 Bom. 124, 64 I.C. 913; *Janki v. Girjadut*, 7 All. 482 (F.B.). In considering the question of pre-emption, the rule of Mahomedan law alone is to be applied, and if the sale is valid under that law, the right of pre-emption will arise, although the sale may be incomplete under this Act—*Begum v. Muhammad Yakub*, 16 All. 344 (F.B.). But the Patna and Calcutta High Courts are of opinion that sec. 54 of this Act abrogates the Muhammadan law of sale even in respect of pre-emption, and no right of pre-emption arises until the sale has been completed under this section by registration—*Kheyali Prasad v. Mullick Nazarul Alum*, 20 C.W.N. 1048, 1 P.L.J. 174, (177, 178), 34 I.C. 210; *Budhai v. Sonaplla*, 41 Cal. 943 (949), 18 C.W.N. 890, 23 I.C. 385 (*per* Carnduff J.). The same opinion was expressed by Banerji J. in *Begum v. Yakub*, 16 All. 344 (356).

Where transfer was made in the form of a sale in lieu of *Kharch-i-pandan* in favour of the transferor's wife and the money consideration shown in the deed of transfer not to be the capitalized value of the right, the transaction is neither an exchange nor a sale. In such a case there is no right of pre-emption—*Shujat Ali v. Mt. Salim Jahan*, A.I.R. 1949 All. 204, 1948 A.L.J. 527.

If the case is governed by the Agra Pre-emption Act, a sale that is pre-emptible under that Act is a sale as defined in sec. 54, T. P. Act. A transfer of property of value more than Rs. 100, effected by a compromise decree is not a valid sale under this Act, in the absence of a registered instrument, and cannot therefore be the subject of pre-emption—*Bindraban v. Rajput*, 53 All. 100, A.I.R. 1931 All. 741 (742), 1930 A.L.J. 1564, 131 I.C. 242, following *Paras Ram v. Neksai*, 50 All. 454, A.I.R. 1928 All. 67.

As regards *waqf*, a bare dedication of the property without delivery of possession is sufficient to a *waqf*—*Zainab Bi v. Jamalkhan*, A.I.R. 1951 Nag. 428, I.L.R. 1949 Nag. 426.

Oral transfer of immoveable property of the value of more than Rs. 100 by a Mahomedan to his wife by way of gift in lieu of dower debt is not valid. Such a transaction is not a true *hiba-bil-ewaz*, but a sale—*Ghulam Abbas v. Razia Begum*, A.I.R. 1951 All. 86 (F.B.), 1950 A.L.J. 917; *Md. Usman v. Amir Main*, A.I.R. 1949 Pat. 237, 26 Pat. 561; *Masum Vali v. Illuri Modin*, A.I.R. 1952 Mad. 671.

274A. Sale :—In determining the question whether a transaction is

a sale or any other transfer the Court should look not merely to the ostensible appearance given to it by the words used by the parties, but the real nature and essence of the transaction should be looked at as a whole. The conclusion arrived at by the Court should be the cumulative result of the totality of circumstances emerging from the agreement—*Central Finance and Housing Co. v. British Transport Co.*, A.I.R. 1954 All. 195. What is commonly called *hiba-bil-ewaz* is not a gift but partakes of the character of a sale—*Fateh Ali v. Md. Bakhsh*, A.I.R. 1928 Lah. 516, 5 Lah. 428; *Suburannessa v. Sabdu*, A.I.R. 1934 Cal. 693, 38 C.W.N. 654, 154 I.C. 480. So where the property is immoveable and is of the value of Rs. 100 or upwards the transfer must be effected by a registered instrument—*Ibid.* The Oudh Chief Court has however taken a different view. It holds that all cases of *hiba-bil-ewaz* cannot be held to be sales within the definition in this section, and writing and registration are not always necessary—*Abdul Hamid v. Abdul Ghani*, A.I.R. 1934 Oudh 163, 148 I.C. 801, following *Bashir v. Zubaida*, A.I.R. 1926 Oudh 186, 92 I.C. 265.

For the purpose of ascertaining whether an instrument is a sale-deed or a release, the word "release" used in the document is not sufficient. In the document executed by B in favour of A, members of a joint Hindu family, it was stated in full quit of his share in the family property A was to be paid Rs. 150 by B who executed a promissory note in favour of A, and the document was named as a release, it was held that the transaction amounted to a sale—*Somu v. Singara*, A.I.R. 1945 Mad. 407, (1945) 2 M.L.J. 17.

The mere fact that in the contract between the parties there might be various covenants or the existence of a provision giving the seller certain rights as consideration does not change the character of the transaction if in substance it is one of sale—*Matta Sura v. Mana Rama*, A.I.R. 1937 Mad. 714, 176 I.C. 444.

Execution of a sale deed does not mean signing the deed but it means all acts necessary to make the parties bound thereby. If a man merely signs a contract and puts it in his pocket and does not allow it to depart from him as his act, that is not execution—*per* Sir Courtney Terrel, J. in *Sunder v. Lalji*, A.I.R. 1933 Pat. 129, 145 I.C. 698.

Certain property in possession of a third party against whom a suit had to be brought to recover its possession was sold for a consideration of Rs. 5,000. Under the deed the vendor was not to get any advantage in case the vendee afterwards succeeded in recovering possession, nor was he liable if the suit failed. The vendee, without waiting for the expiry of one year during which a suit for pre-emption could be brought, sued and recovered the property. A suit was subsequently brought for pre-emption: held that the transaction was a sale within the meaning of this section and was pre-emptible by sec. 11, Pre-emption Act, 1922, and that the vendee was entitled to a proportionate amount of the total costs incurred by him whether in Court or out of Court, but he was not entitled to the benefit of the enhanced value which was in the nature of acquisition to the estate, when there was no pressing necessity for him to sue within a year—*Badri v. Bejoy*, A.I.R. 1932 All 685, 139 I.C. 693.

Boundaries v. area :—Where there is a conflict between boundaries and area in a sale deed and there is no vagueness in the boundaries, they will prevail and the area must be taken as approximate—*Hara Krishna v. Ram Surat*, A.I.R. 1952 Trip. 28 relying on *Nandlal v. Ghulam Ahmad*, A.I.R. 1937 Lah. 940 and *Pannalal v. Bhaiya Lal*, A.I.R. 1937 Nag. 281; *Delli Gramani v. Ramachandram*, A.I.R. 1953 Mad. 769.

Material alteration in a sale-deed :—A material alteration in a deed is one which varies the rights, liabilities or legal position of the parties ascertained by the deed in its original state or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision which was originally unascertained and as such prejudices or may otherwise prejudice the party bound by the deed as originally executed—*Nather Lal v. Mt. Gumti Kuar*, 67 I.A. 318, I.L.R. 1940 All. 625, 45 C.W.N. 29, A.I.R. 1940 P.C. 160. If an alteration (by erasure, interlineation or otherwise) is made in a material part of a deed after its execution, by or with the consent of any party thereto or person entitled thereunder, the deed is thereby made void. The avoidance however is not *ab initio* or so as to nullify any conveyancing effect which the deed has already had, but only operates as from the time of such alteration and so as to prevent the person who has made or authorized the alteration and those claiming under him from putting the deed in suit to enforce against any other party bound thereby, any obligation, covenant or promise thereby undertaken or made—*Ibid*.

Sale in insolvency proceedings :—A sale in insolvency proceedings, whether it be a direct sale by the Official Receiver or a sale at an auction, is nothing more than a transfer by act of parties and therefore the provisions as to registration apply to such sale—*Raghubir v. Kunj Behari*, A.I.R. 1942 All. 39 (41); see also *Shankaram v. Ganapati*, 50 Mad. 135 (F.B.), 51 M.L.J. 529, A.I.R. 1927 Mad. 1; *Abdul Hashim v. Amar Krishna*, 46 Cal. 887; *Golam Hossein v. Fatima Begum*, 16 C.W.N. 394.

276. Transfer of ownership :—The Indian law does not recognize legal and equitable estates; therefore there can be one "owner". Where the property is vested in a trustee, the "owner" must be the trustee. The right of the beneficiary is, in a proper case, to call upon the trustee to convey to him. Until conveyance he is not the "owner"—*Chhatru Kumari v. Mohan Bikram*, A.I.R. 1931 P.C. 196, 10 Pat. 851, 53 I.A. 279, 35 C.W.N. 953, 133 I.C. 705.

The "transfer of ownership" marks the difference between a sale and a mortgage. In a mortgage, the mortgagee holds the estate merely as a security for the debt, and not *absolutely*, and he has therefore only a qualified and limited interest in it, confined to the object of satisfying his debt, and so long as the right of redemption remains in the mortgagor, the full proprietary interest and right cannot be said to have passed from him to the mortgagee. In a sale, on the other hand, the proprietary rights pass in their full sense and absolutely—*Indar Sein v. Naubat*, 7 All. 553 (F.B.).

A relinquishment does not pass ownership. In *Jadu Nath v. Rup Lal*, 33 Cal. 967, (1983-84) Mookerjee J. observed: "The plaintiff did not

execute a conveyance in favour of the defendant; but gave him a deed of relinquishment. Now it is well-settled that title to land cannot pass by admission, when statute requires a deed". See also *Mathura Mohan v. Ram Kumar*, 43 Cal. 790. But under this Act a release by *parole* is a perfectly valid transaction. The appropriate form of conveyance whereby a joint tenant relinquishes his interest in favour of another joint tenant is a release and not a sale or gift: It operates rather as an extinguishment of a right than as a conveyance—*Saya Hman v. Saya Hla*, A.I.R. 1935 Rang. 448, 160 I.C. 325. When property is allotted to a partner as his share of the residue on dissolution the transaction is not a sale—*Commissioner of Income-tax v. Dewas Cine Corporation*, A.I.R. 1968 S.C. 676.

A *compromise* is merely an acknowledgment of the existing rights of parties. It is not a transfer of ownership, and is consequently not a sale. This section therefore does not apply; so, if the terms of a compromise affecting land worth less than Rs. 100 are reduced to writing, it is not necessary that the writing should be registered or possession given under the 3rd para of this section—*Krishna Tanhaji v. Aba Shetta*, 34 Bom. 139.

Where during the pendency of a suit the parties executed a document the effect of which was that the litigation should pursue its full course and whatever the result might be, the contestants would at the end of the litigation divide the property, it was held that was an agreement to divide the property at the end of the litigation and could not create any interest in the property under this section—*Rupchand v. Jankibai*, A.I.R. 1926 Bom. 24, 91 I.C. 817, 27 Bom. L.R. 1441.

Under this section a sham deed of sale, even if registered, does not pass title, for the sale does not become complete in such a case by mere execution of the deed—*Mt. Boota v. Gur Prasad*, A.I.R. 1937 Oudh 20, 12 Luck. 313, 164 I.C. 817. In such a case title does not pass to the vendee and a suit by the latter for possession is not maintainable—*Abdul Wahab v. Muquarrab*, A.I.R. 1939 Pesh. 27, 1939 Pesh. L.J. 35, 183 I.C. 221; see also *Basalingava v. Revanseddappa*, 56 Bom. 556, 34 Bom. L.R. 427, A.I.R. 1939 Bom. 247; *Parsotam v. Ali Haidar*, 13 Luck. 484, 1937 O.W.N. 944, A.I.R. 1937 Oudh 493 and *Hemraj v. Trimbak*, A.I.R. 1924 Nag. 146, 78 I.C. 1011.

A family arrangement can ordinarily be effected orally, but if reduced to writing and the arrangement results in a transfer of title from one side to the other, then registration is necessary—*Kashiprasad v. Bedprasad*, A.I.R. 1940 Nag. 113 (116), 1939 N.I.J. 216, 189 I.C. 117.

Grant of easement :—This section applies to the *transfer* of easements, and not to the *creation* thereof, because the creation of an easement (e.g., a right of way) is not a *transfer of ownership*. An easement can therefore be created by a *verbal agreement*, or unregistered document; no writing or registration is necessary under this section—*Satyanarayan-amurti v. Lakshmayya*, 57 M.L.J. 46 115 I.C. 145, A.I.R. 1929 Mad. 79 (80); *Gun Sone v. Cassim Dalla*, 9 Bur. L.T. 222, 34 I.C. 95; *Sital Chandra v. Delanney*, 20 C.W.N. 1158 (1164), 34 I.C. 450. By a document A agreed that when B would build his second storey, he (B), should

have a right to discharge rain-water as well as water used for daily household purpose through certain spouts, and that A would take the additional burden on the servient tenement. *Held* that the right granted was an easement within the meaning of sec. 4 of the Easements Act. The deed did not transfer any portion of the grantor's (A's) right of ownership, and the document did not require registration—*Bhagwan Sahai v. Narasinha Sahai*, 31 All. 612, followed in *Kondayya v. Veerama*, A.I.R. 1926 Mad. 543, 92 I.C. 672.

... 278. **Price** :—"In all sales it is evident that price is an essential ingredient, and that where it is neither ascertained nor rendered ascertainable, the contract is void for incompleteness and incapable of enforcement. It is not, however, necessary that the contract should in the first instance determine the price. It may either appoint a way in which it is to be determined, or it may stipulate for a fair price"—Fry on Specific Performance, 6th Edn. Secs. 353, 354; *Ram Sundar v. Kali Narain*, 55 Cal. 285, A.I.R. 1927 Cal. 889 (893), 104 I.C. 527.

Price means *money*—*Empress v. Acappa*, 9 Mad. 141; *Volkart v. Vettivelu*, 11 Mad. 459 (at p. 467); *Samaratmal v. Govind*, 25 Bom. 696; *Madam Pillai v. Badrakali*, 45 Mad. 612 (617) (F.B.); *Abadi Begam v. Khalil*, *infra*; *Venkata v. Venkata*, A.I.R. 1931 Mad. 140, 54 Mad. 163, 135 I.C. 17; *Ghulam Abbas v. Razia Begum*, A.I.R. 1951 All. 86 (F.B.), 1950 A.L.J. 917 per Bhargava J. A sale is a transfer of ownership in exchange for *money*. If a property is transferred in exchange for some thing other than money, the transaction is called an *exchange*—*Talib Ali v. Kaniz Fatima*, 2 Luck. 575, 4 O.W.N. 400, A.I.R. 1927 Oudh 204 (205), 102 I.C. 142; *Commissioner of Income-tax v. Motors and General Stores Ltd.*, A.I.R. 1968 S.C. 200. Where the consideration for the transfer is something in addition to half the value of the property, *i.e.*, forbearance on the one side to take proceedings to set aside Court sale, the transaction cannot be called a sale, nor is it an exchange there being no mutual transfer of ownership of things—*Venkata v. Venkata*, *infra*. Where the only consideration for the transfer is forbearance on the part of the transferee not to contest a title suit by the transferor, the transaction is not a sale—*Mahima v. Dinabandhu*, A.I.R. 1960 Orissa 16. But where the vendor agrees to sell certain property to the vendee in consideration of certain decretal amounts due from him to the vendee, the result of the arrangement is that the decretal amount changes its legal character and becomes purchase-money in the hands of the vendor and the amount is "price" within the meaning of this section—*Matta Sura v. Mana Rama*, A.I.R. 1937 Mad. 714, 176 I.C. 444. An agreement between two persons to divide the fruits of a contemplated litigation, in which the consideration for the transaction is described as "efforts, attempts, proceedings, payment of vakils' fees, and the danger of failure and loss" cannot be held to be a transaction of sale, because there is no *price* (*i.e.*, money price) fixed, which is of the essence of a sale, and no amount of money is paid or promised to be paid but the whole is left in the hands of the speculators for the purpose of meeting the expenses of a litigation—*Abadi Begam v. Khalil*, 6 Luck. 282, A.I.R. 1930 Oudh 481 (495), 132 I.C. 753. The transaction does not become a sale merely because the parties are sometimes described as vendors and vendees—*Ibid*.

Where in lieu of advances made by one brother to another a sale deed is executed by the latter in favour of the former, the transaction cannot be presumed as *benami*. It is for good consideration even if some of the advances were barred by limitation—*Asoke v. Chota Nagpur Banking Assn.*, A.I.R. 1947 Pat. 247. There may be valuable consideration other than payment of money or promises to pay money. Thus where the consideration of the sale was that the vendee should conduct litigation in respect of the property sold at his own expense and after successful termination thereof was to pay the vendor 50 per cent. of the value of the property when recovered, it was held that the vendor sold the property itself and not a mere right to sue—*Beni Madho v. John*, A.I.R. 1947 All. 321.

It is settled law that notwithstanding an admission in a sale-deed that the consideration has been received, it is open to the vendee to prove that no consideration has actually been paid, and that if it was not so, facilities would be afforded for the grossest frauds. It is no infringement of sec. 92 of the Evidence Act for a Court to accept proof that by a collateral arrangement between the vendor and purchaser, the consideration money remained with the purchaser, and under the conditions agreed between them—*Irfanali v. Jogendra*, A.I.R. 1932 Cal. 708, 59 Cal. 1111, 36 C.W.N. 461, 143 I.C. 241. See also *Shah Lal Chand v. Indarjit*, 22 All. 370, 27 I.A. 93; *Shah Makhanlal v. Sri Krishna*, 12 M.I.A. 157 and *Chuni v. Basanti*, 36 All. 537. Ordinarily, consideration for a sale is a valuable consideration or price. Past cohabitation besides being immortal is not a valuable consideration—*Sabava v. Tamanappa*, A.I.R. 1933 Bom. 209, 35 Bom. L.R. 345. But see *Gastho v. Rohini*, 13 C.W.N. 692.

In order that a transaction may be a sale, the payment of some money or consideration must be contemplated. The creation of an *adhlapi* tenure, whereby in consideration of sinking a well and clearing the land attached to it within a certain period, a person was to get possession of a part of the land as proprietor, does not amount to a sale—*Ghulam Muhammad v. Tikchand*, 2 Lah. 199 (202), A.I.R. 1921 Lah. 82, 62 I.C. 932. A transfer of property partly in consideration of money and partly in consideration of a forbearance on the part of the purchaser to take certain legal proceeding is not a sale—*Venkata Jagannadha v. Venkata Kumara*, 54 Mad. 163, 60 M.L.J. 56, A.I.R. 1931 Mad. 140 (143).

A discharge of future maintenance is not a 'price', and therefore the transfer of property by husband to his wife for her use during her lifetime in discharge of her future maintenance is not a sale—*Madam Pillai v. Badrakali*, 45 Mad. 612 (F.B.). A transfer of property in lieu of discharge of the right of maintenance of the transferee charged on the property is not a sale but an exchange—*Rajjo v. Lajja*, 26 A.L.J. 169, A.I.R. 1928 All. 204 (205), 114 I.C. 43. In another Madras case it has been held that a transfer of property in consideration of a discharge of a debt is a transfer in exchange of a 'price' and amounts to a sale—*Ariyaputhira v. Muthu Kumaraswami*, 37 Mad. 123, 15 I.C. 343. But this case has been disapproved of in 45 Mad. 612 (F.B.) cited above.

Assignment of property by a Mahomedan to his wife as a dower is not a sale—*Ali Hasan v. Mt. Rashidan*, A.I.R. 1931 All. 237, 124

I.C. 750. But a transfer of immoveable property by a Muhammadan in favour of his wife in lieu of dower is a sale—*Asalat v. Sambhu Dayal*, 14 O.C. 214, 11 I.C. 928; *Fahmidunnissa v. Hiralal*, 64 I.C. 126 (Nag.); *Md. Zaki Khan v. Mannu*, 28 O.C. 227, 87 I.C. 176, A.I.R. 1925 Oudh 407, 2 O.W.N. 171; *Saiful v. Abdul Aziz*, 1931 A.L.J. 951, 133 I.C. 901; *Abbas Ali v. Karim Bakksh*, 13 C.W.N. 160, 4 I.C. 466. Where the transfer of property is made in lieu of a sum of money whether the money is paid in cash or by the *extinction of a dower-debt*, the transaction comes within the definition of a sale in sec. 54, T. P. Act—*Md. Zaki Khan v. Mannu*, (supra). But see *Bashir Ahmad v. Zobaida*, 1 Luck. 83, 29 O.C. 108, A.I.R. 1926 Oudh 186, 92 I.C. 265, and *Talib Ali v. Kaniz Fatima*, (supra), where such a transaction has been held to be a *hiba-bil-ewaz* (exchange) and not a sale, (and cannot give rise to a right of pre-emption) as the word 'price', in this section means money and not the release of an obligation to pay dower-debt. But so far as the T. P. Act is concerned, it makes no difference whether the transaction is treated as a sale or an exchange, for in either case, sec. 54 applies (see sec. 118).

Where at the time of sale the property sold was not in the possession of the vendor but was held by a third party against whom a suit had to be instituted for recovery of possession, but the vendor being too poor to sue for its recovery sold the property to the purchaser for Rs. 5,000, and it was agreed that the vendor was not to get any further sum if the vendee succeeded in his suit for recovering the property, nor was the vendor liable if the suit failed, *held* that the total consideration was Rs. 5,000, neither more nor less, and the property was transferred for this cash consideration. The transaction was therefore a sale—*Badri Prasad v. Bijay Nand*, 54 All. 905, 139 I.C. 693, A.I.R. 1922 All. 685; *Beni Madho v. John*, A.I.R. 1947 All. 321.

Where the larger part of the consideration was paid by the vendee, the sale cannot be held as hollow—*Radhabai v. Gopal*, A.I.R. 1944 Bom. 50, 45 Bom. L.R. 980. Title passes to the vendee, unless there was intention of the parties that it would not pass until the entire amount of the consideration has been paid—*Rajkumar v. Uchit*, A.I.R. 1951 Pat. 454. Non-delivery of the original document of sale and non-delivery of possession were not held to be important in the circumstances of this case.

279. "Promised":—Conditional promise to pay price :—There is nothing contrary to public policy in providing in a deed that the payment of the consideration in a transaction amounting to a sale shall be postponed under certain events (*e.g.*; until possession is obtained within a year) and that it shall not be paid at all in the event of the property being lost or possession not being obtained. It does not thereby become a gambling transaction—*Kauleshar v. Abadi Bibi*, 37 All. 631 (633). Where in a contract for sale the entire purchase-money was to be paid within one month after the receipt of earnest money, and the vendor during that month accepted various instalments towards the purchase-money, the vendor should be regarded to have waived his right for entire payment within one month and cannot plead time as essence of the contract—*U Tha v. Chettiar Firm*, A.I.R. 1938 Rang. 367.

281. Non-payment of price :—The words 'price paid or promised' show that where a sale has been completed by execution and registration of the conveyance, the mere non-payment of the purchase-money does not prevent the passing of the title of the property sold from the vendor to the purchaser; and the vendee, notwithstanding such non-payment, can maintain a suit for possession of the property—*Shiblal v. Bhagwan*, 11 All. 244 (252); *Krishnamma v. Mali*, 43 Mad. 712, 38 M.L.J. 467, 56 I.C. 530; *Somasundaram v. Shwe Ba*, 13 Bur. L.T. 26, 57 I.C. 948; *Bajinath v. Paltu*, 30 All. 125 (127); *Umed Lal v. Davu*, 2 Bom. 547 (548); *Ramdhari v. Borakh Rai*, 10 Pat. 264, 133 I.C. 34, A.I.R. 1931 Pat. 236; *Tatia v. Babaji*, 20 Bom. 176 (183); or he can maintain a suit for declaration of his proprietary right, in case the property is in the possession of other persons, e.g., mortgagees—*Kesri v. Ganga*, 4 All. 168 (170). If the executant conveys title to the vendee from the date of the execution of the document and the recital regarding consideration comes later independently of the clause regarding title, then the title passes independent of the question of consideration—*Michha Kumar v. Raghu Jena*, A.I.R. 1961 Orissa 19.

As regards the remedy of the vendor, it has been held in some cases that he is to bring a separate suit for recovery of the purchase-money. The Court cannot, in a suit brought by the purchaser for possession, make the decree for possession conditional on the payment of the purchase-money, nor can it decree payment of the vendor in the purchaser's suit—*Krishnamma v. Mali*, 43 Mad. 712 (713, 714); *Velayutha v. Govindaswamy*, 34 Mad. 543 (544); *Somasundaram v. Shwe Ba*, supra; *Sagaji v. Namdev*, 23 Bom. 525 (527). The grounds of this decision are : *firstly*, that it is not competent for the Court to incorporate the vendor's charge for unpaid purchase-money into the decree passed in the suit brought by the purchaser for recovery of the property; and *secondly*, that as the vendor is not able to set up a counter claim, the decree cannot incorporate the vendor's lien. But these are mere matters of convenience and procedure, rather than of substantive law, and from the point of view of convenience it has been decided in some other cases that in decreeing the purchaser's suit for possession the Court can make it subject to the condition that the purchaser shall pay the purchase-money within a time fixed by the Court, and that on his failure to pay within the time so fixed the suit shall stand dismissed—*Bajinath v. Paltu*, 30 All. 125 (127); *Basalingava v. Chinnava*, 30 Bom. L.R. 1064, 114 I.C. 369, A.I.R. 1929 Bom. 60 (62); *Basalingava v. Chinnava*, 56 Bom. 556, 138 I.C. 534, A.I.R. 1932 Bom. 247 (250); *Jogeendra v. Manmatha*, 34 I.C. 106 (108); *Umedmal v. Davu*, 2 Bom. 547 (549); *Rama Aiyar v. Vanamamalai*, 27 I.C. 336 (337); *Nilmadhab v. Haranprasad*, 17 C.W.N. 1161, 20 I.C. 325 (327); *Mt. Pran Dei v. Sat Deo*, A.I.R. 1929 All. 85, 111 I.C. 761; *U Tin v. Chettiyar Firm*, A.I.R. 1933 Rang. 401, 147 I.C. 742. In other words, the right of the purchaser to obtain possession and the right of the vendor to realise the unpaid purchase-money should be recognised and enforced in *one action*. If the Court gives an unconditional decree to the purchaser for possession, the vendor will be driven to institute another suit for the unpaid purchase-money. It is obviously undesirable that the matter in controversy which may be settled without disadvantage to any of the parties in a single

litigation should be repeatedly agitated in a succession of suits—*Nil-madhab v. Haran Prosad*,^{*} *supra*; *Basalingava v. Chinnava*, *supra*. But the vendor has no right, on account of non-payment, to treat the sale as void and convey the property to a third person—see *Shib Lal v. Bhagwan*, 11 All. 244 (251, 252); *Kesri v. Ganga Prasad*, 4 All. 168; *Moidin v. Avaran*, 11 Mad. 263 (264). As to the vendor's charge for unpaid purchase-money, see Note 311 under sec. 55.

Where there is a registered deed of sale, which is not tainted by any fraud or the like, it passes the title and interest conveyed, notwithstanding the non-payment of purchase-money—*Chetty Firm v. Chetty Firm*, 9 Bur. L.T. 199, 34 I.C. 125 (126); *Jogendra v. Manmatha*, 34 I.C. 106 (107). The non-payment of the consideration money may be an important item to be taken into consideration in determining whether the conveyance 'was or was not a real transaction. But a conveyance, notwithstanding the non-payment of consideration, may be a perfectly good transaction, except where the conveyance is drawn in such a form that the transfer is conditional only upon the payment of the consideration money—*Kumud Kamini v. Khudumani*, 47 I.C. 202 (203, 204) (Cal.); *Makhian Lal v. Hanuman*, 2 P.L.J. 168 (170), 38 I.C. 877; *Sarjug Saran v. Ramcharitar Singh*, 1968 B.L.J.R. 74. The true test in such a case is the intention of the parties to the transaction. If the intention is that the title should pass immediately even though the consideration has not been paid, the title passes; that is, the failure to pay the consideration for a conveyance does not defeat the conveyance, except when there is an agreement that it should take effect only if the consideration is first paid—*Nitai Chandra v. Champaklata*, 29 C.L.J. 250, 51 I.C. 104 (105). On the other hand, if the operation of the transaction was intended to be postponed till the consideration money had been paid, the transfer would become complete and operative only upon such payment—*Kashi Das v. Chaithru*, 19 C.L.J. 239, 23 I.C. 813; *Abdullah v. Bhichuk*, A.I.R. 1934 Pat. 68, 147 I.C. 767. The question whether the passing of the title is postponed till the payment of the entire price depends on the intention of the parties to be gathered from the sale-deed itself; but where it is not clear, the surrounding circumstances and the conduct of the parties may be considered—*Pirtam Singh v. Jagannath*, A.I.R. 1947 Pat. 1, 12 B.R. 318; *Ghanshyam v. Udayanath*, A.I.R. 1949 Or. 14, 14 Cut. L.T. 40; *Ramchandra Biharilal Firm v. Mathuramohon Naik*, A.I.R. 1964 Orissa, 239. In cases of sale, it is seldom the intention of the parties to allow title to pass without the receipt of consideration and this intention can be gathered from the sale-deed—*Shiba Prasad v. Upendra*, A.I.R. 1935 Pat. 45, 154 I.C. 612; *Munshi Bahem Khan v. Ramachandra Samat*, I.L.R. (1964) Cut. 381. Where the sale-deed expressly stipulates that if the vendee omits to pay the balance of purchase-money within a specified time the deed will be treated as null and void, the vendor is entitled to avoid the deed on the vendee failing to make the payment agreed upon—*Bakhtawar v. Naushad Ali*, 55 I.C. 659 (Oudh). But in a recent case, in similar circumstances, the Privy Council has held that there is nothing in sec. 31, which merely declares that a limitation upon a condition subsequent is a lawful method of grant, to exclude the right of the Court to give relief to vendees who failed to make payment by the date agreed upon in the sale-deed which

provided that on failure by the vendees to make payment to vendor's creditors within the date fixed, the deed was to stand cancelled and the cash balance received by the vendors was also to be forfeited—*Devendra v. Surendra*, A.I.R. 1936 P.C. 24, (25-26), 15 Pat. 127, 40 C.W.N. 238, 63 I.A. 26, 159 I.C. 559; *Shankar Nand Seal v. Harichand Mehra*, 1966 B.L.J.R. 291. Refusal by the vendee to pay the price to the vendor would not by itself be a reason for setting aside the sale. Once a sale is completed, it cannot be rescinded for failure of consideration, unless that right is *expressly reserved*, in which case an action will lie not in consequence of any general right vested in the vendor but on the express covenant made in the deed. In another case, all that the vendor could claim would be damages for breach of the promise to pay the price—*Bai Devmani v. Ravishankar*, 53 Bom. 321, 31 Bom. L.R. 109, 116 I.C. 236, A.I.R. 1929 Bom. 147 (150); *Prem Singh v. District Board*, A.I.R. 1934 Lah. 917, 151 I.C. 163.

Where the father of a minor got a sale-deed in the name of his son by which the father agreed to discharge certain debts binding upon the property sold to the minor and the deed provided "the debt shall be discharged and the minor may hold and enjoy the lands exclusively": held that the property vested in the minor though the debts were not discharged—*Gangai v. Govinda*, A.I.R. 1924 Mad. 544, 84 I.C. 626.

Where a cash payment is to be made at the time of registration, the commoner practice is for the vendee on payment to present the deed for registration and get the registration receipt. But while the retention of the receipt by the vendor is suggestive of non-payment of the cash sum, it is not sufficient proof by itself of non-payment—*Bhup Narain v. Gokul*, A.I.R. 1934 P.C. 68 (70), 13 Pat. 242, 61 I.A. 115, 38 C.W.N. 393, 147 I.C. 1134.

Where the recital in a registered sale-deed showed that full consideration was received by the vendor and possession was delivered to the vendee, but it was found that not a farthing was paid by the latter and the possession of the property and the registered sale-deed remained with the vendor, the conclusion was irresistible that the intention of the parties was that title would not pass unless consideration money was paid and that the title remained with the vendor—*Motilal v. Ugrah Narain*, A.I.R. 1950 Pat. 288. See also *Girish v. Akhtar*, A.I.R. 1953 Pat. 330; *Chandrasekhar v. Pitambari*, A.I.R. 1953 Or. 315; *Panchoo v. Janki*, A.I.R. 1952 Pat. 263; *Gopalakrishnamurthi v. Madireddi*, A.I.R. 1949 Mad. 882, (1949) 1 M.L.J. 240. But see *Chandrashankar v. Abhla Mathur*, A.I.R. 1952 Bom. 56, 53 Bom. L.R. 861, where it has been held that the recital in the sale-deed of the payment of the consideration if not true, does not render the deed invalid. If the document shows that there was an intention to pay the consideration, it is not rendered invalid on account of non-payment of the consideration. So long as passing of the consideration is not a term of the contract, evidence that it did not pass, though the contract did not recite it, is not prohibited by sec. 92, Evidence Act and oral evidence can be admitted under Proviso 2 thereof—*Mutyalu v. Veerayya*, A.I.R. 1946 Mad. 452, (1946) 1 M.L.J. 346.

Where the vendee purchased under a registered sale-deed, but he

abstained from paying the purchase-money for more than three years, and allowed his vendor to retain possession and to sell the land to other persons, *held* that the vendee was not thereafter entitled to bring a suit for possession—*Sangu v. Cumarasami*, 18 Mad. 61 (63). Where the sale-deed was registered and possession delivered to the vendee, but no consideration was paid (although it was expressed in the sale-deed to have been paid) and it was found that the vendor was forced to execute the deed during his illness under undue influence, *held* that the vendor was entitled to have the sale-deed cancelled and possession restored—*Tatia v. Balaji*, 22 Bom. 176. Where the parties enter into a bargain for the sale of property, then if the real intention is that the property should pass, the mere fact of non-payment of part or even the whole of the consideration will not make the deed of transfer fictitious. But the non-passing of the consideration may often be a very strong evidence that the conveyance is not a real transaction and that the deed was not intended to operate. Each case must be decided upon the facts proved—*Alamdard v. Moti Ram*, 16 A.L.J. 454, 46 I.C. 382. Where the fact found is that a portion of the consideration set out in a sale-deed has been found to be good consideration, the mere fact that another portion of the consideration has not been paid is no ground for coming to the conclusion that the parties did not intend the document to be enforceable between them—*Muniram v. Amjad Ali*, 26 A.L.J. 539, A.I.R. 1928 All. 391 (392), 114 I.C. 192.

If no price is paid or even *promised*, there is no sale and the transfer does not take effect, because the essence of sale is exchange of property for a price *paid* or *promised*. Where the price was not paid, and the purchaser never promised to pay it, even a registered conveyance cannot effect a sale—*Maung Saing v. Shwe Lon*, 4 L.B.R. 369.

282. Proof of payment of price :—Notwithstanding an admission in a sale-deed that consideration has passed, the vendor can prove that no consideration has in fact been paid—*Sah Lal v. Indrajit*, 22 All. 370 (P.C.). In such cases, the party (vendor) who alleges non-payment of consideration is ordinarily bound to prove his allegation, and the mere denial by the vendor of the receipt of consideration acknowledged in the recitals of the deed of sale is not in all cases sufficient to cast upon the vendee the burden of proving payment of consideration, especially where the vendee has been put in possession of the property and of the title-deeds—*Rampal v. Suba Singh*, 4 P.L.J. 517, 53 I.C. 83. But where possession has never been transferred after the sale, and the vendee has silently submitted to the withholding of possession for several years, the Court will presume that possession has been withheld for non-payment of consideration, and it will be incumbent on the vendee to give evidence that the consideration has in fact passed and to account for his being out of possession of the property since his purchase—*Achobandil v. Mahabir*, 8 All. 641.

284. Tangible immoveable property :—An undivided share in immoveable property is a tangible immoveable property—*Peari Lal v. Lala*, 14 O.C. 161, 11 I.C. 673; *Maung Hoe v. Pe Hla*, 3 Bur. L.J. 63, A.I.R. 1924 Rang. 267, 83 I.C. 270; *Nathu v. Gulab Chand*, A.I.R. 1934 Nag. 13, 144 I.C. 919. The right to remove sand and earth from a plot of

land has been held to be an interest in immoveable property *Kanji v. Shunmgam*, A.I.R. 1932 Mad. 734, 63 M.L.J. 577, 139 I.C. 510. The interest under a settlement of landed property is an interest in immoveable property—*Official Assignee v. M. E. Molla & Sons*, A.I.R. 1935 Rang. 84, 154 I.C. 9. A mortgage-debt can be validly transferred only in accordance with the provision of this section—*Official Receiver v. Lakshman*, 41 M.L.J. 456; *Perumal v. Perumal*, 40 M.L.J. 25; *Vijayaraghavalu v. Arunachalam*, A.I.R. 1939 Mad. 165, (1939) 1 M.L.J. 582, 18 M.L.W. 766. The right of a usufructuary mortgagee is a legal right in tangible immoveable property—*Pheku v. Syed Ali*, A.I.R. 1937 Pat. 178, 15 Pat. 772, 167 I.C. 890. An assignment of a mortgage-deed requires registration, but the want of registration will not have the effect of extinguishing the original rights of the assignor—*People's Bank of Northern India v. Ram Kishan*, A.I.R. 1938 Lah. 430. A right to catch fish in a lake being a profit a prendre is either immoveable property or an intangible thing—*Ananda Behera v. State of Orissa*, A.I.R. 1956 S.C. 17.

As to what is an 'immoveable property' see 'Notes 17 and 18 under sec. 3.

285. Reversion or other intangible thing :—Unlike the Registration Act, the Transfer of Property Act, sec. 54 does not contain the wide phrase "any interest to or in immoveable property", but the phrase "reversion or other intangible thing" covers every interest in immoveable property which is not regarded (as, e.g., an unavoids share in land is regarded) as being tangible immoveable property in itself—*M. E. Moolla & Sons, Ltd. v. Official Assignee*, (1936) 40 C.W.N. 1253. It has been held by the Lahore High Court that a sale-deed of immoveable property although for Rs. 99 will require registration, if it is in possession of tenants, as what is sold is only an intangible thing—*Sahobuddin v. Kalendar*, A.I.R. 1938 Lah. 304, 40 P.L.R. 24, relying on *Bhaskar v. Padman*, 40 Bom. 313, 33 I.C. 267. A right to redeem a usufructuary mortgage is tangible and not intangible property and a sale of this right to redeem if less than Rs. 100 in value can be effected by delivery of possession—*Sreerama Venkatasubbamma v. Somiseti, Subayya*, A.I.R. 1964 Andh. Pra. 21.

An intangible property can be sold only by a registered deed (para 2), irrespective of value. The following have been held to be intangible property :—

(1) Equity of redemption, in property usufructuarily mortgaged is *intangible* and not *tangible* property, because possession thereof cannot be given to the purchaser—*Ramaswami v. Chinnan*, 24 Mad. 449 (463); *Rahamat Ali v. Muhammad*, 11 A.L.J. 407, 19 I.C. 818 (820; *Jairam v. Balkrishnadas*, 3 N.L.R. 72; *Sheikh Hashmal v. Sheikh Jamir*, 23 C.W.N. 513 (514), 52 I.C. 558; *Mahendra v. Chandrapal*, 24 O.C. 155, 63 I.C. 284. In *Tukaram v. Atmaram*, I.L.R. 1939 Bom. 71, 40 Bom. L.R. 1192, A.I.R. 1929 Bom. 31, Broomfield & Macklin, JJ., have held that the equity of redemption in the case of a usufructuary mortgage is tangible property so that it can be transferred by an unregistered deed where the value of the property does not exceed Rs. 100, following *Sohan Lal v. Mohan Lal*, 50 All. 986 (F.B.), 26 A.L.J. 1084, A.I.R. 1928

All. 726. But this Full Bench case, it appears, does not support the above wide proposition. See in this connection *Ram Kinkar v. Satya Charan*, 43 C.W.N. 281, A.I.R. 1939 P.C. 14. See *Dharmeshwar v. Lakhyadhar*, A.I.R. 1950 Ass. 107 per Ram Labhaya, J. Thadani C. J. contra. See also *Jagarnath v. Chhatu Sah*, A.I.R. 1949 Pat. 504, I.L.R. 27 Pat. 202. But see *Sarju Prasad v. Mt. Aguta Devi*, A.I.R. 1959 Pat. 153 (F.B.) and *Bhanwarlal v. Dhulilal*, A.I.R. 1459 Raj. 218, where the equity of redemption in usufructuary mortgage has been held to be tangible property. So also the equity of redemption in case of a *katkobala* is intangible property—*Ramnarain v. Kula Chandra*, 49 I.C. 426 (Cal). But the equity of redemption in the case of a simple mortgage is tangible immoveable property—*Ramaswami v. Chinnan Asari*, 24 Mad. 449 (463). The interest of a mortgagee in a mortgage which does not involve the immediate transfer of either legal title or possession is an intangible right in immoveable property—*Girdhar v. Motilal*, A.I.R. 1941 Nag. 5, 1940 N.L.J. 151.

(2) Contingent interest—*Subrahmanian v. Perumal*, 18 Mad. 454 (455); *Peari Lal v. Lala*, 14 O.C. 161, 11 I.C. 673.

(3) Right of a simple mortgagee in the property mortgaged—*Ramaswami v. Chinnan*, 24 Mad. 449 (463) (dissenting from *Subramanian v. Perumal*, 18 Mad. 454); *Balagurumoorthy v. Nagulu*, 41 M.L.J. 267, A.I.R. 1921 Mad. 277, 69 I.C. 473; *Mutsaddi Lal v. Muhammad Hanif*, 10 A.L.J. 167, 15 I.C. 853 (854).

(4) *Reversion* :—Where the land is in possession of tenants, the landlord has nothing but a reversion—*Sahabuddin v. Kalendar*, A.I.R. 1938 Lah. 304, 40 P.L.R. 24; *Bhaskar v. Padman*, 40 Bom. 313, 33 I.C. 267; *Damodar v. Giridhari*, 27 All. 564. An “intangible thing” being in the nature of a reversion, a debt which has already become due from a third person (e.g., profits already due from a lambardar to a co-sharer) is not included in the term. An assignment of such a debt does not require to be registered—*Damodar v. Giridhari*, 27 All. 564.

(5) The right of cutting and appropriating “plants now standing or that may hereafter form” on certain land—*Kuthwa v. Thoppai*, 15 I.C. 234 (Mad.).

(6) The interest of a partner in a partnership—*Sahebram v. Purushottamlal*, A.I.R. 1950 Nag. 89, I.L.R. 1950 Nag. 355.

(7) A *patta* right in Hyderabad—*Anthya v. Gottadu*, A.I.R. 1950 Hyd. 58.

Where A allows B to plant mango trees on his land and access to B to gather the fruits thereof, the transaction is not a sale of intangible property—*Balaji v. Misrilal*, A.I.R. 1952 Nag. 321.

This section has no application to the sale of moveable property, such as copyright—*Savitri Devi v. Dwarka Prasad*, I.L.R. 1939 All. 275, A.I.R. 1939 All. 305, 1939 A.L.J. 71; nor to the transfer of a license to sell electricity—*Monmohan v. O. L. Lower Ganges, etc., Distributing Co.*, I.L.R. 1940 All. 568, A.I.R. 1940 All. 458, 1940 A.L.J. 449. There is no law that such a license can be effected only by a written or register-

ed instrument—*Ibid.* A decree passed in a suit for specific performance of the contract to reconvey does not create any interest in immoveable property, and hence the transfer of the share of a Mahomedan minor in the decree by the de facto guardian is not void—*Govinda Chandra Ghose v. Prabhavati Ghose*, A.I.R. 1956 Cal. 147.

286. Mode of transfer :—Paras 2 and 3 lay down the effectual modes of transferring property by sale, and no transfer can be effected otherwise than by complying with the provisions of these paras. The *mutation* of names in the Revenue papers or a statement made before the Revenue officer in a mutation proceeding is not a sufficient compliance with the provisions of this section—*Ram Prasad v. Bedo*, 13 I.C. 436 (All.); *Ram Surup v. Charitter*, A.I.R. 1927 All. 338 (339), 100 I.C. 270. So also, a title to land cannot pass by a mere *admission* when the statute requires a deed—*Mathura Mohan v. Ramkumar*, 43 Cal. 790.

287. Para 2—Registration :—In enacting this section, it was the intention of the Legislature, by means of compulsory registration, to minimise, as far as possible, the chances of litigation and to reduce the opportunities for perjury in connection with sales of immoveable property—*Kurri Veerareddi v. Kurri Bapireddi*, 29 Mad. 336 (334) (F.B.).

The T. P. Act does not apply to Punjab, where a transfer of immoveable property of value of Rs. 100 or upwards can be made orally—*Udho Das v. Meher*, 34 P.L.R. 714, A.I.R. 1933 Lah. 262 (263).

Effect of registration—Transfer of title :—The mere registration of a sale-deed does not necessarily amount to a transfer of property to the vendee, especially if there is no delivery of the deed—*Jogendra v. Manmatha*, 34 I.C. 106 (107) (Cal.); *Hara Beva v. Banchanidhi Barik*, A.I.R. 1957 Orissa 243. Where neither the deed of sale nor possession of the property was delivered to the vendee and no consideration passed, the mere registration of the deed of sale did not operate to pass the title to the vendee—*Raju Mahton v. Hussain Mean*, 59 I.C. 171 (Pat.); *Sree Nath v. Sree Kanta*, 6 I.C. 477 (478) (Cal.). The mere registration of the deed does not necessarily pass the property. Apart from the section, registration is not a formality which creates any rights, although it affects the admissibility in evidence of the document registered. Registration is *prima facie* proof of intention to transfer the title but it is not proof of *operative* transfer; and if there is a condition precedent as to payment of consideration and the delivery of the deed, such conditions must be strictly fulfilled before title can pass—*Sheo Narain v. Darbari*, 2 C.W.N. 207 (208). The mere registration of a deed of transfer is not in itself sufficient to convey title, but the Court has to see what was the *intention* of the vendor, if no consideration passed. The intention may be presumed from circumstances—*Gostho Behary v. Rohini*, 13 C.W.N. 692, 4 I.C. 541. If it was intended by the parties that the title should pass only upon the consideration money being paid, then the mere registration will not be taken as conclusive that the title has passed; and no title will pass unless the consideration money has been paid—*Mauladan v. Raghunandan*, 27 Cal. 7; *Gostho Behary v. Rohini*, 13 C.W.N. 692 (693), 4 I.C. 541; *Seramot v. Samad Ali*, 19 I.C. 562; *Abdul Aziz v. Kala Shah*, 50 P.W.R. 1916, 32 I.C. 961; *Sree Nath*

v. Sree Kanta, 6 I.C. 477. (478); *Kumud Kamini v. Khudumani*, 47 I.C. 202 (204); *Makhan Lal v. Hanuman*, 2 P.L.J. 168 (170), 38 I.C. 877; *Maung Mon v. Ma Kim*, 5 Rang. 636, A.I.R. 1928 Rang. 47, 106 I.C. 358. If, on the other hand, it is proved that a deed of sale was intended to be operative upon registration, and there was no intention of either party to postpone the operation of the conveyance till the consideration was paid, the deed does not become inoperative by reason merely of non-payment of the purchase-money—*Nilmadhab v. Haran Prosad*, 17 C.W.N. 1161, 20 I.C. 325 (326); *Seramot Ali v. Samad Ali*, 19 I.C. 562; *Umedmal v. Davu*, 2 Bom. 547 (548). See also Note 281 above, "Non-payment of price". Similarly, if it was intended by the owner, whether consideration passed or not, to transfer the property to the defendant who was his mistress, *held* that the registration of the sale-deed would be sufficient to transfer the title and no proof of payment of consideration was necessary—*Gostho Behary v. Rohini Gowalini*, 13 C.W.N. 692 (693), 4 I.C. 541.

Two persons entered into a transaction which they embodied in a deed of sale; the deed was described as a contract of sale, but it was registered and it distinctly provided that on certain events happening the property should be regarded as sold to the vendee. The vendee was put in possession of the property in consequence of the registered deed. *Held* that there was a transfer in consequence and by operation of the registered deed when the conditions of the deed were fulfilled—*Kundu Konhuji v. Vishnu*, 37 Bom. 53, 17 I.C. 176 (177).

No title before registration :—Where the sale-deed requires registration (e.g., in the case of immoveable property worth Rs. 100 or upwards) the title does not pass until the sale deed has been registered (2 C.W.N. 207), though there may be transfer of possession and payment of consideration. Therefore, if property is sold to A under a sale-deed executed on the 11th August but the sale-deed is registered on the 25th November, and in the meantime the property is sold in execution of a decree against the vendor on the 7th November and is purchased by B, B's title will take precedence over that of A, and he will be entitled to possession by ousting A—*Tilakdhari v. Gour Narain*, 5 P.L.J. 715 (718), 59 I.C. 290. Where moveable as well as immoveable properties are transferred by a document for a single consideration, which document, though compulsorily registrable in order to affect the immoveable property, is not registered, it is equally ineffectual to affect moveable property—*Bhobi v. Ramlalbyammal*, A.I.R. 1934 Rang. 303, 152 I.C. 431. See also *Petman v. Ganesh*, 34 I.C. 542 and *Bisheshar v. Mt. Bhuri*, A.I.R. 1920 Lah. 20, 56 I.C. 595, 1 Lah. 436.

Registration, where invalid :—Where a non-existent property is included in a sale-deed for getting it registered at a place where the Sub-Registrar but for such inclusion would have no jurisdiction to register it, the registration is invalid—*Mt. Nathibai v. Wailaji*, A.I.R. 1937 Nag. 330, I.L.R. (1937) Nag. 111, 169 I.C. 675. Even where the property is in existence, but is a small strip of land situated in another District and is included in the deed solely with a view to obtain registration there, it amounts to a fraud on the law of registration and the registration is invalid. The crucial question in such cases is that of intention—*Innuganti*

v. Sobhanadri, A.I.R. 1936 P.C. 91, 40 C.W.N. 545, 63 I.A. 169, 161 I.C. 29; *Collector v. Ram Sunder*, A.I.R. 1934 P.C. 157 (167), 38 C.W.N. 1101, 56 All. 468, 61 I.A. 268, 150 I.C. 545; *Rowther v. Official Receiver*, A.I.R. 1937 Mad. 32, 168 I.C. 87.

Presentation of the deed before the Sub-Registrar by a pleader without any power-of-attorney from the executant renders the registration invalid—*Jambu Prasad v. Aptab Ali*, 37 All. 49 (P.C.), 42 I.A. 22, 19 C.W.N. 282, 28 I.C. 422. In such a case the mere admission of the executant before the Registrar is no compliance with the requirements of the Registration Act—*Khaliluddin v. Banni Bibi*, 35 All. 34 (F.B.); *Halima v. Khairunnessa*, A.I.R. 1920 Rang. 17, 3 Rang. 398, 91 I.C. 644. Where the person holding the power-of-attorney for such presentation dies before the presentation and the Registrar was aware of his death but accepted and registered the document, the registration was invalid—*Najib-un-nissa v. Abdur Rahim*, 23 All. 233 (P.C.).

Date of registration :—In case of a transfer the date on which the transfer takes effect is the date of the instrument and not the date of its registration—*Ganesh Prasad v. Baiyalal*, A.I.R. 1938 Nag. 253, 175 I.C. 384; *Kastur Chand v. Wazir Begam*, A.I.R. 1937 Nag. 1, I.L.R. 1937 Nag. 291, 167 I.C. 48.

288. Absence of sale-deed :—Where there is no deed whatsoever in respect of property above Rs. 100 in value, but merely an *oral contract* for sale, it does not amount to a sale of the property, even though possession has been delivered to the vendee and he has paid a portion of the purchase-money. The possession by the vendee cannot take the place of the registered deed required by this section. The property does not vest in him until there is a registered deed. Consequently, the vendor can recover possession from the vendee, with mesne profits—*Papireddi v. Narasareddi*, 16 Mad. 464 (465). But now see sec. 53A which enunciates the doctrine of part performance. A person who claims to be the purchaser of immoveable property of the value of over Rs. 100 cannot sue for declaration of title to the property in the absence of a registered sale-deed except by way of adverse possession—*Ma Mya v. Annamalai*, A.I.R. 1934 Rang. 127, 151 I.C. 227.

Non-registration of deed of conveyance—Part performance :—See sec. 53A and notes thereunder.

289. Evidentiary value of unregistered deed :—In section 49 of the Registration Act, a proviso has been newly added (by the T. P. Amendment Supplementary Act, XXI of 1929) to the effect, that “an unregistered document affecting immoveable property and required by this Act or by the Transfer of Property Act to be registered may be received as evidence of a contract in a suit for specific performance under Chap. II of the Specific Relief Act, or as evidence of part performance of a contract for the purposes of sec. 53A of the Transfer of Property Act, or as evidence of any collateral transaction not required to be effected by a registered instrument.” This proviso supersedes *Thayarammal v. Lakshmi Ammal*, 43 Mad. 822 (823) where it was held that it was not open to the vendee to treat the unregistered deed as an agreement to sell and to sue for specific performance of such agreement.

Though the unregistered instrument is not admissible to prove transfer of title, it can be used in evidence for the purpose of showing that the purchaser entered upon the property under a contract of sale and for determining the nature of his possession—*Mt. Shankri v. Milkha Singh*, A.I.R. 1941 Lah. 407 (413) (F.B.); *Tauqir Ali v. Ram Ratan*, A.I.R. 1941 Oudh 41 (43), 1940 O.W.N. 753, 190 I.C. 85; see also *Varada Pillai v. Jeevaratnammal*, 43 Mad. 244 P.C., 46 I.A. 285; *Qadir Bakhsh v. Mangha Mal*, 4 Lah. 249, A.I.R. 1923 Lah. 495, 73 I.C. 889; *Ata Muhammad v. Shankar Das*, A.I.R. 1925 Lah. 491, 6 Lah. 319, 88 I.C. 872. In such a case the document is admissible to prove the terms of the contract—*Parikhet v. Nidhi*, A.I.R. 1954 Or. 31. The unregistered document is also admissible for the purpose of showing that the purchaser obtained a lien by the passing of consideration—*Mt. Shankri v. Milkha Singh*, supra at pp. 411, 412; see also *Shib Pershad v. Unnopurna*, 12 W.R. 435; *Shambhu v. Nama*, 35 Bom. 438; *Waman v. Dhondiba*, 4 Bom. 126 (F.B.).

290. Para 3 :—Para 3 dispenses with the necessity of registered conveyance in cases of immoveable property valued at less than Rs. 100. "It was thought that in the absence of a much larger number of registration offices than at present exist in India, the requirement of registration in the case of every petty transaction relating to land would have been an intolerable hardship"—Whitley Stokes' *Anglo Indian Codes*, Vol. I, p. 729 (footnote).

By virtue of the amendment of section 4 by the Amendment Act of 1885, para 3 of sec. 54 is rendered absolute, in so far as it prescribes that a sale of tangible immoveable property of value less than Rs. 100 can be made only by a registered instrument or by delivery of the property; if it is made otherwise, e.g., by an unregistered instrument unaccompanied by delivery of possession, the sale is inoperative and confers no title on the vendee—*Makhan Lal v. Banku*, 19 Cal. 623 (F.B.) (overruling *Khatu Bibi v. Madhuram*, 16 Cal. 622); *Konormat v. Nabin*, 15 I.C. 288. See Notes under sec. 4.

An unregistered sale of property under Rs. 100 in value without delivery of possession gives no title to the vendee; consequently, if the same property is afterwards sold to another person under a registered sale-deed, the latter person gets the property in preference to the former, even though the latter purchaser had notice of the prior sale; for the doctrine of notice cannot be invoked to give validity to an invalid title. The contrary view taken in *Shivram v. Genu*, 6 Bom. 515, *Hathisingh v. Kuvarji*, 10 Bom. 105, *Fazluddin v. Fakir Mohammed*, 5 Cal. 336, *Bhalu v. Jakhu*, 11 Cal. 667 and other cases is no longer good law, as these cases were decided before the amendment of sec. 4, when an unregistered deed without possession gave a good title.

If there is delivery of possession, it is sufficient to transfer the ownership; and the fact that there is also an unregistered sale-deed will not weaken or destroy the effect of the delivery of possession—*Bhagabati v. Sashi*, 2 I.C. 413; *Ganga v. Kalicharan*, 22 Cal. 179; *Gulab v. Lattu*, 22 O.C. 58, 51 I.C. 561; *Daya Ram v. Sita Ram*, 79 I.C. 394, A.I.R. 1925 All. 206; *Narasimha v. Bhupati Raju*, 29 M.L.J. 721, 31 I.C. 52; *Brajaballav v. Akshoy*, A.I.R. 1926 Cal. 705, 30 C.W.N. 254, 93 I.C. 115. Such

an unregistered kobala is admissible in evidence in a suit for specific performance of the contract—*Uma v. Chetu*, A.I.R. 1926 Pat. 89, 95 I.C. 187. Where the sale is only for an amount less than Rs. 100, the non-registration of the document is not fatal to the validity of the transfer, if the transferee is able to establish a prior oral sale and delivery of possession in pursuance thereof, *i.e.*, an oral sale sufficiently dissociated from the unregistered sale-deed, that one can be regarded as independent of the other—*Chinnasami v. Manickammal*, A.I.R. 1937 Mad. 265, 168 I.C. 681. The mere existence of an unregistered instrument does not prevent the vendee from falling back upon his title by delivery of the property—*Rupa Teli v. Bishambar Teli*, 8 C.P.L.R. 1; *Shambhubai v. Shiblaldas*, 4 Bom. 89; *Hriday Behari v. Ram Rani*, 3 O.L.J. 460, 37 I.C. 20. But in a Madras case it has been held that if the purchaser relies on an oral sale accompanied by delivery of possession, as well as on an unregistered document of sale, it is the document which must be looked to, and as that document is unregistered, there is no valid sale at all. If there had been no document, and the parties would have been satisfied by mere delivery of property, then the transaction would have been a sale by delivery of property, and therefore valid. But if the parties not satisfied with mere delivery, reduce the transaction to writing, it is the writing that must be regarded as containing the terms of the contract, and the sale can hardly be called a sale by delivery; and the writing being unregistered, the sale is invalid—*Kuppuswami v. Chinna-swami*, 28 L.W. 234, A.I.R. 1928 Mad. 546 (548), 111 I.C. 677. This case has been dissented from in *Keshwar v. Sheonandan*, cited below.

Evidentiary value of the unregistered instrument :—An unregistered sale-deed of immoveable property worth less than Rs. 100, though inoperative under this section, where delivery of possession has not been made to the vendee, is admissible in evidence to prove the contract of sale—*Poomalai v. Karuppa*, (1916) 2 M.W.N. 136, 34 I.C. 921; *Narasimha v. Raghunanda*, 29 M.L.J. 721, 31 I.C. 52; it may be used, under sec. 91 of the Evidence Act, to prove the nature and the terms of the transaction which fell through—*Brajabullav v. Akhoy*, 30 C.W.N. 254, A.I.R. 1926 Cal. 105, 93 I.C. 115. Where the sale was effected by delivery of possession, and there was also a deed of sale which was not registered, held that though the unregistered document did not by itself confer title, and could not be used to prove that the title passed under it, still it would be admissible as evidence, under sec. 91, Evidence Act, of the nature and terms of the transaction—*Keshwar v. Sheonandan*, 10 P.L.T. 449, 122 I.C. 533, A.I.R. 1929 Pat. 620 (621); *Sheikh Juman v. Mohamed Nobingoaz*, 21 C.W.N. 1149, 41 I.C. 779; and can be used in evidence for determining the identity or dimensions of the plot sold—*Harsalsa v. Bapu*, 18 N.L.R. 8, 56 I.C. 382.

Section 49 of the Registration Act does not make a document purporting to transfer immoveable property of less than Rs. 100 in value inadmissible in evidence. Such a document, although it does not confer title, is admissible for the collateral purpose of showing the nature of possession—*Abdul v. Abdul*, A.I.R. 1936 Cal. 130, 61 C.L.J. 590, 161 I.C. 734; *Dawal v. Dharma*, 41 Bom. 550 (559). Where in a document for sale of an interest in immoveable property, it is stipulated that the

transferee is to remove earth and sand from the transferor's land and level it before vacating, the stipulation is admissible as a collateral transaction not affecting the land—*Kanji v. Shummugam*, A.I.R. 1932 Mad. 734 (735), 43 M.L.J. 577, 139 I.C. 510. See Note 289.

291. Possession versus registration:—A sale of immoveable property worth less than Rs. 100, under an unregistered instrument, but accompanied by delivery of possession, undoubtedly confers a good title on the purchaser (see above); but the question arises, whether such purchaser will be entitled to hold his title as against a subsequent purchaser of the same property under a *registered instrument*. Under sec. 50 of the Registration Act, all registered deeds take priority over unregistered deeds in respect of the same property, whether registration in respect of such property is compulsory or not; and since that section says nothing about *possession*, it was held in some cases that a purchaser under an unregistered instrument though he had obtained possession was liable to be defeated by a subsequent purchaser under a registered document (who had no notice of the prior sale)—*Fuzluddin v. Fakir Mahomed*, 5 Cal. 336; *Bimaraz v. Papaya*, 3 Mad. 46; *Mareshwar v. Datta*, 12 Bom. 569; *Kondaya v. Guruvappa*, 5 Mad. 139. In these cases, possession of the prior purchaser was held not to be equivalent to *notice*. In some other cases the High Courts have taken the more rational view that sec. 50 of the Registration Act must be read subject to the equitable doctrine of *notice*, although it has not been expressly mentioned therein, and that the possession of the prior purchaser must be taken as equivalent to *notice*, with the result that the subsequent purchaser under a registered deed will be defeated by the prior unregistered purchaser with possession—*Nani Bibee v. Hafizullah*, 10 Cal. 1073 (1075); *Krishnamma v. Suranna*, 16 Mad. 148 (F.B.); *Dinonath v. Auluckmoni*, 7 Cal. 753; *Sharfuddin v. Govind*, 27 Bom. 452; *Dundaya v. Chanbasappa*, 9 Bom. 427.

This conflict of opinion has now been removed by Explanation II (newly added by the Amendment Act of 1929) in the definition of 'notice' given in section 3. Under that Explanation, possession amounts to notice; consequently, the possession of the prior purchaser will avail as against a subsequent registered purchaser, on the equitable doctrine of notice. See Note 28 under sec. 3.

Where the prior purchaser acquires by a registered deed, and the property is subsequently sold to another by delivery of possession, the former takes the property and the latter gets nothing, since the vendor having already disposed of his right, title and interest to the first purchaser, there remains no residue for him to sell to the second vendee.

292. Delivery of possession:—Under para 4 of this section, if there is no registered deed, the sale must be effected by delivery of possession. Delivery of tangible immoveable property takes place when the seller places the buyer or such person as he directs, in possession of the property. The essence of the transfer is that possession is changed. What was in the occupation of the vendor ceases to continue in his occupation, by reason of the transfer, the possession being transferred to the vendee—*Sibendrapada v. Secretary of State*. 34 Cal. 207. But mere non-delivery of possession or stipulation to deliver possession at

a later period does not prevent the sale from being complete—*Hari Chand v. Gordhan Das*, A.I.R. 1957 Punj. 238.

293. Delivery of possession may be actual or constructive :—In many cases *actual* physical delivery of property is impossible (as for instance, where the property sold is in the possession of tenants or lessees); in such cases delivery of title-deeds is sufficient—*Man Bhari v. Naunidh*, 4 All. 40; *Kattayani v. Narayana*, 9 Mad. 267. Where the land is in the occupation of tenants, a notice to them by the vendor to pay rents henceforth to the purchaser is sufficient constructive delivery of possession—*Kattayani v. Narayana*, *supra*. But where the property is capable of physical possession, there must be real delivery of the property; any sort of constructive possession is not sufficient—*Sarju v. Tulsi*, A.I.R. 1926 Nag. 93, 91 I.C. 1018. Under this section there must be a real delivery of the property—*Biswanath v. Chandra Narayan*, 48 Cal. 509 (515) (P.C.). Mere recital of delivery of possession in the sale-deed is not sufficient—*Nathu v. Gulab Chand*, A.I.R. 1934 Nag. 13, 144 I.C. 919; *Kaliram v. Dulal Ram*, A.I.R. 1933 Cal. 544, 142 I.C. 582. Where delivery of possession is not possible, the sale-deed must be registered—*Ibid*. In a recent Full Bench case the Bombay High Court has however held that the delivery of possession contemplated by this section is not constructive or symbolic, but actual or real delivery. Thus where a mortgagor sells the mortgaged property to a sub-mortgagee in possession, even assuming that the equity of redemption is a tangible immoveable property, the sub-mortgagee can acquire title only by a registered document—*Bikhabhai v. Chimantal*, A.I.R. 1953 Bom. 437 (F.B.). The delivery of possession contemplated by this section must be in pursuance of a sale, which the vendee cannot prove as the unregistered sale-deed cannot be used as evidence—*Tribhuban v. Sankar*, A.I.R. 1939 Bom. 431, 45 Bom. L.R. 866. Where both vendor and purchaser are residing jointly, the only way in which possession can be delivered is by change in the village records and by payment of rent being made in the name of the vendee—*Sukaloo v. Punan*, A.I.R. 1961 Madh. Pra. 176. Where a property subject to usufructuary mortgage is sold to the mortgagee, renunciation of rights by the vendor amounts to delivery of possession—*Bhanwarlal v. Dhulilal*, A.I.R. 1959 Raj. 218.

If, in consequence of the sale, the purchaser enters into possession, there is sufficient delivery of the property and it is unnecessary that there should be any formal making over of possession by the vendor—*Gunga Narain v. Kalicharan*, 22 Cal. 179; *Ummar v. Vythilinga*, 5 M.L.T. 263, 4 I.C. 1135. Where the vendee had been in possession of the property from *before* the date of sale, it was held in earlier Calcutta cases that there could be no formal delivery of possession, and therefore the sale must be effected by a registered instrument; otherwise it would be invalid—*Tilak v. Rudeswar*, 41 I.C. 8 (Cal.); *Sibendrapada v. Secretary of State*, 34 Cal. 207; *Mrinalini v. Mohima*, 6 I.C. 763 (following 34 Cal. 207). This view was followed in an Allahabad case—*Sohan Lal v. Mohan Lal*, 50 All. 986 (F.B.), 26 A.I.J. 1084, 118 I.C. 177, A.I.R. 1928 All. 726 (728). The correctness of these decisions may be doubted. Their effect is to make registration compulsory in case of sale of property worth less than Rs. 100 to persons already in possession. This view has been dissented from in *Sheikh Dawood v. Moideen*, 48 M.L.J. 264, 87 I.C. 331, A.I.R.

1925 Mad. 566; *Thakurdas v. Sobhagchand*, 12 N.L.R. 3, 32 I.C. 233; *Dinanath v. Manbadhi*, 12 N.L.R. 139, 36 I.C. 547; *Mokbul v. Kule Khan*, A.I.R. 1936 Lah. 756, 166 I.C. 751; *Sonai v. Sonaram*, 20 C.W.N. 195, *Santokhi v. Siro Jha*, A.I.R. 1934 Pat. 301; *Bhaskar v. Padman*, 40 Bom. 313, *Maung Mya v. Khine*, A.I.R. 1936 Rang. 497, 166 I.C. 267; *Pheku v. Syed Ali*, A.I.R. 1937 Pat. 178, 15 Pat. 772, 167 I.C. 890; *Ram Nath v. Gajadhar*, 92 I.C. 478, A.I.R. 1926 All. 300; and *Muthi Karuppan v. Muthusamban*, 38 Mad. 1158 (1160), where it has been held that delivery means such delivery as the thing to be delivered is capable of, and that even where the purchaser is already in possession (e.g., as tenant or mortgagee) there can still be a formal delivery of possession within the meaning of this clause, if the vendor by appropriate acts and declarations converts the possession of the tenant or mortgagee into that of a purchaser. These rulings have now been followed by the Calcutta High Court (correcting its earlier view—*Kulu Chandra v. Jogendra*, 60 Cal. 384, 144 I.C. 155, A.I.R. 1933 Cal. 411 (412)). And so, where property of value less than Rs. 100 which had been already mortgaged with possession was sold to the mortgagee, and possession was delivered by pointing out boundaries, by endorsing on the back of the mortgage-bond the fact of sale, and by handing it over to the mortgagee, these acts amounted to formal delivery of possession within the meaning of this section, and the sale was validly effected—*Sonai Chutia v. Sonaram Chutia*, 20 C.W.N. 195 (196), 34 I.C. 692; see also *Ghanaram v. Paltoo*, A.I.R. 1954 Nag. 109 (case of a tenant); *Bihari Pradhan v. Daitari Dash*, 25 Cut. L.T. 281. Where a property which is the subject of a usufructuary mortgage is sold to the mortgagee in discharge of the mortgage, a direction by the vendor to the vendee to keep the property as absolute owner amounts to delivery of possession—*Sheikh Dawood v. Moideen Batcha Sahab*, 48 M.L.J. 264, A.I.R. 1925 Mad. 566, 87 I.C. 331. Where the mortgagor of usufructuary mortgage sold his equity of redemption to the vendee and as provided in the contract of sale the vendee paid off the mortgage and got possession, it was held that he got possession with the assent of the vendor which amounted to delivery of possession by the latter—*Tukaram v. Atmaram*, I.L.R. 1939 Bom. 77, 40 Bom. L.R. 1192, A.I.R. 1939 Bom. 31 (33). In such cases the mere existence of an unregistered instrument does not debar the purchaser from falling back upon his title by delivery of the property—*Ghanaram v. Paltoo*, supra.

In a case of sale of immoveable property worth not more than Rs. 100, by means of an unregistered sale-deed, it is not necessary that delivery of possession should be contemporaneous with the execution of the sale-deed, which will be valid even if the possession is delivered some time after its execution—*Md. Yaqoob Ally v. Chhotey Lal*, A.I.R. 1939 Pat. 218, 179 I.C. 583; *Bhulkoo v. Hereyabai*, A.I.R. 1949 Nag. 410, I.L.R. 1949 Nag. 534.

294. Contract of sale—Contract creates no interest or charge:—The last para of this section lays down the principle of Indian law that title in property can be transferred only by a conveyance and not by mere agreement between parties—*Raja Bhupendra v. Rajeswar*, 32 C.W.N. 16 (25) 55, Cal. 35, A.I.R. 1927 Cal. 956, 106 I.C. 117. This para makes a departure from the English law in that it declares that a

contract of sale does not in itself create any interest in or charge on the property. Under the English law, the purchaser by virtue of the contract of sale becomes in equity the owner of the property from the date of the contract. See Sugden's *Vendors and Purchasers*, (14th Ed), p. 186; *Walsh v. Lonsdale*, 21 Ch. D. 9. This principle of English law has no application to places where the Transfer of Property Act is in force—*Maung Shwe v. Maung Inn*, 44 Cal. 542 (P.C.), 21 C.W.N. 500, 38 I.C. 938; *Dayabhai v. Maharaj Bahadur*, 1 P.L.J. 238 (246), 34 I.C. 482; *Jainarayan v. Balwant*, A.I.R. 1939 Nag. 35, (1938) N.L.J. 379; *Narayanawami v. Lakshmi Narasimha*, A.I.R. 1939 Mad. 220, 1939 M.W.N. 98, 48 M.L.W. 959; *Mt. Shankri v. Milkha Singh*, A.I.R. 1941 Lah. 407 (F.B.); *Maung Shwe v. Maung Dun*, 44 I.A. 15, 44 Cal. 542. In the Punjab where the T. P. Act does not apply it has been observed in *Jalaluddin v. Miran Baksh*, A.I.R. 1941 Lah. 240 that an agreement for sale gives the purchaser an equitable title as owner of the property concerned, though it does not operate against a person who obtains a legal interest in the same property in good faith without notice of the equitable title. But see the later Full Bench decision of *Mt. Shankri v. Milkha Singh*, supra, where it has been held that the purchaser under a contract for sale which has not yet been completed cannot claim any title as owner of the property whether as legal or equitable owner. (It should be noted that prior to the Transfer of Property Act a contract for the sale of immoveable property created an equitable interest in the land and made the purchaser the owner in equity. See *Dinkarrao v. Narayan*, 47 Bom. 191, at p. 215). A mortgaged his property to B and then sold it to C, who agreed to sell it to D. B brought a suit on his mortgage impleading C. D also filed a suit for the specific performance of the contract to sell against C and got the sale deed executed through court. But B was already in possession as an auction-purchaser. D brought a suit for possession, contending that he had acquired an interest akin to a charge on this property and that therefore he was a necessary party to the mortgage suit instituted by B. Held that suit was not maintainable because D acquired no interest in the property under the agreement of sale—*Sankaram Vishnu v. Neelakanta Iyer*, A.I.R. 1955 Tr-Co. 195.

In England the vendee under a contract of sale is described as an equitable owner. In India the law recognises no distinction between legal and equitable estates—*Md. Saddiq v. Ghasi Ram*, A.I.R. 1944 Lah. 322 (F.B.), 48 R.L.R. 505. According to the Indian law embodied in this section a contract of sale does not of itself create any interest in the property. To such a contract, as in other contracts, the doctrine of frustration applies—*Satyabrata v. Mugniram Bangur & Co.*, A.I.R. 1954 S.C. 44. The essential idea upon which the doctrine of frustration is based is impossibility of performance of the contract. "In our opinion, having regard to the nature and terms of the contract, the actual existence of war conditions at the time when it was entered into, the extent of the work involved in the development scheme and last, though not the least, the total absence of any definite period of time agreed to by the parties within which the work was to be completed, it cannot be said that the requisition order (by the Government) vitally affected the

contract or made its performance impossible"—*ibid* at p. 50 per B. K. Mukherjea, J.

There is a clear distinction between a contract which still remains to be performed and specific performance of which may be sought, and a conveyance by which title to property has actually passed. The former is governed by the Contract Act and the latter by the T. P. Act and so much of the Contract Act as is applicable thereto—*Dip Narain v. Nageshwar*, A.I.R. 1926 All. 1 (2) (F.B.), 52 All. 338, 122 I.C. 872. An agreement of sale does not vest any interest in the property and if a third party, say P, obtains an assignment of the property in question the party in whose favour the agreement has been executed has to seek specific performance; but he cannot challenge the right of P on the basis of his prior agreement and a subsequent sale in his favour by the vendor—*Sivarama v. Thiruvadinatha*, A.I.R. 1957 Trav.-Co. 189. In a contract for sale of immoveable property an exclusively written record is not required by the law of this country. If an oral agreement or written memorandum is complete in itself obligation is fixed upon the parties, unless it is understood or intended that such contract shall not become operative until reduced in writing. In such a contract the substantial agreement between the parties upon the main features of the transaction, *i.e.*, the sale, the identity of the property, the price, etc., does not necessarily create a concluded contract—*Hyam v. Gubbay*, 20 C.W.N. 66, 32 I.C. 53. Although the presumption is that in fixing the price regard was had on both sides to the quantity of land, yet there may be considerations which may rebut or weaken the presumption—*Hussonally v. Tribhuban*, 25 C.W.N. 385 (P.C.), 61 I.C. 361. Where an instrument is described as an agreement and is stamped as such and it clearly states that a deed of sale will be executed later on, the document is not a conveyance—*Amroo v. Babarao*, A.I.R. 1951 Nag. 403, I.L.R. 1950 Nag. 25. Payment of price and delivery of possession will not convey title until a registered conveyance is executed—*Comr. of Income-tax v. Dhanomal*, A.I.R. 1949 Sind 28, I.L.R. 1947 Kar. 240. Where a preliminary contract, though in writing, is afterwards reduced into a formal deed and there is any difference between them, the former is entirely governed by the deed—*Kondal v. Dhanakoti*, A.I.R. 1938 Mad. 81, 46 M.L.W. 797. A deed should be construed as a whole. In the case of a conveyance for the purpose of carrying out a contract for sale, if the terms of sale-deed are clear they would override the contract. But if the terms of the latter are to be rejected, that part of it should be rejected which is inconsistent with the contract—*Krishnaswamy v. Perumal*, A.I.R. 1950 P.C. 105, 64 M.L.W. 1.

A document purporting to be a contract of sale which, after reciting the receipt of some earnest money, provided that within two months the vendor would execute a proper conveyance and thereupon receive the balance of the purchase-money and give up possession of the property sold, would not pass any right or interest to the purchaser but only give him a right against the vendor to call for a conveyance and possession on paying the balance of the purchase-money—*Harmasji v. Keshav Parshotam*, 18 Bom. 13; *Mahadeo v. Vasudev*, 23 Bom. 181. A mere agreement of sale under which a small portion of the purchase-money is paid, but which is not followed by delivery of

possession or a registered sale-deed, does not convey any legal title to the purchaser, and therefore he can not convey any title to others even by a registered conveyance—*Mg. Po. v. Mg. Tet*, 2 Rang. 459 86 I.C. 205, A.I.R. 1925 Rang 68. When a mortgagee has contracted to sell the mortgage-debt to another person and the latter has paid some consideration, but the deed of sale has not been completed, no title passes to the intended transferee, and he cannot sue on the mortgage-bond. Nor does the vendor stand in the position of a benamidar for the intended transferee—*Biswambar v. Nilambar*, 33 C.W.N. 997 (999), A.I.R. 1930 Cal. 263, 125 I.C. 861; see also *Comr. of Income-tax v. Dhanomal*, supra. But if the contract of sale is followed by delivery of possession and payment of purchase-money, then, though there is no registered conveyance, the transaction is more than a mere contract, and the last para of sec. 54 cannot apply. In such a case the vendor cannot say that the vendee has obtained no interest in the property. Nor can the property be attached as the property of the vendor in execution of a decree against the vendor—*Ram Baksh v. Mughlani*, 26 All. 266 (269, 270); *Karalia v. Manusukhram*, 24 Bom. 400 (402).

An unregistered contract of sale is an agreement to sell and so gives rise to a right to enforce specific performance—*Jainarayan v. Balwant*, A.I.R. 1939 Nag. 35, 1938 N.L.J. 379, 180 I.C. 963. The vendee's remedy in a contract of sale is a suit to enforce specific performance of the contract not only against the vendor but also against a transferee from the vendor with notice of the contract—*Ramasami v. Chinman*, 24 Mad. 449; *Mahadeo v. Vasudev*, 23 Bom. 181; *Pancham Lal v. Kishore*, 1887 A.W.N. 15; *Gangaram v. Laxman*, 40 Bom. 498. If the vendor dies without completing the contract for sale, the claim for specific performance can be enforced against his heir. If the vendor gives away the property to somebody else by a will, and then agrees to sell it but dies before completing the sale, the contract can be specifically enforced against the devisee—*Gangaram v. Sakharam*, 22 Bom. L.R. 1396, 59 I.C. 796. In such a suit for specific performance the purchaser can, in the absence of any evidence to the contrary, easily discharge the onus about readiness and willingness by simply showing that he is still ready and willing to carry out the bargain—*Brijmohan v. Chandrabhagabai*, A.I.R. 1939 Nag. 173, 1939 N.L.J. 315, 182 I.C. 12. Although the contract of sale can be enforced against a subsequent transferee with notice and perhaps against an attachment, the title relates back—*Gendmal v. Laxman*, A.I.R. 1945 Nag. 86, I.L.R. 1944 Nag. 852. See also *Varughese v. Lonan*, A.I.R. 1952 Tr.-Coch. 467. See in this connection *Appa Rao v. Veeranna*, A.I.R. 1953 Mad. 409, (1952) 2 M.L.J. 166. When the chairman of a Municipal Board passes an order directing sale of land belonging to the Municipality the order of the Chairman is not a sale but a contract of sale—*Madanlal v. Municipal Board*, 1968 Raj. L.W. 356.

There is a distinction between a *contract to sell* and a *contract of sale*. The former is an executory contract while the latter is an executed contract. Sale creates a *jus in rem* while a contract to sell is a *jus ad rem*. The postponement of the passing of title in a contract of sale does not convert it to a contract to sell—*Sahadeo v. Kuiber Nath*, A.I.R. 1950 All. 632, 1950 A.L.J. 467. The party who has contracted to purchase a pro-

erty cannot sustain a claim for recovery of mense profits—*Kochuvareed v. Mariappa*, A.I.R. 1954 Tr. -Coch. 10. Where the property agreed to be sold is compulsorily acquired the purchaser suing for specific performance of the contract cannot claim compensation money lying with the collector under this section or under sec. 73 (2) *post*—*Md. Abdul Jabbar v. Lal Mia*, A.I.R. 1947 Nag. 254, I.L.R. 1947 Nag. 328.

The rule of English law not permitting a purchaser to recover damages for breach of a contract of sale relating to immoveable property is not applicable in India in view of the express provisions of sec. 73, Contract Act, which are comprehensive enough to apply to breaches of contract arising from sale of moveable as well as immoveable property. Refusal by the vendee to implement a contract of sale results in damages to the vendor, and in the case of immoveable property the damages are to be assessed on the footing of what the vendor would have got had the contract been carried out. The vendor is entitled to re-sell the property to re-imburse the loss caused to him by the breach, in accordance with the explanation to sec. 73, Contract Act, which applies to such cases—*Motilal v. Jammadas*, A.I.R. 1936 Nag. 4 (7-8), 162 I.C. 944. Readiness and willingness to carry out his obligation is always a condition precedent to the plaintiff's right to recover damages in respect of breach of one of two concurrent obligations. If it is proved that the purchaser was not in a position to pay the balance of the purchase-price, he cannot recover damages although the vendor may have committed breach. He is, however, entitled to recover the sum paid as a deposit or part of the price—*Abdullah v. Tenenbaum*, A.I.R. 1934 P.C. 91 (92), 149 I.C. 816.

A contract of pre-emption creates no interest in immoveable property—*Basdeo v. Jhugru*, 46 All. 333 (338, 340); *Dinkarrao v. Narayan*, 47 Bom. 191 (204). Nor does a mere contract of sale give rise to a right of pre-emption; such right can arise only upon a completed sale—*Tukaram v. Ukarda*, A.I.R. 1924 Nag. 327, 76 I.C. 374.

A contract for sale of immoveable property does not require to be registered, even though the value of the property or the amount of earnest money is Rs. 100 or upwards—*Mt. Shankri v. Milkha Singh*, A.I.R. 1941 Lah. 407 (F.B.). See the new Explanation to sec. 17, Registration Act, added by the Indian Registration Amendment Act, II of 1927, which supersedes the Privy Council decision in *Dayal Singh v. Indar*, 31 C.W.N. 125 (P.C.) 53 I.A. 214, 98 I.C. 508, A.I.R. 1926 P.C. 94.

295. Sale to minor :—The Madras High Court was once of opinion that the Privy Council decision of *Mohari Bibi v. Dharmadas Ghosh*, 30 Cal. 539, declaring contracts by minors void, applied also to sales of immoveable property to minors; and hence such sales were wholly void—*Navakoti Narayana v. Loyalinga Chetty*, 33 Mad. 312, 19 M.L.J. 752, 4 I.C. 383 (384). But this decision has been overruled by the Full Bench case of *Raghava Chariar v. Srinivasa*, 40 Mad. 308 (313), where it has been held that the Privy Council decision in 30 Cal. 539 which was a case of transfer by a minor should not be applied to a transfer made in

favour of a minor, and that a transfer of immoveable property may be made in favour of a minor by way of sale, mortgage or gift, just as a minor may inherit an immoveable property; and that there is no provision in the T. P. Act under which the minor is incapable of being a transferee of property. Section 7 which speaks of "persons competent to contract" applies to *transferors* and not to *transferees*. The Allahabad High Court taking the same view, likewise holds that a sale executed in favour of a minor is valid, and the minor is competent to sue for possession of the property conveyed thereby—*Munni Kunwar v. Madan Gopal*, 38 All. 62 (69), 13 A.L.J. 1084; *Narain Das v. Dhanja*, 38 All. 154 (160); *Ulfat Rai v. Gouri*, 33 All. 657. See also *Muniya v. Perumal*, 24 M.L.J. 352 (disapproving 33 Mad. 312); *Gangai v. Govinda*, A.I.R. 1924 Mad. 544, 84 I.C. 626; *Subba v. Guruva*, A.I.R. 1930 Mad. 425, 120 I.C. 77. But a minor cannot enforce a contract of sale of immoveable property entered into by his guardian on his behalf during his minority, as he is not bound by such a contract and consequently there is no mutuality—*Mir Sarwarjan v. Fakhruddin*, 39 Cal. 232 (P.C.).

296. Sale by Official Receiver :—A sale by an Official Receiver in Insolvency is not exempt from the provisions of this Act, and a duly registered conveyance by the Official Receiver is necessary to pass title to the auction-purchaser—*Abdul Hashim v. Amiar Krishna*, 46 Cal. 887, 53 I.C. 121; *Kamsala v. Hussain Sab*, A.I.R. 1935 Mad. 55, 152 I.C. 988.

55. In the absence of a contract to the contrary; the
 Rights and liabilities of buyer and seller. buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold :

(1) The seller is bound—

- (a) to disclose to the buyer any material defect in the property *or in the seller's title thereto* of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover ;
- (b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power ;
- (c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto ;
- (d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place ;
- (e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto

which are in his possession as an owner of ordinary prudence would take of such property and documents ;

(f) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits ;

(g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same ;

Provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is incumbered or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(3) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power :

Provided that, (a) where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and, (b) where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (a) the seller, and in case (b) the buyer of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require ; and in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncanceled and undefaced, unless prevented from so doing by fire or other inevitable accident.

(4) The seller is entitled—

- (a) to the rents and profits of the property till the ownership thereof passes to the buyer ;
 - (b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer, *any transferee without consideration or any transferee with notice of the non-payment*, for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part *from the date on which possession has been delivered*.
- (5) The buyer is bound—
- (a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest ;
 - (b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs : provided that, where the property is sold free from incumbrances, the buyer may retain out of the purchase-money the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto ;
 - (c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller ;
 - (d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.
- (6) The buyer is entitled—
- (a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof ;
 - (b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as

against the seller and all persons claiming under him, * * * to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (a), and paragraph (5), clause (a), is fraudulent.

Amendment :—In clause (1) (a) and clause (4) (b) the italicised words have been added, and in clause 6 (b) the words "with notice of the payment" have been omitted, by sec. 17 of the Transfer of Property Amendment Act, XX of 1929. The reasons have been stated in proper places.

With regard to this expression "notice of payment" it has recently been held by the Judicial Committee that possession by tenants under a prior transferee from the seller is not notice of their lessor's title to a subsequent transferee and therefore not "notice of payment" within the meaning of clause (6) (b) as it stood before the amendment of 1929, unless the subsequent transferee had in fact learnt that the rents were paid to the prior transferee—*M. M. R. M. Chettiar Firm v. S. R. M. S. L. Firm*, 46 C.W.N. 57 (P.C.), A.I.R. 1941 P.C. 47.

Scope :—In the absence of a statutory provision prohibiting transfer, the rights of parties to the sale of property held by the transferor on annual patta from Government are governed by the present Act—*Jainur Ali v. Chafina Bibi* A.I.R. 1951 Ass. 20, I.L.R. (1950) 2 Ass. 1.

297. Contract to the contrary :—The words "in the absence of any contract to the contrary" show that the operation of this section can be excluded by any contract or agreement or covenant between the vendor and the purchaser—*Webb v. Macpherson*, 31 Cal 57 (71, 72) (P.C.). Thus, where the vendee stipulates that he will pay the purchase-money before the registering officer, he will not be bound to pay the purchase-money at the time of completing the sale in accordance with clause (5) (b) of this section—*Vythinatha v. Bheemachariar*, 8 I.C. 804. So also, the duty of the vendor to produce his title-deeds for examination as provided in clause 1 (b) may be superseded by a stipulation between the parties dispensing with their production—*Re Johnson and Tustin*, 30 Ch. D. 42. The seller is bound under clause (2) of this section to give to his purchaser a title free from reasonable doubt. But the purchaser may relieve the vendor of this obligation by a special contract to the contrary and may choose to take such title as the vendor can give—*Ghousiah Begum v. Rustamjah*, 13 Mad. 158 (163).

But in order to enable the parties to evade the operation of this

section it is necessary that the "contract to the contrary" must be indicated by clear and unambiguous expressions—*Mahomed Ali v. Budharam*, 39 M.L.J. 449, 60 I.C. 235 (236); *Mahamud Mamura v. National Bank*, A.I.R. 1944 Mad. 512, (1944) 2 M.L.J., 264. "When a vendor sells property under stipulations which are against common right and place the purchaser in a position less advantageous than that in which he otherwise would be, it is incumbent on the vendor to express himself with reasonable clearness; if he uses expressions reasonably capable of misconstruction, if he uses ambiguous words, the purchaser may generally construe them in the manner most advantageous to himself"—per Knight Bruce, V.C. in *Seaton v. Mapp*, 2 Coll. 556 (562); followed in *Motiahoo v. Vinayak*, 12 Bom. 1 (17). Moreover, in order to evade the operation of this section, the contract must be contrary to (*i.e.*, inconsistent with) its provisions. Thus, where a conveyance was made in consideration of a sum of money a portion of which was paid and the balance was expressed to be payable with interest in annual instalments, for which the purchaser executed an agreement, it was held that the agreement was not inconsistent with the creation of a charge under clause (4) (b), and that the vendor was entitled to a charge for the balance of purchase-money in spite of the agreement—*Webb v. Macpherson*, 31 Cal. 57 (72, 73) (P.C.). See also Notes under clause (2), *infra*.

The "contract to the contrary" need not be express and may be implied from the terms of the sale-deed. But in order to exclude the operation of the statutory liability of the vendor imposed by this section, the contract, covenant or agreement, must so clearly be inconsistent with the rules of this section as to lead to the inference that it has been made to qualify the generality of its provisions. Moreover, the contract will be construed favourably to the purchaser. Thus, where the vendors agreed that "if any partner or co-sharer of ours should arise and make a claim, and the whole or part of the property sold goes out of the possession of the vendor, the vendee will be entitled to recover the amounts from our persons and property of every kind", and the vendee was dispossessed by a reversioner of the widow from whom the vendor had purchased the property, *held* that the clause in the sale-deed was not exhaustive of the contingencies under which the vendee would be entitled to recover the sale-price, and the event which happened in this case entitled the vendee to a refund of the sale-consideration—*Nand Ram v. Purshotam*, 1933 A.L.J. 201, 145 I.C. 615, A.I.R. 1933 All. 203 (205).

In order that the "contract to the contrary" made by the parties should oust an implied contract contained in this section, the two contracts must relate to the same subject-matter—*Balagurumurthy v. Nagulu Chetty*, 41 M.L.J. 267, 69 I.C. 473.

298. Clause (1) (a)—Seller is bound to disclose material defects:—The seller is in duty bound to inform the purchaser of any material defect in the property of which the seller is, but the purchaser is not, cognizant, and which the purchaser could not have himself discovered. In other words, the law makes a distinction between *latent* and *patent* defects. Patent defects are those defects which may be discovered by ordinary vigilance on the part of the purchaser, and such defects need

not be pointed out by the vendor. Thus, the existence of an open foot-path over the property—(*Keats v. Earl of Cadogan*, 10 C.B. 591; *Ashburner v. Sewell*, [1891] 3 Ch. 405) or the ruinous state of the buildings is an instance of patent defect which the purchaser might have found out by the exercise of ordinary diligence. But a vendor is bound to disclose all *latent* defects known to him, even though he may have stipulated to sell the property *with faults*—*Schmider v. Heath*, 3 Camp. 506. Latent defects are such as the greatest attention would not enable the purchaser to discover—*Sugden's Vendors and Purchasers*, p. 333. A buyer is not bound to complete the sale if there are defects in the property or in the title which are material and also latent, that is, not discoverable by the exercise of ordinary care, or if the title is not free from reasonable doubt. A defect to be material must be of such a nature that if the buyer had been aware of it he might not have entered into the contract at all. The liability of property to be compulsorily acquired may fairly be said to amount to a material defect which is not capable of being discovered with ordinary care—*Lallubhai v. Mohanlal*, A.I.R. 1935 Bom. 16, 59 Bom. 83, 155 I.C. 564. Where the seller knowingly made a representation in the sale-deed which was false and received consideration on the strength thereof, it was a case of fraudulent misrepresentation. The principle of *caveat emptor* did not apply in such a case, *Varkkey v. Chacko*, A.I.R. 1953 Tr.-Coch. 236. Where the non-disclosure amounts to fraud the plaintiff's remedy is a suit for rescission of the sale-deed and for return of the price under sec. 38, Specific Relief Act. He cannot ask for a return of the price before the sale is rescinded—*Allahadino v. Udhoomal*, A.I.R. 1942 Sind 81, I.L.R. 1942 Kar. 32. But see *Varkkey v. Chacko*, supra.

The seller is bound to disclose only *material* defects, i.e., those defects which are of such a nature that it must be reasonably supposed that if the buyer had been aware of it he might not have entered into the contract—*Flight v. Booth*, (1834) 1 Bing. N.C. 370, 41 R.R. 599. But the seller is not bound to disclose defects of a *trifling* nature, e.g., the rottenness of some boards or joists or broken panes of glass—*Dart's Vendors and Purchasers*, 7th Edn. p. 1082. The words "ordinary care" are however somewhat indefinite. A purchaser who wilfully departs from the usual course of business to avoid knowledge of his vendor's title is not allowed to get advantage from his wilful ignorance of defects, which he would have known if he had transacted the business in the ordinary way—*Lallubhai v. Mohanlal*, A.I.R. 1935 Bom. 16, 59 Bom. 83, 155 I.C. 564. Assuming the existence of a town planning scheme in the area where the land sold is situate and there is a material defect in the seller's title on that account, he can discover it with ordinary care. Therefore sec. 55 (1) (a) cannot be invoked in such a case—*Ahmed v. Gani*, A.I.R. 1953 Mad. 628, (1952) 2 M.L.J. 567.

According to the last para of this section, if the seller does not disclose to his buyer any material defect in the property of which he is aware and of which the buyer is not aware and which he could not discover with ordinary care, the omission is said to be fraudulent; but if the seller himself had no knowledge of the defect, the case does not fall within this section—*Nursing Das v. Chuttoo Lal*, 50 Cal. 615 (623), 74 I.C. 996, A.I.R. 1923 Cal. 641. The duty to disclose is not affected

by the fact that the buyer could have discovered the defect had he inspected the property—*Ratanlal v. Nanabhai*, A.I.R. 1956 Bom. 175. Whether the sale is made by auction or by private treaty the purchaser is under no obligation to make enquiry as to defects in the vendor's title, but it is the duty of the vendor to disclose all that is necessary for his own protection—*Sk. Moula Buksh v. Dharamchand Raniwala*, 65 C.W.N. 881.

Defects in title:—The words 'material defects' include *defects in title*—*Haji v. Dayabhai*, 20 Bom. 522. This is now made clear by the addition of the words "or in the seller's title thereto". The *Special Committee observes*:—"Sub-clause (a) of clause (1) of section 55 provides that a seller is bound to disclose to the buyer any material defect in the property of which the seller is aware. The expression 'material defect in the property' has been held to include a defect in the title of the seller. (I.L.R. 20 Bom. 522). We propose to give effect to the decision by inserting the words 'or in the seller's title thereto' in sub-clause (1)." From practical point of view there is a distinction between a defect in the property and a defect in title—*Ratanlal v. Nanabhai*, A.I.R. 1956 Bom. 175. The former only prejudices a purchaser in the physical enjoyment of the property while the latter exposes him to adverse claims. A buyer is not entitled to resile from a contract of sale when he enters into it with full knowledge of the limitations on his physical enjoyment of the property due to any physical defect in it—*Motilal v. Jomnadas*, A.I.R. 1936 Nag. 4, 162 I.C. 944; *Lallubhai v. Mohanlal*, supra. So, where the vendee knew the boundaries and extent of the land, he is not entitled to damages on the ground of deficiency in area—*Kondal v. Dhanakoti*, A.I.R. 1938 Mad. 81, 46 M.L.W. 797. An omission to disclose flaws in the title which the purchaser has no apparent means of discovering will be fraudulent under this section, and the vendee will be entitled to get a refund of the purchase-money—*Haji Essa Sulleman v. Dayabhai*, 20 Bom. 522 (529); *Sheo Ram v. Thakur Mahto*, 58 I.C. 529 (530) (Pat.); *Mahomed Siddiq v. Li Kan*, 4 Bur. L.J. 154, 92 I.C. 766, A.I.R. 1925 Rang. 372 (373); *Sheo Ram v. Thakur Mahto*, 58 I.C. 529 (Pat.). "The same rule applies to incumbrance and defects in the title as to defects in the estate itself. The vendor is bound to deliver to the purchaser the instrument by which the incumbrances were created or on which the defects arise, or to acquaint him with the facts if they do not appear in the title-deeds. If a seller knows and conceals a fact material to the title, relief cannot be refused to the purchaser"—*Sugden's Vendors and Purchasers*, (14th Ed.), p. 5 (cited in 20 Bom. 522, 529. The existence of a covenant in a sale-deed guaranteeing non-existence of incumbrances and its subsequent breach necessarily involves the vendor to indemnify the vendee. It is not legally necessary that there should be an express condition in the sale-deed to indemnify the purchaser in case any defect in his title is subsequently discovered—*Imam Din v. Bhag Sing*, A.I.R. 1936 Lah. 746, 166 I.C. 302. Where there is a prior registered encumbrance non-disclosure is not fraudulent because the buyer could have known about it by enquiries—*Ganpat v. Mangilal*, A.I.R. 1962 Madh. Pra. 144; but see *Sk. Moula Buksh v. Dharamchand Raniwala*, 65 C.W.N. 881. Where several items of property are sold at one price and some of them are subsequently found to have been subject to a charge, the vendee is entitled to have the

sale rescinded as regards these items only and to get damages—*Paparao v. Polinaidu*, A.I.R. 1945 Mad. 205, (1945) 1 M.L.J. 323. Where the property sold by the tenant to his landlord is subsequently discovered to be subject to undisclosed mortgages, the landlord can renounce his character of purchaser and resume the old relationship of landlord and tenant—*Bisweswar v. Abdul*, A.I.R. 1947 Cal. 328. But see *Madan Mohan v. Jawala Prasad*, A.I.R. 1950 E.P. 278, 52 P.L.R. 201, where it has been held that the existence of an incumbrance on the land sold is not a material defect—Sub-sec. (1) (a) of this section. Where the vendor concealed the existence of a decree for partition on the house conveyed, and the purchaser was ejected by a co-parcener of the vendor under the decree, *held* that the non-disclosure amounted to fraudulent concealment, and the vendor was bound to refund the purchase-money to the vendee—*Gajapathi v. Alagia*, 9 Mad. 89 (91). On a sale of a lease containing unusual and onerous covenants, it is the duty of the vendor, before the contract is made, to disclose the existence of the covenants to a purchaser ignorant of them. If he does not give the purchaser express notice of the covenants, he must show that he gave him such an opportunity of acquainting himself with the terms of the lease as he ought reasonably to have done—*Molyneux v. Hawtrey*, [1903] 2 K.B. 487; *In re Hardwicke and Lipskin's Contract*, [1902] 2 Ch. 666. Restrictive covenants in the nature of easements imposed on the property are material defects which it is the duty of the vendor to disclose to the vendee. His failure to do so will entitle the vendee to refuse to complete the sale—*Lallubhai v. Mohanlal*, *supra*. As to a right of preemption, see *Mt. Ishra v. Nawbat*, A.I.R. 1933 Lah. 522 I.C. 120.

Where the vendee is *perfectly aware* of the defect in title or existence of an incumbrance, there is no duty on the part of the seller to inform the buyer of such defect or incumbrance. Therefore, where the vendee buys with full knowledge that the vendor has not got a good title, he cannot be said to have been defrauded by the vendor within the last clause of this section—*Ramasubbu v. Muthiah*, A.I.R. 1925 Mad. 968 (969), 85 I.C. 999. Similarly, if defect in title is such that the purchaser could have discovered it if he had taken reasonable care to investigate the title, there is no duty cast on the vendor to disclose the defect; and the purchaser is not entitled to say that there has been a fraud on the part of the vendor in not informing him of the defect—*Harilal v. Mulchand*, 52 Bom. 883, 30 Bom. L.B. 1149, 113 I.C. 27, A.I.R. 1928 Bom. 427 (429). Where a right of way once existed in the property agreed to be sold, but before the agreement was entered into, the right had been extinguished by operation of law, namely under the Town Planning Act on the reconstitution of plots, the seller had no duty to disclose anything as to the right of way—*Ratanlal v. Nanabhai*, A.I.R. 1956 Bom. 175.

299. Remedy of purchaser :—The law is now well-settled that where the purchaser discovers defects in the property before conveyance, he can rescind the contract or successfully oppose a suit for specific performance (*Reeve v. Berridge*, 20 Q.B.D. 523); but if the purchaser discovers material defects after the conveyance, he must

make out a case of fraud in order to set aside a sale (*Brawnlie v. Campbell*, 5 App. Cas. 937)—*Eastern Mortgage and Agency Co. Ltd. v. Fazlul Karim*, 52 Cal. 914, A.I.R. 1926 Cal. 385 (389), 90 I.C. 851. If as a result of agreement between the holder of a money-decree and the judgment debtor the property of the latter is put up to sale by public auction and a prior registered assignment is not disclosed in the notification and conditions of sale the auction purchaser is entitled to repudiate the agreement and claim refund of the purchase money deposited from the actioner—*Sk. Moula Buksh v. Dharamchand, Ranivala*, 65 C.W.N. 881. If a certain property is allotted to a co-sharer on partition together with the debts of the joint family and the co-sharer agrees to sell that property receiving a part of the price in advance the vendee may ask for the refund of the amount paid in advance not on the ground that the title is defective but on the ground that the sale is liable to be avoided on the ground of fraud by the creditors under sec. 53—*Meenakshi Ammal v. A. Munuswami*, I.L.R. (1966) 1Mad. 114.

In the case of an executed contract where property has been conveyed and the purchase-money paid, the purchaser has only a limited right to claim compensation from his vendor. He may sue when there is a breach of covenant of title or warranty or when the deed contains an express condition for compensation for any defect. But where his claim is based on misrepresentation, pure and simple, such misrepresentation must be fraudulent—*Parmanand v. Mohanlal*, A.I.R. 1933 Sind 144, 144 I.C. 37. Where there is no allegation that the parties had agreed that compensation would be paid for shortage of area and the plaintiff's case is that he was to pay for the actual area ascertained then, and if he fails to do so, he can only succeed on proof that the failure was due to the fraudulent conduct of the defendant—*Ibid.* A mere mis-statement of the area is not to be regarded as anything more than a false demonstration. If the space to be conveyed is precisely defined by boundaries, the statement of its measurement may be treated as surplusage and of no consequence—*Leon v. Maung*, A.I.R. 1933 Rang. 24, 142 I.C. 12. See also *Durga Prasad v. Rajendra*, 41 Cal. 493, 40 I.A. 223.

Under the concluding words of this section, an omission to make the disclosure under clause (1) (a) is fraudulent. *Prima facie*, therefore, such an omission may also be a "fraud" as defined by sec. 17 (5) of the Indian Contract Act, and so render the contract voidable at the option of the purchaser under sec. 19, or else a purchaser may sue for rescission under sec. 35 of the Specific Relief Act—*Bai Dasibai v. Bai Dhanbai*, 49 Bom. 325, A.I.R. 1925 Bom. 85 (87), 85 I.C. 597—*Champalal v. Roopa*, A.I.R. 1963 Raj 38. The onus of proving that non-disclosure is fraudulent lies on the purchaser—*Sachidanand Patnaick v. G. P. & Co.*, A.I.R. 1964 Orissa 269.

300. Misdescription :—If the misdescription is not of sufficient importance, and does not go to the essence of the contract, the sale will not be annulled but compensation will be given to the purchaser. "In each case the question depends upon the view of the Court as to the importance of the misdescription"—*Fawcett v. Holes*, (1889) L.R. 42 Ch.

D. 150. Thus, a parcel of property was sold 'with a cook-room attached to it', but no such cook-room was in fact attached to the property; the purchaser applied for rescission of the sale. *Held* that the absence of the cook-room was not very material because there was enough space on which a cook-room could be built, it did not go to the very essence of the contract so as to warrant the Court in saying that the sale ought to be annulled; an adequate compensation was a sufficient remedy—*Administrator-General v. Aghore Nath*, 29 Cal. 420 (426). Where the sale-deed recited that some of the lands sold had been given for cultivation to tenants for one year, but on completion of the sale it was found that the tenants were permanent tenants of the land, *held* that there was an error or misdescription as to the quality of the interest transferred, for which the purchaser was entitled to claim damages without rescinding the sale—*Viswanath v. Bala*, 18 Bom. L.R. 292, 34 I.C. 147 (148). But where the misdescription goes to the essence of the contract and materially alters the substance of it, *i.e.* where the misdescription, although not proceeding from fraud, is so material that it may reasonably be supposed that but for such misdescription the purchaser would have never entered into the contract at all, in such a case the contract will be avoided altogether, and the purchaser is not bound to resort to the remedy of compensation—*Flight v. Booth*, 1 Bing N.C. 440, 41 RR. 599; *In re Puckett and Smith's Contract*, [1902] 2 Ch. 258, *Ramayya v. Komarappa*, A.I.R. 1936 Mad. 814, 70 M.L.J. 719, 163 I.C. 704. Where the vendor did not guarantee the area of the property as stated in the sale-deed, nor did he make any representation in respect thereof as would amount to an assurance, but designedly or undesignedly left the vendee under an impression that the deficiency in area, if any, would not be great, and the vendee remained content with it and did not take steps to have a measurement made, *held* that the vendee was not entitled to any damages or to a conveyance of more land in case the actual area of the plots sold was found to be less than that given in the sale-deed—*Hassonally v. Tribhovan Das*, 25 C.W.N. 385 (397) (P.C.), 61 I.C. 361, A.I.R. 1921 P.C. 40.

A misdescription should be distinguished from mere laudatory expressions and puffing advertisements, such as where a house of mean character is described as a "desirable residence for a family of distinction" or a land imperfectly watered is described as "uncommonly rich water-meadow land"; such expressions, though objectionable from the point of view of honesty, will not render the contract voidable by the purchaser, because their exaggerative character is obvious from the very nature of the language used. See *Dart's Vendors and Purchasers*, p. 110. If the purchaser is aware that the vendor's laudatory statements are false, and yet enters into a contract, the rule of *caveat emptor* will apply, as for instance in a case where a coal-mine was stated to be "standing on a fine vein of coal" but the purchaser knew that it had been worked and was almost exhausted—*Colby v. Godsden*, 34 Bing. 416.

301. Cl. (1) (b)—Vendor is bound to produce documents of title:—Clause (1) (b) imposes upon the vendor the duty of producing his title deeds for inspection by the purchaser at his request. "As to incumbrances and defects in title, a vendor must produce to the purchaser all such

documents of title, in his possession or power, as are necessary, an must inform him of all material defects not apparent thereon."—*Dart's Vendors and Purchasers*, p. 195 (cited in 20 Bom. 522, 530). "A prudent purchaser will enquire for the title-deeds, demand a satisfactory explanation if any of them are not forthcoming. His omission to make such an enquiry may fix him with notice of an equitable mortgage by deposit"—*Dart*, p. 520; *Whitbread v. Jordan*, 1 Y & C. 303. Thus, where in reply to inquiries by a purchaser the vendor said that the title was unincumbered and the title-deeds were at his bankers' for safe custody, and the question was allowed to drop, the purchaser was held to have constructive notice of an equitable mortgage secured by deposit of the title-deeds—*Maxfield v. Burton*, L.R. 17 Eq. 15.

Under this clause, the vendor is bound to produce his documents of title for examination by the buyer only when the latter asks for them. Note the words '*at his request*'. Where the purchaser never asked for the title-deeds, the fact that the vendor did not produce them would not justify the purchaser in repudiating the contract—*Maung Po Te v. Maung Shwe*, 10 Bur. L.T. 35, 35 I.C. 373 (374). Where the agreement for sale was entered into on 24th January 1947 and the sale was to be completed by 23rd May following, but no request was made by the buyer to examine the documents of title till 16th May, 1947, it was held that the buyer must be regarded to have accepted the seller's title before he made the request—*Bawa Sunder Singh v. Hans Raj*, A.I.R. 1953 Punj 231. The seller is not bound to produce the title deeds at the office of the buyer's lawyer—*Ibid*. When the title-deeds are in the possession of a co-sharer, the other co-sharers and their vendees have a right to enforce production of the title-deeds for inspection by that co-sharer—*Sm. Labanya Ray v. Phanindra Mohon Mukherjee*, 68 C.W.N. 611.

The words "*possession and power*" indicate that the vendor is bound to produce not only the deeds in his possession, but also those which he can produce, and the mere fact that the procuring of those documents will cause the vendor trouble and expense is no answer to the purchaser's demand. But his liability is confined to the production only of those documents which affirmatively evidence the vendor's title, and does not extend to those which are merely required to negative some possibilities. See *Dart*, p. 627. Sub-sec. (1) (b) of this section does not however enable the vendee to require production of the documents not in the possession or power of the vendor or to claim expenses for making a search for them in the collector's or the Registrar's office and for obtaining copies thereof—*Rathna Bai v. Mrs. Barrass*, A.I.R. 1943 Mad. 593, (1943) 1 M.L.J. 461.

If the vendor fails to produce documents to show at least a marketable title, the purchaser is entitled to refuse to complete the sale, and the vendor is bound to return to the purchaser his deposit with interest at the usual rate—*Shrinibasa v. Meherbai*, 41 Bom. 300 (311) (P.C.); *Bishan Das v. Fazal Ilahi*, A.I.R. 1937 Pesh. 8, 167 I.C. 858. Where an agreement for sale provides that the vendor shall forthwith deliver the title deeds for inspection the word '*forthwith*' means with all reasonable celerity' and the vendor is not required to deliver without

any request from the purchaser—*Jitendra Nath Roy v. Maheshwari Bose*, A.I.R. 1965 Cal. 45.

While the vendor is liable to *produce* his title-deeds for inspection by the purchaser or any one on his behalf, he is not bound to *deliver* them to him before the completion of the sale—*Sugden's Vendor's and Purchasers*, p. 29. These must be delivered after payment of purchase-money; see clause (3) of this section.

In India, the seller is not bound to *deliver an abstract* of title; his only obligation is to produce his documents of title for examination by the buyer, if the latter so requests—*Jyoti Prosad v. H. V. Low & Co.*, 34 C.W.N. 347 (351), A.I.R. 1930 Cal. 561. It has been held by the Bombay High Court that the purchaser must in the first instance bear the cost of obtaining certified copies of all orders and consent decrees, asked for in his requisition—*Shamsuddin v. Dayabhai*, 48 Bom. 368.

Clause (1) (b) however, is not exhaustive, because it does not state *where* the deeds are to be produced, at whose *expense*, and how far is their non-production vital to the contract—*Gour's Law of Transfer*, 6th Edn. Vol. I. p. 723.

302. Cl. (1) (c) Vendor is bound to answer material questions :— Under clause (1) (c) the vendor is bound to answer to the best of his information all relevant questions put to him by the purchaser in respect of the property; and the purchaser's omission to ask questions will not relieve the vendor of his liability to disclose material defects in the property—*Heywood v. Mallalien*, 25 Ch. D. 357; Dart p. 167.

The questions asked by the purchaser must be *relevant i.e.*, specific and direct, and not too general or vague. Thus, where the purchaser made the following requisition:—"Is there to the knowledge of the vendors or their solicitors any settlement, deed, fact, omission or any incumbrance affecting the property not disclosed by the abstract?" It was held that neither the vendors nor their solicitors were bound to answer such a *general* question—*In re Ford and Hill*, 10 Ch. D. 365. Any information regarding the income or the rental of the property is a relevant question, which it is the duty of the seller to answer. If he gives an answer which is false, he is guilty of a breach of duty and misrepresentation. Further, if he volunteers any information about the income, he is certainly bound to give true information—*Prem Chand v. Ram Sahai*, 28 N.L.R. 184, A.I.R. 1932 Nag. 148, 140 I.C. 209. The duty of the seller is not only to answer requisitions but also to point out a material defect of which he is aware and of which the buyer is not aware—*Ratanlal Acharatlalshet v. Nanabhai Miyabhai*, A.I.R. 1956 Bom. 175.

Abstract of title :—Where the sale was, under the condition which required the party to deliver to the purchaser an abstract of the title, subject to the further stipulation that the purchaser would, within a specified period after the delivery of the abstract, deliver at a particular place specified therein a statement in writing of his objections and requisitions, if any, to or on the title as deduced by such abstract, and upon the expiration of such last mentioned time (essence of the contract) title was to be considered as approved, subject only to such objections and requisitions if any; *held* that the time within which the purchaser

was to deliver his statement if there were objections and requisitions, was to date from the delivery of a perfect abstract which meant an abstract that contained with sufficient fulness the effect of every instrument which constituted the vendor's title and contained all facts, e.g. as the death of the father, where the title has to be shown to have devolved upon the son—*Nilmoney v. Dhirendra*, A.I.R. 1930 Cal. 428, 57 Cal. 1115, 126 I.C. 705. The stipulation was not to be used to thrust upon the purchaser a property to which there was no title at all and even if the abstract be perfect, the stipulation could not debar the purchaser from enquiring into the title or from making an objection to it, if such an objection goes to the very root of the title—*Ibid.*, at p. 430.

It is the duty of the vendor to make out his title. Even where a vendor has under the contract an express power of rescission if requisitions are made, which he is unwilling to comply with, yet that power does not enable him to override reasonable requisitions—*R. G. Lakshmidas & Co. v. Sir Dorab Tata*, A.I.R. 1927 Bom. 195, 51 Bom. 247, 101 I.C. 229.

303. Cl. (1) (d) Preparation of conveyance :—Under clause (1) (d), it is the duty of the purchaser and not of the vendor, to prepare the conveyance—*Kapadbhanj Municipality v. Ochavla*, A.I.R. 1928 Bom. 328 (330), 30 Bom L.R. 920, 113 I.C. 161; *Dinkar Rai v. Ayub*, A.I.R. 1023 Nag. 37 (39). Upon a sale in consideration of a gross sum, the purchaser having accepted the title is bound, subject to any special stipulation in the contract, to prepare the conveyance and tender it for execution to the vendor—*Dart*, p. 570. The execution of the conveyance by the vendor and the payment of the price by the purchaser being presumed in law to take place simultaneously, if the vendor beforehand signifies his refusal to execute the conveyance, the purchaser need not tender the purchase-money or a draft of the conveyance—*Essaji v. Bhimji*, 4 B.H.C.R. (O.C.) 125.

It is the duty of the purchaser to tender a conveyance to the vendor for execution, and until such tender is made by the purchaser or waived by the vendor, the purchaser has no right to obtain the title-deeds—*Ma Huit v. Moung Po Pu*, 31 C.L.J. 87 (P.C.), 55 I.C. 791 (792), A.I.R. 1919 P.C. 124. But where the vendor agrees to make the conveyance, the vendee is under no duty to tender to the vendor a draft conveyance—*Probodh Kumar v. Gillanders, Arbuthnot & Co.*, A.I.R. 1934 Cal. 699, 152 I.C. 571. Under this clause, it is the duty of the vendor to execute and deliver a valid conveyance to the purchaser, and if for any reason he executes an invalid or ineffective conveyance, he has no answer to a suit for specific performance of the agreement to sell and for the execution of a legal and binding sale-deed—*Santhayi v. Mahomed*, 11 L.B.R. 94, 65 I.C. 405, A.I.R. 1921 L.B. 16.

304. Cl. (1) (e)—“Take care of the property” :—“The vendor is *pro tanto* a trustee in possession although he holds the purchaser at arm's length, and, as a trustee, is bound to do those things which he would be bound to do if he were a trustee for any other person”—*per* Lord Selborne in *Phillips v. Silvester*, L.R. 8 Ch. 173 (177). Cf. section 15 of the Indian Trusts Act (II of 1882). He is bound to protect the property

from injury or wrongful occupation by trespassers. If he fails in his duty in this respect, he will be liable to pay compensation to the purchaser—*Sashi Bhusan v. Rai Chand*, A.I.R. 1950 Cal. 333. For an application of the principle of this clause in auction sale see *Royal B. P. B. Society v. Bomash*, 31 Ch. D. 390. The obligations begin to arise as soon as the purchaser has paid the purchase-money, though he has got no conveyance; and even when instead of paying the whole of his purchase-money, he pays a part of it, it would seem to follow as a necessary corollary that to the extent to which he has paid the money, the vendor is a trustee for him—*per* Lord Cranworth in *Rose v. Watson*, 10 H.L.C. 672 (683). And since he is a trustee, he would be liable for damages as if on a breach of trust, if he is guilty of waste or other misfeasance—*Clarke v. Ramuz*, (1891) 2 Q.B. 456. The position of the vendor in this respect has also been held to be analogous to that of a mortgagee in possession—*Phillips v. Silvester*, L.R. 8 Ch. 173. In the case of an agreement to sell a tenanted premises the vendor commits a breach of duty under sec. 55 (1) (e) if he relets a part of the premises falling vacant without consulting the vendee—*Mohd. Hazi Abdulla v. Ghela Manek Shah*, (1959) 2 W.L.R. 12.

305. Cl. (1) (f)—Delivery of possession :—In every contract of sale, unless the contrary appears, the vendor must be deemed to impliedly agree to give possession of the property to the purchaser, in addition to executing a conveyance in his favour—*Surendra Ramanujan v. Sicalingam*, 47 Mad. 150, 45 M.L.J. 431, A.I.R. 1924 Mad. 360, 77 I.C. 542. Under clause (1) (f), the obligation is upon the vendor to give the vendee possession, and not upon the latter to get possession for himself, especially when any difficulty arises in identifying the particular land sold. It is the duty of the vendor to ascertain the subject-matter of sale—*Darpan Koer v. Kedar Nath*, 1 P.L.J. 140, 35 I.C. 539. Where the condition in the sale-deed was *inter alia* that the vendor would not be liable if any defect in title was found subsequently and that if the vendee did not get possession, he should himself take steps to do so and the vendor would help him; but it was found that at the time of the sale the vendor did not have possession and he had lost all right to obtain possession, it was held that the above clauses did not exonerate the vendor from the statutory liability under this clause—*Barisal Loan Office v. Satish*, A.I.R. 1936 Cal. 12, 40 C.W.N. 19, 160 I.C. 407.

In the absence of a contract to the contrary, the vendor is liable to give up possession *immediately* after the execution of the sale-deed—*Sri Ram v. Kidari*, 6 Lah. 308, 88 I.C. 743, 26 P.L.R. 488, A.I.R. 1925 Lah. 481. But the vendor is not bound to put the purchaser in possession before the conveyance is executed—*Kapadvanj Municipality v. Ochhavlal*, 30 Bom. L.R. 920, A.I.R. 1928 Bom. 328 (330), 113 I.C. 161; nor can the purchaser insist on getting possession before the terms of the conveyance have been agreed upon and before actual execution of the conveyance—*Ibid.*

The vendor is bound to give such possession of the property as its nature admits, *i.e.*, such possession as is capable of being taken. The word "possession" is a flexible one, and when the property is stated to be in the occupation of tenants subject to whose tenancy the purchaser

buys, the nature of the contract shows that possession means possession as landlord—*Sugden's Vendors and Purchasers*, p. 8; *Venkata Suraya-subba Rao v. Vasudeva*, A.I.R. 1956 Andhra 113; *Visvanatha Iyer v. Muhammad Kunju*, 1964 Ker. L.J. 12. If the property is already mortgaged with possession to a usufructuary mortgagee, the purchaser will get such possession as the vendor had, *viz.*, proprietary possession—*Mumtazunnessa v. Bhagirath*, 6 I.C. 114. The presence of tenants or trespassers in the property does not affect the nature of the property as the expression "its nature" in this clause mean an incident which is inherent in the property—*Sashi Bhusan v. Rai Chand*, A.I.R. 1950 Cal. 333.

Where the property sold is the coparcenary interest of a Hindu member of a joint family, specific possession cannot be given unless the other members of the family are parties to the suit—*Abdul Aziz v. Ajudhia*, 15 C.P.L.R. 156; *Rewa Singh v. Hardayal*, 3 N.L.R. 160. See also *sec. 44*.

See also Note 292 in *sec. 54* under heading "Delivery of possession."

Where the parties agree that possession in a particular way should be given, the agreement will be enforced; and possession given in any other way will not satisfy the requirements of law. Thus, if the purchaser of a house wants actual possession thereof, a constructive possession will not avail, and the purchaser is entitled to repudiate the contract—*Phillips v. Caldecleugh*, L.R. 4 Q.B. 159; *Hyam v. Gubbay*, 20 C.W.N. 66.

The non-payment of purchase-money does not prevent the ownership from passing from the vendor to the purchaser, and the latter, notwithstanding such non-payment, can maintain a suit for possession. For cases see Note 281 in *sec. 54*, under heading "Non-payment of price." In such a case the purchaser is entitled to an unconditional decree for possession and the seller is to bring a suit for recovery of the unpaid purchase-money—*Ramayya v. Soma Ayyar*, A.I.R. 1947 Mad. 92, I.L.R. 1947 Mad. 397. But see *Peary Lal v. Hub Lal*, A.I.R. 1945 All. 135, I.L.R. 1945 All. 183, where it has been held that in such a case the purchaser can be put to terms by the decree, as the provisions of this section do not exclude the application of the principles of equity. If the vendor fails to give possession, the purchaser is entitled to rescind the contract and to recover the purchase-money if already paid—*Vuddondam v. Venkatakeswara*, A.I.R. 1951 Mad. 470, (1950) 2 M.L.J. 807. But if in the conveyance the vendor expressly stipulates that he would not be liable to the purchaser if the latter fails to get possession by reason of the act of anybody other than the vendor, *held* that the purchaser, on his failure to get possession of the land, owing to the act of a third party, would not be entitled to a refund of the purchase-money—*Indra Narain v. Badan Chandra*, 47 I.C. 340 (Cal.).

The provisions of this clause do not give the vendee a right to obtain from the vendor any expenses which he may have incurred subsequent to the sale in obtaining possession of the property. If he decides, on being resisted in obtaining possession, to establish his right himself, then that is a matter with which the vendor has no concern.

If he wishes to rely upon the covenant granted to him by the statute, then he can enforce his rights only by a suit against the vendor for specific performance or for damages—*U Mya v. Chettyar Firm*, A.I.R. 1937 Rang. 81, 167 I.C. 84.

Under this clause the vendor is bound to give possession to "the buyer or such person as he directs." Therefore a suit for specific performance of the contract and for possession to such person can be brought by the buyer along with such person—*Sashi Bhusan v. Rai Chand*, supra.

Growing crops :—The right to growing crops passes on the sale of land in the absence of anything to the contrary and in case of Court-sale the right accrues from the date of the delivery of possession of the land—*Supdt. & Remembrancer of Legal Affairs v. Bhagirath*, A.I.R. 1934 Cal. 810, 61 Cal. 991, 38 C.W.N. 854, 59 C.L.J. 482.

305A. Cl. (1) (g) :—The seller imposes upon himself the obligation mentioned in this clause. The fact that the trustees of the property and not the seller were to be the conveying parties does not affect this obligation. The meaning of the word "seller" cannot be limited in that way—*Govindram v. State of Gondal*, A.I.R. 1950 P.C. 99, 54 C.W.N. 419, 77 I.A. 156, 52 Bom. L.R. 450. The terms of the contract of sale may operate to substitute the date of possession for the date of sale. Mere use of the word 'net' in the price in the contract may be sufficient to exclude the application of this clause—*ibid*.

306. Payment of public charges, rents :—An agricultural loan by the Government is not a public charge any more than it is a public debt. But it may be an incumbrance by statute or contract and then it is the duty of the vendor to discharge it—*Duntuluri v. Kunjuluri*, 9 M.L.T. 108, 8 I.C. 435. A tax levied by the Municipality under the Local Acts must be paid according to the terms of those Acts. Thus, a house-tax levied under the Madras District Municipalities Act is a yearly tax, though payable in two half-yearly instalments, and the whole year's tax will be levied from the purchaser, though the second half-yearly instalment only became due after he purchased the house—*Chairman, Municipal Council v. Kottamma*, 30 Mad. 423.

Where leasehold property is sold, the vendor is bound to pay the rent which had accrued due, up to the date of sale, not only during the tenancy of the vendor but also during the tenancy of person through whom he claimed otherwise than by purchase—*Phul Kuer v. Rambhanjan*, A.I.R. 1924 Pat. 822, 75 I.C. 975.

307. Discharge of incumbrances :—One of the duties of the vendor is to discharge amongst other things all incumbrances on the property existing at the date of the sale, except where the property is sold subject to incumbrances—*Munirunnissa v. Akbar Khan*, 30 All. 172; *Har Charan v. Nurul Hassan*, A.I.R. 1934 Oudh 492, 152 I.C. 221. The word "incumbrances" is of sufficient amplitude to include also a recurring liability like maintenance allowance—*Ibid*, at p. 493. Where the vendor fails to discharge the incumbrance the vendee is entitled to a refund of the purchase price as damages—*Ganpat v. Mangilal*, A.I.R. 1962 Madh. Pra.

144. The owners of certain immoveable property, which was under a mortgage, entered into a contract for the sale of the property but subsequently declined to complete the sale on the ground that the property had already been mortgaged and that the mortgagees refused to release the property. On a suit by the vendee for breach of the contract of sale, the vendors were bound to convey the property free from the incumbrances, and the existence of the mortgage was no defence to the purchaser's action—*Nabin Chandra v. Krishnabarana*, 38 Cal. 458.

There is no presumption under the clause that encumbered property is sold free from encumbrances. Where the buyer is to discharge the encumbrances, the case will be governed by an express "contract to the contrary"—*Parshotam v. Taimur Ali*, A.I.R. 1945 All. 39, 1944 A.L.J. 454. Where the vendor has contracted to sell the property free from incumbrances, but due to non-payment of interest by the vendor the mortgage dues have greatly increased, he cannot take advantage of the hardship created by himself—*Arun v. Tulsi*, A.I.R. 1949 Cal. 510. Where the property is agreed to be sold free from incumbrances, the seller is bound to give vacant possession of the property, even if it be in the occupation of trespassers, as such an occupation is an "incumbrance"—*Sashi Bhusan v. Rai Chand*, A.I.R. 1950 Cal. 333.

If expenses for construction of development works under agreement with the Improvement Trust are to be incumbrances on the property, the owner thereof is bound to discharge them before he sells the land, unless there is an agreement to the contrary with the purchaser—*S. K. Buty v. Shriram*, A.I.R. 1954 Nag. 65. The purchaser is not bound to pay the municipal taxes paid by the seller for a period prior to the date of sale—*ibid.*

Where the vendor leaves the purchase-money with the purchaser for payment to his creditors, the amount so left cannot be said to be transferred in trust to the vendee in the legal sense of the expression, but it is a mere direction to pay the amount to the creditor on behalf of the vendor within a reasonable time; and when the amount is not so paid, the vendor is entitled to recover it as a debt as he has a lien on the property for the unpaid balance—*Gujar Mal v. Paras Ram*, A.I.R. 1937 Lah. 608, 172 I.C. 438; *Sheopati v. Jagdeo*, A.I.R. 1931 All. 95; *Gajadhar v. Rishab Kumar*, A.I.R. 1949 Nag. 319, I.L.R. 1949 Nag. 122. A vendor sold his property to the vendee for a certain amount out of which a certain sum was to be left with the vendee for paying off Zarpeshgidar of the vendor. The pre-emptor obtained a pre-emption decree in his suit against the vendee on condition of his depositing the purchase-money. The vendee withdrew the whole amount as he was entitled under the pre-emption decree, but had not paid the Zarpeshgi money. The pre-emptor thereupon brought a suit for possession from the Zarpeshgidar and in the alternative prayed for a decree against the vendee for the Zarpeshgi money in order to pay it off to Zarpeshgidar and obtain possession from him: *Held* (i) that the vendee could not be regarded as a trustee of the pre-emptor; (ii) that as the vendee had never entered into any contract with the pre-emptor to pay the money to the Zarpeshgidar, the vendee was under no obligation to pay to the pre-emptor the amount which he had not paid to the Zarpeshgidar and (iii) that

the pre-emptor after becoming aware of the fact that the Zarpeshgidar had not been paid off could and should have obtained a suitable relief in respect of it in the pre-emption suit—*Sital v. Ramsaran*, A.I.R. 1937 Pat. 594, 16 Pat. 360, 171 I.C. 720. Where a purchaser agrees to pay off a prior mortgage out of the sale consideration left with him, whether the payment by the purchaser is in the capacity of the mortgagor's agent depends upon circumstances—*Taibai v. Wasudeorao*, A.I.R. 1937 Nag. 372 (375) (F.B.), 172 I.C. 142.

Where the vendor leaves a part of the purchase money with the purchaser, if there is any unexpended balance in the hands of the latter as a result of statutory reduction of the debt by scaling down thereof, the vendor is entitled to the same—*Subba Row v. Varadaiah*, A.I.R. 1943 Mad. 482, I.L.R. 1943 Mad. 885; *Pachigolla v. Karatam*, A.I.R. 1942 Mad. 525, (1942) 2 M.L.J. 506; *Kailash v. Joti* A.I.R. 1948 All. 307, 1948 A.L.J. 103. But the vendor will not be entitled to demand a refund of the balance amount when the vendee had actually paid more than the amount deposited—*Radhakrishna v. Subramania*, A.I.R. 1953 Mad. 370, (1952) 2 M.L.J. 198. See also *Veerabhadrayya v. Subbarayadu*, A.I.R. 1942 Mad. 650, (1942) 2 M.L.J. 154. It has been held in Punjab that the vendor is not entitled to participate in the benefits which the vendee might obtain by non-payment—*Narain v. Bachan*, A.I.R. 1953 Punj. 110, I.L.R. 1952 Punj. 219.

When a portion of the purchase money is retained by the vendee to pay off incumbrances, the latter acts as an agent of the vendor, only that the agency is not revocable as it is coupled with an interest—*Subba Row v. Varadaiah*, supra.

Clause (1) (g) clearly means what it says, viz., that there must be a provision in the sale-deed that the property is sold subject to incumbrances, and if that provision is not specifically set out in the sale-deed, then the vendor will be liable for all prior incumbrances. This clause cannot be interpreted to mean that the vendor is only liable if he stated in the sale-deed that he sold the property free from incumbrances—*Jugal Kishore v. Banwari*, 51 All. 1053 119 I.C. 1, A.I.R. 1929 All. 791; *Alagappa v. Chettyar Firm*, A.I.R. 1937 Rang. 287, 14 Rang. 766, 170 I.C. 484.

The mere fact that the vendee was aware of the existence of an incumbrance does not relieve the vendor of the statutory liability to get the incumbrance discharged in the absence of a contract to the contrary—*Podapati v. Manduva*, A.I.R. 1927 Mad. 193, 98 I.C. 450. In such a case if the mortgagee institutes a suit on his mortgage impleading both the vendor and the vendee gets a decree and the properties are sold, the vendee would be entitled to damages, a suit for which would not be barred by *res judicata*—*Gobardhan v. Afzal*, A.I.R. 1932 All. 553, 138 I.C. 495. But where in such a mortgage suit it was found that the vendees were negligent in their defence and did not raise proper pleas available to them and that there was really no cloud on the title of the vendors and the vendees unnecessarily paid an exorbitant sum to the mortgagees without even consulting the vendors, the vendees were not entitled to recover the amount so paid—*Sethi Lookmanji v. Mangal Sain*, A.I.R. 1938 Lah. 743.

Even in those provinces (*e.g.*, Berar) to which the T. P. Act did not apply, a covenant for quiet enjoyment and freedom from incumbrances should independently of this Act, be held to be implied in a sale, in accordance with justice, equity and good conscience. Consequently, the vendor was bound to reimburse the purchaser for the payment made by the latter to discharge the incumbrances created by the vendor and not disclosed in the conveyance—*Keshrimal v. Kadhai*, 55 I.C. 152 (153) (Nag).

If the vendor does not discharge the incumbrances, the vendee is entitled under clause (5) (b) to retain out of the purchase-money the amount of the incumbrances, and to pay the amount to the persons entitled thereto—*Naina v. Basant*, A.I.R. 1934 All 406, (1934) A.L.J. 318 (F. B.).

If the vendor professes to sell unencumbered property, but the property is found to be mortgaged, the vendee may, before completing the contract of sale, compel the vendor to redeem the mortgage and to obtain a re-conveyance from the mortgagee. See sec. 18 (c) Specific Relief Act. If the incumbrance is discovered after payment of the purchase-money, the vendee can redeem the mortgage by paying the mortgage-money himself and can file a suit against the vendor for recovery of the money (sec. 69 Contract Act)—*Manishankar v. Ram Krishna*, 6 Bom. L.R. 832; *Bhagwati v. Banarsi*, 50 All. 371 (P.C.). 32 C.W.N. 705 (708), A.I.R. 1928 P.C. 98, 108 I.C. 687; *Nathu Khan v. Burtonath Singh*, 20 A.L.J. 301 (P.C.), 26 C.W.N. 514, 42 M.L.J. 444, 66 I.C. 107, A.I.R. 1922 P.C. 176 (178). He can also recover damages for the period for which he is kept out of possession for no fault of his—*Gauri Shankar v. Mumnu*, A.I.R. 1935 Oudh 142, 153 I.C. 811. The benefit of such a contract passes to the transferee of the vendee—*Rinsa Ansa v. Mohanlal*, A.I.R. 1938 Nag. 257

The provision under clause (g) is one which cannot be enforced against the vendor, *after* the completion of the sale, without an express covenant to that effect. Thus, if at the time of purchase the amount due under the mortgage was Rs. 16,000, as disclosed in the preliminary decree on the mortgage, but after the sale was complete the decree was amended and the mortgagee was held to be entitled to a sum of Rs. 23,000, which the purchaser had to pay in order to release the mortgage, and he thereupon sued the vendor for the difference between the sum which he paid to the mortgagee and the sum of Rs. 16,000, *held* that the purchaser's claim could not be allowed. The amount that was stated in the sale-deed was the actual amount then found due under the mortgage-decree, but on a proper construction of the sale-deed, the purchaser was bound to discharge the incumbrance *entirely* and not merely to pay the sum mentioned in the sale-deed. The decree was amended by an order subsequent to the purchase. If by the amendment the amount had been reduced, the purchaser would have been profited by it. On the same principle, he was bound to pay the entire amount as increased by the amended decree—*Bidhu Bhusan v. Umesh*, 57 Cal. 683, 51 C.L.J. 538 A.I.R. 1930 Cal. 568 (571), 128 I.C. 183; —*Mahalakshmanma v. Chalamayya*, 1957 Andh. L.T. 475.

If the property had been mortgaged to a partnership firm, the vendee would be entitled to require further proof of the release of the property than merely a document purporting to be signed by one of the partners for the firm as a whole. He would be entitled to proof as to who all the individual partners were and as to whether they had authorised that partner to reconvey the property—*Hirachand v. Jayagopal*, 49 Bom. 245, A.I.R. 1925 Bom. 69, 89 I.C. 553.

If the parties substitute a written contract for the statutory contract contained in this section they cannot throw away the latter and rely on the former. Thus where the plaintiffs purchased certain property from the defendant under a deed which recited that if any portion of the property was lost as a result of a claim by an incumbrancer, the vendor would indemnify the vendees to the extent of the loss suffered; and subsequently on a decree for sale being obtained by a mortgagee of the property the plaintiffs had to pay a large sum of money to avoid the sale: *held* that as no portion of the property had passed out of the hands of the plaintiffs-vendees they were not entitled to claim the said amount—*Ram Chander v. Bhagwati*, 22 A.L.J. 576, 79 I.C. 590.

Where the condition in the sale-deed was merely that the mortgage was to be paid off by the vendee and provided that he was responsible for future interest and was to pay it off before the property was endangered, the presumption is that he was to pay it off immediately, at any rate, as soon as it was reasonably possible—*Kallu v. Ramdas*, A.I.R. 1929 All. 121, 26 A.I.J. 53, 107 I.C. 679.

308. Clause (2)—Covenant for title :—A covenant to indemnify is not the same thing as a covenant for title, and does not run with the land; consequently, if A sells a property to B, and C executes an indemnity bond to indemnify B if he is dispossessed of the property, the benefit of the covenant of indemnity cannot be taken advantage of by a person who purchases the property from B (or who purchases the property at Court sale)—*Natesa v. Gopalasami*, 51 Mad. 688, A.I.R. 1928 Mad. 894 (896). It is doubtful even whether a covenant for title mentioned in this clause can pass to a purchaser at Court sale—*Ibid*. The usual covenant for title on sale are: (i) for right to convey; (ii) for quiet enjoyment; (iii) for freedom from encumbrances; and (iv) for further assurance—*Hukum Singh v. Makumat Rai*, A.I.R. 1968 Punj. 110 (F.B.). Statutory warranty is not affected by an agreement in the sale deed that in case the vendee's possession is lost vendor would return consideration—*Ram Swarup v. Fatteh*, A.I.R. 1960 All. 367.

The benefit of the covenant for title can be enforced by a pre-emptor who steps into the shoes of the vendee. He assumes all the liabilities and becomes entitled to all the benefits to which the vendee is entitled *Md. Siddiq v. Md. Nuh*, 52 All. 604, A.I.R. 1930 All. 771 (774), 124 I.C. 185; *Abdul v. Kisan*, A.I.R. 1931 Nag. 166, 27 N.L.R. 392.

The covenant implied in this clause runs with the land, and a purchaser from the vendee or a purchaser from a pre-emptor is entitled to the benefit of this covenant—*Bapu v. Kashiram*, 31 Bom. L.R. 658, 119 I.C. 659, A.I.R. 1929 Bom. 361 (363); *Hanwant v. Candi*, 51 All. 651, 1929 A.L.J. 433, A.I.R. 1929 All. 293 (295), 119 I.C. 243. See the third

para of clause (2). This para lays down that the benefit of the covenant of title may be enforced by any person in whom the property is in whole or in part from time to time vested. So, where the purchasers have sold the property purchased by them to another person, they are no longer entitled to get a decree for damages against the vendor for his failing to convey proper title, because the property is no longer vested in them but in their vendee, and it is their vendee and not they themselves who have sustained damages for defect in the vendor's title—*Ramayya v. Kotayya*, 32 L.W. 138, 1930 M.W.N. 195, A.I.R. 1930 Mad. 748 (751), 127 I.C. 617.

This clause applies not only to cases where there has been a complete sale, but also applies to cases where the transaction has not progressed beyond the stage of contract—*per* Abdur Rahim J. in *Adikesavan v. Gurunatha*, 40 Mad. 338 (350) (*Sadasiva Ayyar J. contra*); *Imjad Ali v. Mohini*, 27 C.W.N. 1025, A.I.R. 1924 Cal. 148, 80 I.C. 623; *Kathamuthu v. Subramaniam*, 50 M.L.J. 228, 94 I.C. 561, A.I.R. 1926 Mad. 569; *Subayya Chowdhury v. Veerayya*, 1955 Andhra W.R. 502. In some other cases the Madras High Court also lays down that a covenant of title is not only attached to a contract of sale but is also attached to the conveyance—*Arunachala v. Ramasami*, 38 Mad. 1171 (1175); *Sigamani v. Munibadra*, 49 M.L.J. 668, A.I.R. 1926 Mad. 255, 91 I.C. 514. The words "seller" and "buyer" include persons who have agreed to sell and buy—*Surendra Maneklal v. Bai Narmata*, A.I.R. 1963 Guj. 329.

The presumption as to the title of the vendor is absolute, and, in the absence of a contract to the contrary, is irrefutable—*Mad. Siddiq v. Md. Nuh*, 52 All. 604, 1930 A.L.J. 653, A.I.R. 1930 All. 771 (773), 124 I.C. 185; *Sk. Moula Buksh v. Dharamchand Raniwala*, 65 C.W.N. 881. An express covenant of title in a sale-deed is not necessary, since under this clause such a covenant is implied in every sale of immovable property—*Ramayya v. Kotayya*, 32 L.W. 138, A.I.R. 1930 Mad. 748 (750), 127 I.C. 617. The expression "shall be deemed to contract" in this clause implies that the covenant mentioned in this clause must be deemed to be embodied in every contract of sale, and that the rule of *caveat emptor* is thus rendered obsolete—*Basaraddi v. Enajaddi*, 25 Cal. 298 (300); *Ramchandra v. Dwarkanath*, 16 Cal. 330; *Chidambaram v. Shivattaswamy*, 15 M.L.J. 396; *Mehdi Husain v. Jafar Khan*, 8 O.C. 345.

It is true that express covenants of title overrides all implied covenants in that regard, but the implied covenants cannot be got rid of except by clear and unambiguous language—*Saraswatibai v. Madhukar*, *infra*. See also *Mad. Ismail v. Syed Hussam*, A.I.R. 1952 Punj. 298. A stipulation by the vendor in the deed of sale that if any legal or other defect in his title is found in future he will be liable for the same is an express covenant for title and quiet enjoyment, but it does not exclude the implied covenant for title, and as such it cannot be considered to be a contract to the contrary—*Nathuni Shah v. Satyanarain Prasad*, A.I.R. 1961 Pat. 11. If in a contract of sale there is no express stipulation as to the warranty of title and the vendor afterwards expresses his inability to give such a warranty, the

Court can pass a decree for specific performance, even though the vendor's refusal was not *mala fide*—*Deep Chandra v. Ruknuddaula*, A.I.R. 1961 All. 93 (F.B.), I.L.R. 1950 All. 1033. This section, which embodies an absolute warranty of title unless there is an agreement to the contrary, is applicable both to a conveyance and to a contract for sale—*Ibid* per Agarwala & Wanchoo JJ. The purchaser can claim specific performance with compensation if he can bring the case within sec. 14, Specific Relief Act. But if the sale deed has been executed, the purchaser can claim compensation if he establishes fraud—*Delli Gramani v. Ramachandram*, A.I.R. 1953 Mad. 769. See in this connection *Gulabchand v. Suryajirao*, A.I.R. 1950 Bom. 401, 52 Bom. L.R. 61. In a suit for damages for breach of covenant for title and quiet possession the damages should be ascertained on the date of the suit and not on a prior date—*Venkataswami v. Venkayya*, A.I.R. 1953 Mad. 529, (1953) 1 M.L.J. 242.

The purchaser's insistence on the form of warranty to be inserted in the sale deed subsequent to the contract of sale does not affect the contract already made, nor can it amount to repudiation when it is not persisted in—*Durga Prasad v. Deep Chand*, A.I.R. 1954 S.C. 75 in appeal from *Deep Chand v. Ruknuddin*, *supra*).

Where a suit is based on an express covenant of title, it is not open to the plaintiff to take advantage of sub-sec. (2), even if that were held to be a rule of equity—*Dugar Mal v. Gobind Saroop*, A.I.R. 1950 E.P. 74, 51 P.L.R. 347.

A covenant for title is implied in a sale of immoveable property, and the onus is on the vendor to prove a contract displacing that presumption—*Sri Ram v. Kidari*, 6 Lah. 308, 88 I.C. 743, A.I.R. 1925 Lah. 481. A transferee from the buyer is entitled to sue for damages on the ground of breach of implied covenant of title—*Guruswamy Goundar v. Santhappan*, I.L.R. (1965) 1 Mad. 287.

Under this section there is also a covenant for quiet enjoyment which does not include a covenant to deliver possession. So where possession is not delivered to the purchaser, no question of breach of quiet enjoyment arises—*Vishwanath v. Deokabai*, A.I.R. 1948 Nag. 382, I.L.R. 1948 Nag. 50. A covenant for quiet enjoyment involves a right to undisturbed possession. It becomes enforceable if there is obstruction or dispossession. The seller cannot escape the obligation to compensate the purchaser when ultimately it is found that the former had not title to the whole or part of the property sold—*Gulabchand v. Suryajirao*, *supra*. A covenant of title does not include a covenant to give possession. In the absence of an express covenant there is nothing in clause (2) to imply that the vendor shall put the vendee in possession of the property—*Muthusami v. Dharma Raja*, 1926 M.W.N. 209, A.I.R. 1926 Mad. 495, 94 I.C. 302. So also, a guarantee of title does not include payment of arrears of rent which passed with the land. The remedy of the purchaser, if the tenants fail to pay the arrears of rent, is a suit against the tenants and not against the seller—*A. L. Chettiar v. Maung The*, 6 Bur. L.J. 24, A.I.R. 1927 Rang. 134 (135), 101 I.C. 320. When a vendor gives guarantee of quiet enjoyment, his estate after his death is answerable for the breach of the covenant—*Kalyani Ammal v.*

Ezhumalai Nattar, 81 Mad. L.W. 272. If the purchaser is evicted the measure of damage is the market value of the land at the time of eviction—*Ibid.* The covenant for good title can be enforced against the universal legatee of the vendor, but not against a legatee of the universal legatee—*Polamreddi v. Yaratapalli*, A.I.R. 1960 Andh. Pra. 29.

Under this clause, the seller merely gives a warranty that he has in fact and in law the estate which he professes to have—a warranty which would take effect upon proof of breach; but he does not undertake (as in England) to show a good title by production of documents and verification of facts—*Jyoti Prosad v. H. V. Low & Co.* 34 C.W.N. 347 (351), A.I.R. 1930 Cal. 561.

Every conveyance imports a covenant of title under this clause, and this is so whether the buyer has or has not notice of the infirmity of the seller's title—*Mt. Chandrawatibai v. Valabdas*, A.I.R. 1931 Sind. 141, 133 I.C. 76. *Saraswatibai v. Madhukar*, A.I.R. 1950 Nag. 229, I.L.R. 1950 Nag. 467; *Sheokumar v. Central Co-operative Bank*, A.I.R. 1947 Pat. 477; *Avadesh v. Zakaul Hussain*, A.I.R. 1944 All. 243, I.L.R. 1944 All. 612; *Paparao v. Polinaedu*, A.I.R. 1945 Mad. 205, (1945) 1 M.L.J. 323; *Basappa v. Kodliah*, A.I.R. 1959 Mys. 46; *Sohan Lal v. Bal Kishan* A.I.R. 1960 Punj. 275. Where a seller professing to be the owner of a property transfers it while he is really a lease-holder with limited power of transfer, there is a breach of an implied contract—*Thomas v. Hanuman Prasad*, A.I.R. 1929 All. 837 (839), (1929) A.L.J. 1122. Clause (2) of sec. 55 applies not only to a completed sale but also to an agreement to sell—*Shankerlal v. Jethmal*, A.I.R. 1961 Raj. 196.

Where the covenant against encumbrances is not an independent covenant, but is part of the covenant for quiet enjoyment, the covenant does not mean to guarantee that the estate was free from encumbrances. The mere existence of an encumbrance does not give a right to sue under this covenant. In an action on a covenant of this description the plaintiff must allege the facts constituting the disturbance and that the disturbance was lawful, with sufficient particularity, to show the breach of covenant—*per Mukherji, J.* in *Eastern Mortgage & Agency Co. v. Md. Fazlul Karim*, A.I.R. 1926 Cal. 385 (390), 52 Cal. 914, 90 I.C. 851. Some hindrance or prevention of enjoyment must be proved in such a case. Mere existence of outstanding encumbrances, unless they prevent entry and enjoyment, as in the case of prior unexpired lease, will not constitute an immediate breach—*per Walmsley, J.* in the same case at p. 387. See in this connection *Ramamurthi v. Kuppuswami*, A.I.R. 1950 Mad. 621, (1950) 1 M.L.J. 499.

A covenant of title will be implied to be imported into a contract if the transaction is one of sale as defined in sec. 54. A mere license granted to a person to cut and remove trees is not a sale, and no covenant for title or quiet enjoyment will be deemed to be attached to such a transaction—*Mummikuti v. Puzhakkal*, 29 Mad. 353.

Marketable title:—The meaning of a title free from reasonable doubt is a marketable title which can at all times be forced upon an unwilling purchaser—*Lallubhai v. Mohanlal*, A.I.R. 1935 Bom. 16, 59 Bom. 83. "Every purchaser is" observed Turner, V.C., "entitled to

require a marketable title, by which I understand it to be meant a title, which so far as its antecedents are concerned, may at all times and under all circumstances, be forced upon an unwilling purchaser"—*Pyrke v. Waddingham*, 10 Hare 1 (9-10). "Where the rectitude of the title depends upon facts which.....are certainly capable of being disputed, a Court of Equity will not enforce the contract"—*P. B. & Tile Co. v. Butler*, 16 Q.B.D. 778 (787). Unless a marketable title is proved, specific performance of the contract of sale cannot be granted—*Duggan v. Talyrkhan*, A.I.R. 1938 Bom. 77, 39 Bom. L.R. 1166, 173 I.C. 714. In 1892 certain property was mortgaged to two joint mortgagees. In 1913 the owner of the property contracted to sell it and in order to prove that the mortgage had been discharged, produced a certified copy of a registered release, dated September, 1902, which was executed by one only of the mortgagees, but which recited that the other mortgagee was dead and that the executant of the release was his sole heir and representative and that the mortgage had been redeemed. No further proof of the recital was offered : held by the Privy Council that the vendors had failed to deduce a marketable title to the property, recitals being evidence only against the parties to the deed or those claiming through or under them—*Shrinivas v. Meher Bai*, 41 Bom. 300 (P.C.), 21 C.W.N. 558, 39 I.C. 627. The marketable title was the right, title and interest of the mortgagee himself and the equity of redemption of the mortgagor which the mortgagee was entitled to convey as the mortgagor's agent—*Abraham v. Abdul*, A.I.R. 1949 Bom. 154. If a proper title by adverse possession can be successfully made out, this would fulfil the vendor's obligation to make out marketable title—*Shankerlal v. Jethmal*, A.I.R. 1961 Raj. 196.

Unless the vendor's liability as imposed by this clause is excluded by express covenant, his liability will be deemed to subsist notwithstanding the fact that the vendee may have some idea as to the defect in the vendor's title—*Kalka v. Namdar*, A.I.R. 1933 All. 389; *Nawal v. Sarju*, A.I.R. 1932 All. 546, 54 All. 774, 139 I.C. 99, or had knowledge of the earlier transactions of the vendor—*Seetharamamma v. Ramireddi*, A.I.R. 1940 Mad. 739 (740), 1940 M.W.N. 14. When a vendor's title depends not upon a question of law, but upon proof of a disputed fact, that fact must be proved, before the vendor can be held to have made out a good title—*Seetharamamma v. Ramireddi*, supra at p. 743.

Good title is title good against everybody. Marketable title is free from reasonable doubt. Seller's liability is limited to the title which he has professed to transfer—*Mahomed Ziaul Haque v. Calcutta Vyapar Pratisthan*, A.I.R. 1966 Cal. 605.

Purchaser's remedy :—If the purchaser fails to obtain possession, owing to the vendor's defect of title, another person having a better title being in possession of the property, the purchaser is entitled to a refund of the purchase-money—*Ragava v. Samachariar*, 1 L.W. 8, 1914 M.W.N. 57, 22 I.C. 42. Where there is an express contract in the deed itself that in case of defect of title the vendee will be compensated by the vendor, the vendee is entitled on the basis of this covenant to maintain a suit for compensation by way of a refund of a part of the consideration of the sale for not having got possession of a part of

the land sold due to want of title of the vendor in it—*Nathuni Shah v. Satyanarain Prasad*, A.I.R. 1961 Pat. 11. If, however, the purchaser obtains possession but is subsequently dispossessed owing to the vendor's defect of title, the remedy of the purchaser is not a refund of the original consideration but damages measured according to the market value of the land at the time of dispossession. It would be unjust and inequitable to base the amount of damages on the original consideration paid at the time of purchase, because since that time the situation might have considerably changed—*Md. Siddiq v. Md. Nuh*, 52 All. 604, 28 A.L.J. 653, A.I.R. 1930 All. 771 (777), 124 I.C. 185. See also *Narasingarayudu v. Ankineedu*, 1961 Andh. L. T. 421. In a suit for refund of purchase-money where the land is still in possession of the purchaser, the fair rule will be to give him such compensation as will compensate him for the defective quality of his title. This of course, will vary considerably according to the circumstances of the particular case—*Har Lal v. Mulchand*, A. I. R. 1928 Bom. 427, 52 Bom. 883, 112 I.C. 27; *Papu v. Kashiram*, A.I.R. 1929 Bom. 361, 31 Bom. L.R. 658, 119 I.C. 659. A suit for refund of purchase-money may be regarded as a suit for damages—*Enjad v. Mohini*, A.I.R. 1924 Cal. 148, 27 C.W.N. 1025, 80 I.C. 623. Where the vendor who was impleaded as a defendant to the suit impeaching his title and claiming the vendee's eviction remained *ex parte* and therefore the vendee compromised the suit and subsequently filed a suit for damages against the vendor for breach of the covenant. Held, that the vendor was liable and he could not without imputing bad faith to the vendee blame him for compromising the suit—*Narayan Kishan v. Bhaurao*, A.I.R. 1956 Nag. 124.

When defect in the vendor's title is discovered after the execution of the conveyance and there has been no fraud, the vendee cannot avoid the sale, but his remedy lies merely in a suit for damages—*Udho Das v. Mehr Baksh*, A.I.R. 1933 Lah. 262; *Eastern Mortgage & Agency Co. v. Md. Fazul Karim*, A.I.R. 1926 Cal. 385, 52 Cal. 914, 90 I.C. 51.

Under this clause there is an implied term in the contract of sale as to the liability of the vendor for title and power to transfer, and where he has neither of the two in respect of a portion of the land sold, the vendor is liable to pay damages—*Lachmi Narain v. Har Swarup*. A.I.R. 1939 All. 170, 1938 A.L.J. 1136, 180 I.C. 342. The transferee from a purchaser can sue for damages the vendor in breach of a deemed covenant of title, notwithstanding the buyer's knowledge of defect in title—*Guruswamy Goundar, v. Santhappan*, I.L.R. (1965) 1 Mad. 287.

The law in India laid down in sec. 73 of the Contract Act as to the right of damages for breach of contract to sell immoveable property is different from that of England. Knowledge of the purchaser of the defect of title in his vendor does not affect his right to recover damages—*Adikesavan v. Gurunatha*, 40 Mad. 338 (F.B.).

In so far as the guardian appointed by the Court can be said to have incurred any liability under this clause, he does so in his capacity as a guardian—*Maida v. Kishan*, A.I.R. 1934 All. 645, 151 I.C. 820.

When vendor is relieved of his liability:—Under this clause, there is an implied liability on the vendor to give to the purchaser a title free from reasonable doubt. But this liability may be relieved if there be a *contract to the contrary*. See the opening words of this section. Thus, a stipulation that the purchaser shall not investigate the vendor's title but shall accept the title as it is, will relieve the latter of his obligation of giving a covenant for title—*Chousiah v. Rustomjah*, 13 Mad. 158 (161, 163). But this waiver on the part of the vendee must be intentional and based upon a full knowledge of the circumstances. If the purchaser enters into possession or pays the whole or part of the purchase-money or does other acts which a purchaser is not bound to do till a good title has been made out, he may be deemed to have waived his objection as to title. The question as to whether objection as to title has been waived is one of fact, and it may be that under certain circumstances the payment of purchase-money may indicate a waiver on his part. But where the purchase-money has been paid under an honest error of judgment on the part of the vendee's solicitors as to the title, such payment does not amount to waiver and the vendee is entitled to a refund of the purchase-money if the vendor fails to make out a marketable title—*Meghji v. Tayeballi*, 26 Bom. L.R. 1019, A.I.R. 1925 Bom. 64, 90 I.C. 189. A covenant contained in a sale-deed to the effect that "if any dispute arises through me (vendor) in respect of the land, I shall get it settled" does not amount to a 'contract to the contrary'. This covenant means that the vendor will see that if the purchaser does not get full ownership, title and peaceful possession through the defect in the vendor's title or through the act of the vendor, the latter is bound to remove such defect. It does not exclude the covenant of title required by sec. 55 (2)—*Ragava v. Samachariar*, 1 L.W. 8, 1914 M.W.N. 57, 22 I.C. 42. Where a contract of sale provided that "if.....any dispute arises from any one, I (seller) shall settle them at my own expense." Held that the clause being vague was not sufficient to constitute a contract to the contrary. Held, further that the taking of possession and payment of the balance of price did not amount to a waiver of the purchaser's rights to require a good title—*Subbayya Chowdary v. Veerayya*, 1955 Andhra W.R. 502.

The "contract to the contrary" must be a written one, and cannot take the shape of an *oral agreement*, because it would not be admissible in evidence under sec. 92, Evidence Act in contradiction of the written deed of sale—*Md. Siddiq v. Md. Nuh*, 52 All. 604, 1930 A.L.J. 653, A.I.R. 1930 All. 771 (774), 125 I.C. 185; *Adikesavan v. Gurunatha*, 40 Mad. 338 (351) (F.B.). The existence of a mortgage makes the title incomplete and the non-repudiation of liability to discharge the mortgage is not a valid ground for not meeting the demand for enquiry into title—*Subbayya Chowdary v. Veerayya*, 1955 Andhra W.R. 502.

The effect of a covenant for title implied in this clause can be got rid of by the vendor indicating by *clear and unambiguous* expression that he does not mean to guarantee that he has got title to the property and is entitled to convey the same—*Mahomed Ali v. Budharaju*, 39 M.L.J. 449, 60 I.C. 235 (236). But the vendor cannot get rid of his liability under this clause by reason of the fact that the purchaser had

knowledge of the defect of his title. Under this clause there is a statutory guarantee for good title unless the same is excluded by the contract of parties, and the question of knowledge of the purchaser does not affect his right to be indemnified under the Indian statute law—*Subbaroyya v. Rajagopala*, 38 Mad. 887 (889); *Arunachala v. Ramasami*, 38 Mad. 1171 (1175), 25 I.C. 618, 27 M.L.J. 517; *Thekkemannengath Raman v. Pazhiyot Manakkal*, 28 M.L.J. 184, 27 I.C. 989; *Basaraddi v. Enajaddi*, 25 Cal. 298 (301); *Bapu v. Kashiram*, 31 Bom. L.R. 658, 119 I.C. 659, A.I.R. 1929 Bom. 361 (364); *Lakhpal v. Durga Prasad*, 8 Pat. 432, 117 I.C. 654, A.I.R. 1929 Pat. 388 (389); *Adikesavan v. Guru Natha*, 40 Mad. 338 (351) (F.B.); *Mahomed Ali v. Budharaju Venkatapathi*, 39 M.L.J. 449, 60 I.C. 235 (237); *Nawal Kishore v. Sarju*, 54 All. 774, 139 I.C. 99, A.I.R. 1932 All. 546 (547); *Ramachandra v. Dwarkanath*, 16 Cal. 330; *Lachman Das v. Jawahir Singh*, 44 P.L.R. 1922, A.I.R. 1924 Lah. 476, 70 I.C. 250; *Subbayya Chowdhary v. Veerayya*, 1955 An. W.R. 502. Where the purchaser knew that there were disputes about the title, but he was assured that he would be given documents to prove that the property was the vendor's by ancestral right, *held* that the vendee had a claim for damages against the vendor—*Parasurama v. Muthuswamy*, 50 M.L.J. 100, A.I.R. 1925 Mad. 1209, 91 I.C. 313. Where the vendor sold under the condition that "the purchaser shall take such title as the vendor possesses, and the vendor shall not be bound to give any better title to the purchaser than he possesses," and the purchaser *believed that the vendor had some title*, however defective, but it was afterwards found that the vendor had *no title*, nor even possession, *held* that the purchaser could not be compelled to take the property—*Motivahoo v. Vinayak*, 12 Bom. 1 (17). Unless the purchaser *took the conveyance with all defects* in the vendor's title, the mere fact that he knew or was expected to know all about the property conveyed to him would not disentitle him to repudiate the contract and get a refund of the purchase-money—*Basaraddi v. Enajaddi*, 25 Cal. 298 (301)). But a breach of covenant for title or quiet possession would not entitle the buyer to avoid the sale but would entitle him to damages, and such breach is no bar to a suit for recovery of unpaid purchase-money—*Soorayya v. Kateeza Beegum*, A.I.R. 1957 Andhra Pra. 688.

The vendor is also relieved of his liability, if the property which he proposes to sell is by its very nature *inalienable* (e.g., a *Karamkuri* tenure or occupancy holding) and the purchaser is *aware of it*. In such a case no covenant for title can be given by the vendor, and if the purchaser is ejected by the superior landlord, the vendor will not be liable for damages on any implied covenant for title—*Sankaran Nair v. Ramaswami*, 2 L.W. 155, 27 I.C. 889 (890); see also *Kulla Mal v. Umra*, 61 I.C. 604 (Lah.). Where M sells two survey numbers, one to A and the other to B, wrongly inserting the survey number sold to B in the deed of A and vice versa, and N after purchasing the right title and interest of A with knowledge of the mistake just to harass B brings a suit to recover the survey number sold to B but inserted in the deed of A and the suit is dismissed, N cannot invoke the warranty of title under sec. 55 (2)—*Ramalinga Padayachi v. Natesa Padayachi*, A.I.R. 1967 Mad. 461.

Covenant of indemnity :—Where a vendor agreed to indemnify

the vendee for the costs in suits in which the latter would be obliged to defend his title to the property conveyed, and where a suit was filed and the vendee incurred costs therefor in defending his title to the property : held that the vendee was entitled to recover the costs—*Venkata Rangayya v. Satyanarayana*, 39 M.L.J. 316, 60 I.C. 164 (165); *Ramaswami Chettiar v. Muthukrishna Aiyar*, A.I.R. 1967 S.C. 359.

A general indemnifying clause in a sale-deed making the vendor liable for any loss which might accrue in connection with the sale can properly be held to include the risk of the vendee's title being defeated by a pre-emptor—*Kalian Singh v. Fazal Din*, 94 I.C. 1055, A.I.R. 1926 Lah. 455; *Khonmon Bibi v. Shah Mali*, 111 P.R. 1908, 4 I.C. 690. But a covenant of indemnity under which the vendor undertakes to indemnify the vendee against any person who interferes with his possession is a covenant to indemnify against lawful title only, and cannot be relied upon where the interference is by a person having no title—*U Mya v. Chettyar Firm*, A.I.R. 1937 Rang. 31 (32), 167 I.C. 84. Warranty cannot be implied under sec. 55 (2)—*Tara Singh v. Smt. Charan Kaur*, 70 Punj. L.R. 34.

The clause in a sale-deed that "if upon the objection of any one any damage or loss accrues to the vendee, the vendor will be liable" amounts to a contract of indemnity and is not a mere covenant for title and quiet possession—*Mangladha v. Ganda Mal*, A.I.R. 1929 Lah. 388, 102 I.C. 424. When the buyer knows that the seller has no title and still agrees to buy with knowledge of want of title implied warranty cannot be invoked—*Ramalinga Padavachi v. Natesa Padayachi*, A.I.R. 1967 Mad. 461. But see *Krishna Chandra v. Atreyaparupu Apparao*, 33 Cut. L.T. 155.

Covenant of title in sale by trustees :—See proviso to clause (2). In the case of a sale by a trustee it is also provided in sec. 38 of the Indian Trusts Act (II of 1882), that the trustee selling the trust property may insert such stipulations either as to title or evidence of title or otherwise in any contract for sale, as he thinks fit.

309. Clause (3)—Delivery of documents of title :—The title-deeds of an estate, counterpart leases and other documents of the like kind such as *kahuliyats* ought to be regarded as accessory to the estate and pass with it. Although village account-books cannot properly be called title-deeds, these may be claimed by the purchaser as necessary for the enjoyment of the property and accessory to it—*Shri Bhavani v. Devrao*, 11 Bom. 485. The vendor is bound to deliver the documents of title relating to the property; he is not bound to hand over a mortgage-deed or will which had been executed by a previous owner of the property and which are not at all relevant to the present title of the vendor. See *Haji Mahamed v. Musaji*, 15 Bom. 657 (666).

As soon as the purchaser has paid the purchase-money, the vendor is bound to deliver up the title-deeds. If the purchaser after payment of the purchase-money, negligently but without fraud, leaves the title-deeds in the hands of the vendor any subsequent purchaser from the first purchaser may recover them from the original vendor, and even against a

person to whom the vendor has fraudulently conveyed the property—*Harrington v. Price*, 3 B. & Ad. 170.

Where a mortgagee sells the property mortgaged to him in exercise of the power of sale conferred upon him by the mortgage-deed, it is clearly a document of title within the meaning of this clause and the vendor is bound to surrender it to the vendee—*Mylapore Hindu Permanent Fund Ltd. v. Pushpammal*, (1939) 2 M.L.J. 434, A.I.R. 1939 Mad. 774, 1939 M.W.N. 482.

Where there are several purchasers, the purchaser of the lot of the *greatest value* (and not the largest area) is entitled to the custody of the deeds [see clause (3) (b); see also Sugden's *Vendors and Purchasers*, p. 434] even if he is the purchaser of the last lot and the vendor has given a covenant to different purchasers to produce to them the title-deeds—*Khaderao v. Romer*, 42 Bom. L.R. 1024, A.I.R. 1941 Bom. 48. But if there be a condition that the purchaser of the largest lot shall have the title-deeds, such condition will be given effect to and the purchaser of the lot largest in superficial area shall get them—*Griffiths v. Hatchard*, 1 K. & J. 17.

310. Clause (4) (a)—Sellers right to rent before completion of sale :— The seller is entitled to all rents and profits of the land between the date of the contract of sale and the date of its completion. The vendee will, however, be entitled to compensation for breach of the contract to convey in addition to the execution of the conveyance, and such compensation will naturally be the value of the mense profits which could have been obtained between the date when the breach of contract took place and the date when the conveyance was actually executed—*Subbaroyar v. Kottaya*, 1916 M.W.N. 284, 34 I.C. 737. But although the vendor is entitled to rents and profits till the completion of the sale, he cannot commit waste by taking crops in an immature state or otherwise than by due course of husbandry—*Dart's Vendors and Purchasers*, p. 733. After a suit for the specific performance of an agreement for sale or in the alternative for damages was decreed, the purchaser filed a subsequent suit for mesne profits: *Held* that the suit was not maintainable as the plaintiff was not entitled to rent and profits until the conveyance had been executed in his favour, and also on the ground that the suit was barred under Or. 2 r. 2, C.P.C.—*Gogineni Ramakrishnayya v. Vennan Viraraghaviah*, (1954) 2 M.L.J. (Andhra). 11.

After the completion of the sale, the purchaser is entitled to the rents and profits; and if the vendor remains in possession after the sale, the purchaser is entitled to take an occupation rent from the vendor—*Metropolitan Railway Co. v. Defries*, 2 Q.B.D. 387. But no occupation rent will be allowed where the vendor has continued to be in possession only by reason of the purchaser's failure to take possession—*Dakin v. Cope*, 2 Russ. 170.

311. Clause (4) (b)—Vendor's charge for unpaid purchase-money :— It has already been stated under sec. 54, that non-payment of price does not prevent the ownership of the property from passing to the

purchaser, and he can maintain a suit for possession of the property notwithstanding such non-payment. See Note 281 under sec. 54. But the vendor has got a charge for the unpaid purchase-money under this clause.—*Velayutha v. Govindaswami*, 30 Mad. 524; on appeal, 34 Mad. 543 (544). If the vendor has already delivered possession of the property to the purchaser before the payment of the price, he is not entitled to rescind the contract and to recover possession from the purchaser, or to resell the property to a third party. His remedy is to sue for the money and he has a charge on the property for that amount, under this clause—*Trimalrao v. Municipal Commissioner*, 3 Bom. 172; *Moidin v. Acaran*, 11 Mad. 263 (264). He will be entitled to recover interest on the unpaid purchase money if the sale is not completed—*Malikappa v. Bhimappa*, A.I.R. 1966 Mys. 86; *Rajlingam v. Somanna*, A.I.R. 1967 Andh. Pra. 7.

The charge which the vendor obtains under this Act is different in its origin and nature from the vendor's lien given by the Courts of Equity in England; and the English cases as to a vendor's lien for unpaid purchase-money, though useful for the purposes of illustration, are not authoritative in the interpretation of the law on the subject as laid down in sec. 55.—*Webb v. Macpherson*, 31 Cal. 57 (72) (P.C.). "The Transfer of Property Act", observe their Lordships in this case, "gives a statutory charge upon the estate to an unpaid vendor unless it be excluded by contract. Such a charge, therefore, stands in quite a different position from the vendor's lien. You have to find something, either express contract or at least something from which it is a necessary implication that such a contract exists, in order to exclude the charge given by the statute. In their Lordships' opinion there is no ground whatever for saying that that charge is excluded by a mere personal contract to defer payment of a portion of the purchase-money, or to take the purchase-money by instalments, nor is it, in their Lordships' opinion, excluded by any contract, covenant or agreement with respect to the purchase-money which is not inconsistent with the continuance of the charge." See also *Krishnaswami v. Vijiaraghava*, (1939) 1 M.L.J. 344, A.I.R. 1939 Mad. 590 (591), 49 M.L.W. 597; *Sobhalal v. Sidhelal*, I.L.R. 1939 Nag. 636, A.I.R. 1939 Nag. 210, 1939 N.L.J. 252. The mere execution of a promissory note by the purchaser for the amount due to the vendor does not extinguish the vendor's lien—*C. Sunduraja Pillai v. Sakthi Talkies*, A.I.R. 1967 Mad. 127; *Dhanikachala Pillai v. A. Raghava Reddier*, A.I.R. 1962 Mad. 423.

When there was an agreement to transfer certain clay works to another company the consideration for which was partly in cash, partly in promise to employ the transferor at a certain rate and partly for the allotment of shares to the transferor, and the company went into liquidation before the conditions were carried out, such transferor could not claim a charge against the assets of the company under this section. His remedy lay otherwise by action against the company for breach of contract—*Johnston v. Official Liquidator*, A.I.R. 1939 Rang 46.

As soon as a sale transaction is completed, the vendor automatically acquires a charge for the unpaid purchase-price and this charge can be

enforced against the vendee personally. It is analogous to the unpaid vendor's lien in English law which has been recognised in this section, the principle whereof applies to the Punjab—*Mela Ram v. Ram Das*, A.I.R. 1942 Lah. 275 (F.B.), 44 P.L.R. 415. This charge is not excluded by a mere personal covenant to defer payment of a part of the purchase money or to take it by instalments, even though the vendor has directed to pay the amount to his creditors or other nominees. In the latter case the vendee is not a trustee for the creditors—*ibid.* For instances of this charge for the unpaid purchase-money see *Somu v. Singara*, A.I.R. 1945 Mad. 407, (1945) 2 M.L.J. 17; *Pyare Lal v. Mt. Kalawati*, A.I.R. 1949 All. 340, 1949 A.L.J. 294; *Poomalai v. Annamalai*, A.I.R. 1944 Mad. 124, (1943) 2 M.L.J. 515; *Raja Ram v. Chheda*, A.I.R. 1949 All. 555, 1949 A.L.J. 343; *Jeychand v. Keshavji*, A.I.R. 1942 Sau. 72.

When the ownership passes at once, the money value of the charge at the date of the sale-deed must be the amount of the purchase-money remaining unpaid at that date, neither more nor less—*Shankar v. Gotiram*, A.I.R. 1942 Bom. 67 (70), 43 Bom. L.R. 1014. But the charge is not excluded by the fact that the buyer is to pay the money to a creditor of the seller—*Ibid.* As to the relinquishment of the statutory charge by a subsequent agreement, see this case.

If the vendee gives a mortgage of the property for the unpaid purchase-money which is found to be invalid for want of attestation, the vendor is entitled to a charge under this clause for the unpaid money and interest thereon. The charge can be enforced by sale of the property under sec. 100, T. P. Act and O. 34, r. 15, C.P.C.—*Kocherlokata v. Venkata*, A.I.R. 1936 P.C. 204, 59 Mad. 910, 63 I.A. 304, 40 C.W.N. 1130, 163 I.C. 4. See also *Sahib. Khan v. Kushaldas*, A.I.R. 1937 Sind 198, 170 I.C. 791.

An unpaid vendor has only an equitable right under this clause to recover the purchase-money from the property he has sold. He does not obtain the status of a secured creditor until his right is declared by a decree of Court—*Mokshagunam v. Ramakrishna*, A.I.R. 1922 Mad. 335, 42 M.L.J. 426, 70 I.C. 357. Where a vendee brings a suit for possession the vendor's lien may be enforced in the same action. No separate action is necessary—*Syed Noor v. Qutbuddin*, A.I.R. 1956 Hyd. 114.

Where the land is sold to three persons in certain shares, the vendor has a lien on the land for the unpaid purchase-money against all—*Bhag Mal v. Sheromoni etc. Committee*, A.I.R. 1934 Lah. 348, 150 I.C. 725.

Where a vendor, in compliance with the contract for the sale of an estate, executes a conveyance thereof, but the purchase-money is wholly or partially unpaid, then notwithstanding that on the face of the conveyance it is expressed to be paid, or that a receipt for it is endorsed thereon, the vendor has a lien on the estate for the money due to him—*Alliance Bank of Simla v. Walsh*, 66 P.R. 1883; *Meghraj v. Abdulla*, 12 A.L.J. 1034, 25 I.C. 208; *Umedmal v. Davu*, 2 Bom. 547; *Mukta Pershad v. Abdul Razak*, 33 I.C. 527 (Oudh); *Trimalrao v. Municipal Commissioner*, 3 Bom. 172.

In the case of a sale to several vendees in certain shares, the vendors have a lien on the property for the unpaid money against all and are not concerned with the proportion paid by the various co-purchasers—*Bhag Mal v. Shiromoni, etc., Committee*, A.I.R. 1934 Lah. 348, 150 I.C. 725.

The vendor's charge is *non-possessory* and does not confer on him the right to retain possession by virtue of his charge. He is only entitled to retain the title-deeds and to charge interest on the unpaid purchase-money—*Velayutha v. Govindasami*, 30 Mad. 524. If the vendor retains possession of the property, he is liable for mesne profits—*Hari Prasad v. Harihar*, A.I.R. 1923 Pat. 205 (206), 70 I.C. 804. If the vendor continues in possession of the property sold, and the vendee takes no steps for a long period (e.g., 7 years) to take possession of the property, the vendor has a right to retain possession until the purchase-money is paid—*Subrahmaniam v. Poovan*, 27 Mad. 28 (30). Where title in the property has passed to the vendee notwithstanding the non-payment of part of the purchase-money and the vendee brings a suit for possession, although it is not competent to the Court to pass a decree for possession conditional on the vendee paying the balance of the purchase-money, it is open to the Court, while decreeing possession to the vendee, to incorporate in the decree the statutory charge under the clause in favour of the vendor, and it would be open to the vendor to enforce the charge by seeking execution of that decree—*Shobhalal v. Sidhelal* I.L.R. 1939 Nag. 636, A.I.R. 1939 Nag. 1939 210, 1939 N.L.J. 252, following—*Basalingua v. Chinnava*, 56 Bom. 556, 34 Bom. L.R. 427, A.I.R. 1932 Bom. 247; *Raj Lingam v. Somanna*, (1965) 2 An. W.R. 401.

The provisions of this Act relating to charge for unpaid purchase-money do not apply to *leases*, consequently no charge can be created for the unpaid amount of premium. The only lien which is recognised in this Act is a lien in favour of the vendor—*Venkatacharyulu v. Venkatasubba Rao*, 48 Mad. 821, 90 I.C. 725, A.I.R. 1926 Mad. 55. The fact that the purchase was made at a sale by auction and not by a private treaty does not kill the equitable lien—*Shoe Dulare v. Jagannath*, A.I.R. 1932 Oudh 88, 136 I.C. 222.

Where lost and where not :—The vendor's charge is not lost by a mere personal contract to defer the payment of a portion of the purchase-money or to take the purchase-money by instalments; nor is it lost by any contract covenant or agreement with respect to the purchase-money which is not inconsistent with the continuance of the charge—*Webb v. Macpherson*, 31 Cal. 57 (72) (P.C.). The mere taking of a promissory note from the purchaser for the purchase-money does not extinguish the lien—*Karupiah v. Hari Row*, 21 M.L.J. 849, 11 I.C. 890; *Puthi Narayanamurthi v. Marimuthu*, 26 Mad. 322; *Daraisami v. Lakshmanan*, 14 M.L.J. 285; *Vallyappa v. Narayanan*, 18 I.C. 81, 1913 M.W.N. 826; *Swaminatha v. Subbarama*, 50 Mad. 548, 51 M.L.J. 856, 100 I.C. 10, A.I.R. 1927 Mad. 219 (225); *Khishaswami v. Vijiaraghava*, (1939) 1 M.L.J. 344, A.I.R. 1939 Mad. 590, 49 M.L.W. 597.

The general rule is that the mere taking of a bond, bill, promissory note or covenant for the purchase-money will not destroy the lien. The

question depend not upon the circumstance of taking a security but upon the *intention* which must be gathered from all the surrounding facts, the nature of the security and the expressions and the conduct of the vendor. If, for instance, the bond, note or covenant was *substituted* for the consideration money, the lien ceases to exist; if, on the other hand, the lien was intended to be reserved, the taking of an *additional security* would not destroy it—*Alliance Bank of Simla v. John Walsh*, 66 P.R. 1883; *Dayal Das v. Harkrishan*, A.I.R. 1930 Lah. 568, 11 Lah. 587, 125 I.C. 330. The acceptance by the vendor of a bond given by the vendee for payment of the balance of the purchase-money by instalments does not imply an intention on the part of the vendor to relinquish the lien—*Bashir Ahmed v. Nazir Ahmed*, 43 All. 544 (546). He cannot be deemed to have abandoned the lien by a mere personal contract to defer payment of a portion of the purchase-money or to take it by instalments, or by taking a mere personal security, e.g., a promissory note, bill of exchange or bond. Whether the vendor has relinquished his lien is in every case a question of intention to be gathered from all the circumstances of the case and the onus rests on the person denying the right to prove a clear and manifest intention to relinquish that right—*Morton v. Woodfall*, A.I.R. 1927 Lah. 103 (104), 8 Lah. 257, 99 I.C. 770. Where the consideration consisted partly of money and partly of shares and for that portion of the consideration which was represented by the shares the vendor did not rely on the security of the estate, but on the shares of the company, it was held that the arrangement was inconsistent with the vendor's lien in so far as the value of the shares was concerned—*Ibid.* When there is a separate agreement for payment of part of the purchase-money in lieu of actual cash, it is a question of *intention* of the parties whether the agreement is accepted as an additional security or whether it is a substitution of the statutory charge created by sec. 55 (4) for the unpaid purchase-money—*Munayya v. Krishnayya*, 47 M.L.J. 737, A.I.R. 1925 Mad. 215 (217), 84 I.C. 949; *Krishnaswami v. Subramania*, 35 M.L.J. 305, 44 I.C. 523. Where it was intended that the vendee should execute a mortgage-deed and extinguish the lien, but the mortgage-deed was not completed by registration and remained a simple bond, the lien was not extinguished—*Ranganayaki v. Parthasarathi*, 10 L.W. 550, 54 I.C. 503. Where the vendor obtained a promissory note not from the vendee but from a third person at the instance of the vendee, and the third person did not pay, even then if the third person's note or bond was only an additional security to the vendor's liability and not in substitution of it, the lien was not lost—*Balagurumoorthi v. Nagulu*, 41 M.L.J. 267, A.I.R. 1921 Mad. 277, 69 I.C. 473. Plaintiff and another sold a land jointly to defendants 1 to 4 for Rs. 10,000; of this amount Rs. 8,650 was paid in cash, and for the balance of Rs. 1,350, the 1st. defendant alone executed two promissory notes, one in favour of each of the vendors for Rs. 675 each with interest. Plaintiff sued on his promissory note for Rs. 675 and also claimed a lien for the unpaid purchase-money. *Held* that the fact that the promissory notes were executed in favour of each of the vendors by only one of the vendees, that there was a stipulation for a fixed rate of interest, and that only one of the vendors brought a suit without joining the co-vendor, showed that the promissory note

formed part of the consideration, that there was therefore no unpaid purchase-money and that the plaintiff was not entitled to a charge on the land—*Krishnaswami v. Subramania*, 35 M.L.J. 304, 44 I.C. 523. An agreement by the purchaser to execute a hypothecation bond for the unpaid consideration-money does not extinguish the vendor's charge—*Lakshmana v. Sankaramoorthy*, 25 M.L.J. 245, 18 I.C. 199 (201).

Where the agreement between a vendor and a purchaser of property is that the latter should pay the purchase-money or part thereof to a third person to whom the vendor is indebted, there is no statutory lien on the property which the vendor can enforce in default of payment by the vendee, but only a personal covenant the breach of which must be compensated in damages—*Abdulla v. Mammali*, 33 Mad. 446; *Sivasubramania v. Gnanasmmanda*, 21 M.L.J. 359, 10 I.C. 98 (102); *Gur Dayal v. Karam Singh*, 38 All. 254 (260). Thus, where a property which is subject to a mortgage is sold and part of the consideration money is left with the vendee to pay off the mortgage, the money so left is not purchase-money in the strict sense of the term, and the vendor has no lien in respect of it, if it is not paid—*Mukta Pershad v. Abdul Razaq*, 33 I.C. 527 (Oudh). But, this view has not been accepted in some later cases, where it is said that a mere direction by the vendor to the vendee to pay the purchase-money or a portion thereof to the vendor's creditor does not extinguish the lien; so that on failure by the vendee to pay off the vendor's creditor, the vendor is entitled to recover the unpaid money by sale of the property—*Daulatram v. Indrajit*, 8 Luck. 185, 141 I.C. 468, A.I.R. 1933 Oudh 33; *Sivasubramania v. Subramania*, 39 Mad. 997, 31 M.L.J. 530, 37 I.C. 459; *Kunchithapatham v. Palamalai*, 32 M.L.J. 347, 39 I.C. 405; *Meghraj v. Abdulla*, 12 A.L.J. 1034 (1038), 25 I.C. 208; *Mahadeo v. Mahipal*, 12 A.L.J. 921, 25 I.C. 939; *Harchand v. Kishori*, 7 I.C. 639; *Swaminatha v. Subbarama*, 50 Mad. 548, A.I.R. 1927 Mad. 219, 51 M.L.J. 856; *Alwar Chetty v. Jagannatha*, 54 M.L.J. 109, A.I.R. 1928 Notes 56; *Ramanand v. Sheo Das*, 43 All. 314 (317), 60 I.C. 933; *Daulatram v. Indrajit*, A.I.R. 1933 Oudh 33, 141 I.C. 468; *Ram Chander v. Ram Chander*, A.I.R. 1936 All. 870; *Kesho Das v. Jivan*, A.I.R. 1941 Lah. 10—especially where there is nothing to show that the vendor's creditor has accepted the liability of the purchaser in lieu of that of the vendor—*Thyagaraja v. Seshappier*, 27 M.L.T. 94, 54 I.C. 458. On vendee's failure to pay the money held by the vendee the vendor is entitled, in addition to charge, to claim damages from the vendee and his properties and actual damages need not be established—*Swaminatha Pillai v. Parameswararam Pillai*, A.I.R. 1967 Ker. 195. But where the unpaid purchase-money is insufficient to pay the mortgage-debt payable by the vendor, he is not entitled to recover the unpaid purchase-money—*Tripura v. Nikunja*, 44 C.W.N. 383, A.I.R. 1940 Cal. 380, 190 I.C. 494. The mere fact that the vendor who had asked the vendee to pay the creditors of the vendor asked the vendee some time after the sale-deed was executed not to pay the amount due to one of the creditors, does not mean that the vendor intended to give up or waive the right given by the statute in the shape of a charge on the property for the unpaid purchase-money—*Lakshmayya v. Purushathamma*, *infra*. But where the vendee at the instance of the vendor executes a promissory note for the purchase-money or part of it in favour of a third party, there is in respect of

the whole or part of the purchase-money covered by such note, a "contract to the contrary" within the meaning of this section, and the vendor's statutory charge on the property is so far defeated. The position is the same, so far as the vendee is concerned, whether the third party is a *benamidar* for the vendor or not, unless it is shown that the vendee was aware that the third party was a *benamidar* for the vendor, in which case there would be no contract to the contrary—*Swaminatha v. Subbarama*, 50 Mad. 548, 51 M.L.J. 856, A.I.R. 1927 Mad. 219 (225).

The vendee from a mortgagor retained a part of the purchase-money for payment to the mortgagee and paid the balance to the mortgagor. In the meantime the U. P. Agriculturists' Relief Act was passed whereby the vendee was able to clear off the mortgage debt for less amount than what was due: *held* the mortgagor was entitled to recover the balance as unpaid purchase-money—*Rameshwar v. Hari Kissen*, I.L.R. 1940 All. 340, A.I.R. 1940 All. 351, 1940 A.L.J. 366; see also *Naina Khatun v. Basant Singh*, 56 All. 766 (F.B.), A.I.R. 1934 All. 406, 1934 A.L.J. 318. The major portion of the consideration had been left with the vendees who undertook to the various creditors to redeem the lands purchased by them. The vendees made default in paying the creditors; *held* that an implied obligation was cast upon the vendees to indemnify the vendor for the loss sustained by the vendees' default—*Kartar Singh v. Sant Singh*, A.I.R. 1940 Lah. 321; see also *Waring v. Ward* 7 Ves. 332; *Tilak Ram v. Surat Singh*, I.L.R. 1938 All. 500 (F.B.), A.I.R. 1938 All. 297, 1938 A.L.J. 455. In such a case, if the vendor does nothing to mitigate the damages when he discovered that the vendee had been in default and does not even warn the vendee of the consequences of delay, nor makes a demand from him for payment of the amount either to the creditors or to himself, he is not entitled to recover from the vendee the full amount of the loss sustained by him—*Kartar Singh v. Sant Singh*, *supra* (at p. 325). Where the vendor on default of the vendee alleges himself to have paid the mortgagee and sues the vendee for recovery of the amount, it is essential for him to prove the alleged payment—*Kesho Das v. Jiwan*, A.I.R. 1941 Lah. 10. In this case the vendor's lien for the unpaid purchase-money was not extinguished by the deposit made by a successful pre-emptor of the pre-emption money. The vendor had his lien both against the pre-emptor and his transferee with notices of the non-payment—*Ibid*.

Where the vendor leaves a part of the price with the vendee to be paid to his illegitimate son after the latter attained majority, the vendor cannot be said to have a lien for the amount on the property sold—*Chandra Kesavalu v. Perumal Chettier*, (1939) 1 M.L.J. 820, A.I.R. 1939 Mad. 722, 1939 M.W.N. 437; see also *Swaminatha v. Subharama*, 50 Mad. 548, 51 M.L.J. 856, A.I.R. 1927 Mad. 219.

Interest in immoveable property;—The unpaid vendor's lien under this clause is an interest in immoveable property—*Raghunatha v. Rajagopala*, A.I.R. 1933 Mad. 181, 142 I.C. 730; *Lakshmayya v. Purshottama*, A.I.R. 1938 Mad. 457 (458), 47 M.L.W. 527. The debt with the security can be transferred—*Sheonandan v. Zainal*, 42 Cal. 349. Despite the provisions of sec. 8, *ante*, an instrument assigning such right where the property is worth more than Rs. 100 is compulsorily registrable

under sec. 17 of the Registration Act—*Raghunatha v. Rajagopala*, supra; see also *Dayal Singh v. Indar Singh*, A.I.R. 1926 P.C. 94, 53 I.A. 214, 98 I.C. 508.

Extinguishment :—In order to extinguish a statutory charge under this clause there must be an express contract or something from which it is a necessary implication that such contract exists and is not excluded by a contract, covenant or agreement with respect to the purchase-money which is not inconsistent with the continuance of the charge. Thus, where by an agreement a part of the purchase-money was left with the purchaser to be paid to the vendor after the happening of a certain event and there was no indication in the agreement that the charge was intended to be extinguished: *held* that the charge was not extinguished and the auction-purchaser of the vendor's right could enforce it—*Achanta v. Gunesetti*, A.I.R. 1937 Mad. 92, 170 I.C. 649.

Amendment :—The words “any transferee without consideration or any transferee with notice of the non-payment” have been inserted by Act XX of 1929. They have made it clear that the lien will be ineffectual as against a transferee for value and without notice—see *Sheo Dulare v. Jagannath*, A.I.R. 1932 Oudh 88, 136 I.C. 222.

311A. Enforcement of the charge :—The vendor's lien is a *personal* right so that no other person except the vendor himself (e.g., a creditor of the vendor) can enforce it—*Hari Ram v. Denaput Singh*, 9 Cal. 167. Thus, a judgment-creditor of the vendor cannot, in execution of his decree, bring the property to sale as the property of his judgment-debtor. He may attach the unpaid purchase-money which is due to his judgment-debtor, but he cannot cause the property purchased by a third party to be sold for the recovery of his judgment-debt—*Moti Lal v. Bhagwan Das*, 31 All. 433. But the vendor can *transfer* the charge to an assignee. The debt itself can certainly be transferred, and there is no reason why the security for the debt should not also be transferred with it. In such a case, the transferee can enforce the charge against the purchaser—*Sheonandan v. Zainal Abdin*, 42 Cal. 849 (855), 19 C.W.N. 899.

The vendor can enforce the charge against the property in the hands of the vendee within twelve years from the date of the sale-deed, under Art. 132 of the Limitation Act—*Almad v. Raihan*, A.I.R. 1934 All. 525, (1934) A.L.J. 682, 148 I.C. 639. If the vendee sues for possession and the vendor alleges non-payment of the full purchase-money, court can pass a decree in favour of the vendee conditional on payment of the balance of the consideration money—*Dhuri Sah v. Krishun Prasad Sah*, A.I.R. 1965 Pat. 29.

Against whom enforceable :—This section, if read with sec. 40, shows that the vendor's lien is enforceable against the property not only in the hands of the purchaser but also in the hands of the transferees *with notice* of the non-payment of purchase-money—*Ramanand v. Sheo Das*, 43 All. 314; *Meghraj v. Abdullah*, 25 I.C. 208, 12 A.L.J. 1034; *Ram Raghubir v. United Refiners*, 9 Rang. 56; A.I.R. 1931 Rang. 139, 134 I.C. 737. This is now expressly provided by the addition of the words “any transferee without consideration or any transferee with notice of the non-payment.” The *Special Committee* remarks :—“Sub-clause (b) of clause

4 of the same section provides that the vendor's lien for the purchase-money can be enforced against the property in the hands of the buyer. The provision as it stands is insufficient, as such lien can easily be defeated by the buyer by parting with the property. It is, therefore, proposed to provide that it can be enforced against the property in the hands not only of the buyer, but also of all other persons claiming under him if they had notice of the sale." The lien will be enforceable against a purchaser at a Court-sale who had full notice of all the facts—*Sheo Dulare v. Jagannath*, 7 Luck. 405, A.I.R. 1932 Oudh 88 (90), 136 I.C. 222.

But the lien cannot be enforced against the purchaser's transferees for value and without notice of the vendor's lien—*Gurdayal v. Karam Singh*, 38 All. 254 (257), 14 A.L.J. 304, 35 I.C. 289; *Syed Hassan v. Sheo Narain*, 1 Luck. 7, 3 O.W.N. 25, A.I.R. 1926 Oudh 81, 91 I.C. 917, *Tehilram v. Kashibai*, 33 Bom. 53 (68); *Meerasahib Muhammad, Kunju v. Padmanabha Iyer*, A.I.R. 1965 Ker. 28.

311B. Personal remedy :—Apart from the vendor's lien on the property for the unpaid purchase-money, the vendor has got a personal remedy against the vendee. Under sub-sec. (5) (b), the buyer is bound to pay or tender the purchase-money to the seller, at the time and place of completing the sale. This shows that the vendee is held personally liable for the purchase-money apart from the liability imposed on the property purchased—*Raghukul v. Pitam*, 52 All. 901, 1930 A.L.J. 1524, A.I.R. 1931 All. 99 (100), 130 I.C. 198. But, where the vendors had bound themselves to accept as purchaser either the firm or a person nominated by the firm and there was no provision that in the case of a nominee the firm would be liable for the balance of the purchase-money, the members of the firm were not personally liable—*Ram Raghubir v. United Refineries*, A.I.R. 1939 P.C. 143, 37 C.W.N. 633, 142 I.C. 788.

312. Interest on unpaid purchase-money :—The vendor has a lien not only for the amount of the unpaid purchase-money, but also for the interest thereon; for it is a principle of equity that where one party to a contract of sale enters into possession of the property before the whole price has been paid, he is ordinarily liable to pay interest on the unpaid purchase-money from the date when he enters into possession—*Pandurang v. Mahadeo*, 46 Bom. 195, A.I.R. 1922 Bom. 186, 64 I.C. 492, 23 Bom. L.R. 1000; *Ratanlal v. Municipal Commissioner*, 43 Bom. 181 (200) (P.C.); *Dinkar Rao v. Ayub*, A.I.R. 1923 Nag. 37 (39); *Tomlinson v. Harding*, A.I.R. 1930 Lah. 131, 120 I.C. 538; *International Ry. Co. v. Niagara Parks Commission*, A.I.R. 1941 P.C. 114 (119); *Mrs. I. K. Sohan Singh v. State Bank of India*, A.I.R. 1964 Punj. 123. But this clause does not give the vendor an absolute right to get interest irrespective of equities. Such interest cannot be claimed so long as the vendor is in possession of the property purchased by him—*Duraiswamy v. Md. Abbas*, A.I.R. 1952 Mad. 678. Where mesne profits are awarded, the interest can be set off against the mesne profits—*Sahib Khan v. Kushaldas*, A.I.R. 1937 Sind 198, 170 I.C. 791. But if the delay in payment of the purchase-money is due to the vendor's own fault (e.g., default in showing a good title) he will not be entitled to take advan-

tage of his own wrong, and the Court will deny him interest—*Ellarayan v. Nagendra Iyer*, 6 L.W. 233, 42 I.C. 509; *Narasingerji v. Raja Panaganthi*, 1921 M.W.N. 519, A.I.R. 1921 Mad. 498; *Subhadrabai v. Mahomedbhai*, 25 Bom. L.R. 931, A.I.R. 1924 Bom. 187 (189), 77 I.C. 247. But lapse of time occasioned merely by the defect of the vendor's title not known to him at the date of the contract, especially where immediate steps are taken by the vendor to remedy the defect, does not exempt the purchaser from paying interest—*Subhadrabhai v. Mahomedbhai*, (supra).

This clause contemplates interest being payable only if the ownership of the property has entirely passed to the buyer and the property is in the hands and therefore in the enjoyment of the buyer. Where not only is the profit claimable by the vendee proportionate to the amount of the purchase-money he has paid, but the property is also stipulated and provided to be only proportionate to the amount of the purchase-money paid by him, the case cannot be regarded as one in which the ownership of the property has absolutely passed to the purchaser in respect of the whole extent, and the purchaser is not liable for interest—*Lodd Govindoss v. Muthia Chetty*, 48 M.L.J. 721, A.I.R. 1925 Mad. 660. When the purchase-money is left with the vendee for paying a prior mortgage-debt, and he has not paid it, the money is not to be treated as a security for the payment of the mortgage-debt, but as a deposit, for which the purchaser should pay interest to the vendor—*Chokkalinga v. Ramanadhan*, 24 L.W. 257, A.I.R. 1926 Mad. 1031, 97 I.C. 536. But if the purchase-money is left with the vendee for paying a mortgage-debt on the property and it is found that the money left with the vendee is insufficient to pay off the mortgage, the vendee is entitled to retain the money until the vendor provides the rest of the money necessary for paying off the mortgage-debt; this retention of the money by the vendee will not be treated as a deposit of the money of the vendor in the vendee's hands, and the vendee will not be liable to pay interest—*Muhammad Siddiq v. Muhammad Nasrulla*, 21 All. 223 (227) (P.C.).

Where the parties intended that the payment of the purchase-money and the delivery of possession of the property should be carried out contemporaneously, interest on the money would not be payable so long as the vendor was in possession of the land—*Muthu Chetty v. Sima*, 35 Mad. 625.

The interest is payable "from the date on which possession has been delivered". These words have been added by the Amendment Act of 1929. "This clause is silent as to the date from which interest on the unpaid purchase-money should run. It seems fair that it should run from the date when the buyer is put in possession."—*Report of the Select Committee*.

313. Clause (5) (a)—Purchaser's duty to disclose facts :—Clause (5) (a) casts upon the purchaser the duty of disclosing to the seller any fact of which the buyer is aware but of which he has reason to believe that the seller is not aware, and which materially increases the value of the property. The duty of a buyer is not a duty arising from an implied contract, but is a statutory obligation imposed on the buyer—*Gangai v.*

Govinda, A.I.R. 1924 Mad. 544, 84 I.C. 626. Under the last para of this section, the omission to make a disclosure under this clause amounts to fraud, irrespective of *intention*. And so it has been held in an English case : "If a person comes to me and offers to sell to me a property which I know to be of five times the value he offers it for, he being ignorant of his rights and in the belief that he cannot make out a title which I know that he can, and I conceal that knowledge from him, is that not a *suppressio veri*, which is one of the elements which constitute a fraud?"—*Summers v. Griffiths*, 35 Beav. p. 32. Thus, a purchase for an inadequate price from an old and infirm woman ignorant of the value of the property sold was set aside on the ground of fraud—*Sadashiv v. Dhakubai*, 5 Bom. 450.

314. Clause (5) (b)—Payment of purchase-money :—The buyer is bound to tender the purchase-money on completion of the sale—*Mahatab v. Collector*, A.I.R. 1932 All. 454, 142 I.C. 83. A sale is said to be completed when the vendor executes the conveyance. The execution of the conveyance by the seller and the payment of the purchase-money by the buyer are presumed to take place simultaneously. So the purchaser need not tender the purchase-money if the vendor beforehand signifies his refusal to execute the deed—*Essaji v. Bhimji*, 4 B.H.C.R. (O.C.) 125.

The purchaser is bound to pay money in accordance with the direction of the vendor. If he directs payment to a particular person, the purchaser must make payment to such person, and in doing so, he will be entitled to retain the benefit of any remission made by such person in favour of the purchaser—*Siva Subramania v. Gnanasamanda*, 21 M.L.J. 359, 10 I.C. 98 (102). See also *Indra Singh v. Comr. of Income-tax*, A.I.R. 1943 Pat. 169, 22 Pat. 55. Such a direction can be revoked except under some special circumstances—*Mela Ram v. Ram Das*, A.I.R. 1942 Lah. 275 (F.B.), 44 P.L.R. 415. Where a direction is given by the vendor to the vendee to pay the balance of the sale consideration to the creditor of the former, the creditor can bring a suit against the vendee for recovery of the amount—*Devraje v. Ram Krishnaiyar*, A.I.R. 1952 Mys. 109. The suit is governed by Art. 116, Limitation Act, as the claim arose under a registered instrument—*ibid.* See in this connection *Janaki v. Kanaru*, A.I.R. 1942 Mad. 583, (1942) 2 M.L.J. 603. But it has been held that where A mortgages his property to B, part of the consideration for the mortgage being B's promise to A to pay C, the amount which A owed to C, C, not being a party to the contract cannot sue for the payment—*Iswaran Pillai v. Sonnivevaru*, 38 Mad. 753; *Ganesh Das v. Mt. Banto*, A.I.R. 1935 Lah. 354. See also *Jamna Das v. Ram Autar*, (1911) 39 I.A. 7.

Where the purchaser is directed by the vendor to pay off, out of the purchase-money, certain debts due by the vendor to his creditors, and the vendee undertakes to do so, such creditors can institute a suit against the vendee and recover the amount due to them although they had no notice of, and were not parties to, the agreement between the vendor and the vendee in respect of payment of their debts. The purchaser in such a case is treated as the trustee of the vendor's creditors for the money reserved in his hands for their benefit—*Dwarka Nath v. Priya Nath*, 22 C.W.N. 279 (281), 36 I.C. 792, following *Gregory v. Williams*, (1817) 3 Mer. 582. It is doubtful whether the purchaser in such a case

can be treated as the trustee of the vendor's creditor. In *Jamnadas v. Ram Autar*, 39 I.A. 7, 16 C.W.N. 97, an action was brought by a mortgagee to enforce against purchaser of the mortgaged property an undertaking that he entered into with his vendor to redeem the mortgage. The suit was dismissed by the Privy Council on the ground that the purchaser entered into no contract with the mortgagee. If, however, the vendee *did not undertake* to pay the vendor's creditor out of the purchase-money left in his hands, the vendor's creditor was not entitled to recover the amount from the vendee—*Bhagwat Narain v. Ganga Prasad*, 62 I.C. 617 (619) (Pat.). In another case, however, the Patna High Court went still further and held that if after executing a mortgage the mortgagor sold the property leaving with the vendee money to redeem the mortgage, and the vendee *agreed* to do so, still the mortgagee could not sue the vendee on the mortgage, as there was no privity between them—*Kamta Prasad v. Nanku Prasad*, 78 I.C. 545 (Pat.). But there can be no question that where the purchaser undertook to pay the debt due to the vendor's creditor, and this undertaking was not only contained in the registered conveyance, but was also *communicated to the creditor and accepted by him*, the creditor was entitled to sue the purchaser on the registered instrument—*Debnarayan v. Chunilal*, 41 Cal. 137 (147), 17 C.W.N. 1143. In *Adhar v. Dolgovinda*, 40 C.W.N. 1037 it has been laid down by a Division Bench of the Calcutta High Court that a stranger to contract reserving a benefit to him cannot sue thereon, unless from the terms of the contract it is clear that a trust for him was created.

If the property is sold free from incumbrances, and it is found that the vendor had already mortgaged it, the vendee, if he pays off the incumbrance, is entitled to set off the amount so paid against the balance of the purchase-money remaining unpaid—*Munirunnissa v. Akbar Khan*, 30 All. 172 (175) (F.B.). If the purchase-money is insufficient to pay off the incumbrance, the purchaser is not liable to pay at all till the vendor provides the rest of the money necessary for the purpose—*Muhammad Siddiq v. Muhammad Nasirullah*, 21 All. 223 (226) (P.C.). The principle of this clause is also applicable to the sale of a decree. Thus, where a decree sold was at the time under attachment at the instance of a creditor of the decree-holder, the purchaser of the decree can retain out of the purchase-money a sum sufficient to pay off the claim of the creditor and to remove the attachment, and if the purchaser pays off the creditor, the amount so paid will be set off against the balance of the purchase-money—*Khetsidas v. Shib Narayan*, 9 C.W.N. 178 (189, 190).

A deposit is not merely a part-payment but is an earnest also. If the vendee makes default in completing the contract of sale, the deposit may be retained by the vendor and no express stipulation is necessary for the purpose—*Narendra v. Nripendra*, A.I.R. 1948 Cal. 208. But the Court can in the exercise of its equity jurisdiction, relieve the vendee from forfeiture of the earnest money—*Cheranji Lal v. Jisuk Ram*, A.I.R. 1953 Or. 105, 17 Cut. L.T. 184. Purchase price paid in advance cannot be forfeited because it is not given by way of earnest—*Sardarilal v. Sm. Sakuntala Devi*, 63 Punj. L.R. 362.

This section does not affect the passing of title to the vendee. It

merely fixes a starting point of limitation for the recovery of the consideration money—*Ghanashyam v. Udayanath*, A.I.R. 1949 Or. 14, 14 Cut. L.T. 40. If money is left with the buyer to pay off an incumbrance and the buyer fails to do so, he is liable to return the amount to the seller—*Soorayya v. Katuza Beegum*, A.I.R. 1957 Andhra Pra. 688. A suit to recover the amount is to be brought within 12 years, not from the date of the sale but from the date when the incumbrance is satisfied by the vendor or is otherwise extinguished—*D. Subbaiah v. G. Suryanarayana*, A.I.R. 1959 Andh. Pra. 636 (S.B.).

315. Clause (5) (c)—From completion of sale purchaser must bear loss :—After the sale is complete and the ownership of the property passes to the buyer, the purchaser must suffer any loss of the property caused by destruction. If, however, the property had been insured by the vendor against loss by fire, the purchaser is entitled to the benefit of the insurance. See this subject discussed under sec. 49 *ante*.

It is implied by this clause that if any deterioration of the property takes place *before* the ownership passes to the purchaser, *i.e.*, between the contract of sale and its completion, the vendor is liable for it till the completion of the sale.

316. Clause (5) (d)—Payment of public charges and rents :—The liability of the purchaser to pay rents and discharge burdens incidental to his ownership commences from the very date the ownership has passed to him, irrespective of the fact whether he obtained possession on that date ; and this principle is applicable also to Court-sales, though the section as such does not apply to them. Thus, where the purchaser at a Court-sale had his sale confirmed on the 31st March but did not obtain possession till the 11th May following, he was held to be liable to pay the two instalments of rent which fell due subsequently to the confirmation of the sale, namely on 1st April and 1st May, and it was immaterial when he recovered actual possession of the land—*Ramasami v. Annandurai*, 25 Mad. 454.

317. Payment of incumbrances :—If the property is sold subject to incumbrances, the purchaser is bound to pay the money due on the incumbrances to the incumbrancer. If the incumbrances turn out to be invalid, the purchaser is entitled to the benefit of the bargain, and the vendor cannot claim it. Thus, in execution of a decree for sale, certain villages were sold and the proclamation for sale notified that there were two prior mortgages (say, for Rs. 2,000) on the property. The auction-purchaser purchased the property subject of course to the incumbrances. Subsequently it was found that the two mortgages were invalid. Then the mortgagor (judgment-debtor) brought a suit to recover from the purchaser the amount of Rs. 2,000 being the amount due on the two mortgages (the existence or supposed existence of which had led to a diminution of the price) as the vendor's unpaid purchase-money or as money which the purchaser ought in equity to return to the judgment-debtor. *Held* that after the sale was completed, the vendor had no claim to participate in any benefit which the purchaser might derive from his purchase. "If the purchaser covenants with the vendor to pay the incumbrances, it is still nothing more than a contract of indemnity. The pur-

chaser takes the property subject to the burden attached to it. If the incumbrances turn out to be invalid, the vendor has nothing to complain of. He has got what he bargained for. His idemnity is complete. The vendor cannot pick up the burden of which the land is relieved and seize it as his own property"—*Izzatunnessa Begam v. Kuniwar Pertab Singh*, 31 All. 583 (589) (P.C.) overruling *Inayat Singh v. Izzatunnessa*, 27 All. 97 (F.B.). But see *Ram Lal Singh v. Harihar Prasad*, A.I.R. 1955 Pat. 254, where A sold in 1937, certain properties to B who undertook to pay to the creditors of A certain specified amounts in discharge of mortgages on the other properties of A, out of the consideration for sale. As the Bihar Money Lenders Act, 1938 provided that interest in excess of the principal could not be realised there was an excess of purchase-money in the hands of B. A sued to recover the excess. *Held* that B being in the position of a trustee was liable to refund the excess. The Kerala High Court has, however, held in *Kunjikavu Amma v. Janaki Amma*, A.I.R. 1957 Ker. 98 that where any property is sold subject to an incumbrance which is subsequently found to be invalid, the benefit goes exclusively to the purchaser. On a conveyance for value of lands subject to a mortgage and expressed to be so conveyed there is in the absence of express agreement, an undertaking implied by law on the part of the purchaser to indemnify the vendor against personal liability on foot of the mortgage—*Janki v. Md. Ismail*, A.I.R. 1932 Pat. 273, 139 I.C. 525.

Interest :—Under this clause, the purchaser is bound to pay future interest on incumbrances accruing due after the completion of the sale, and not the accumulated interest due *before* the sale.

318. Clause (6) (a)—Purchaser's right to improvements :—After the completion of the sale, the purchaser is entitled to the benefit of any improvement in the property, in the same way as he is liable under clause (5) (c) to suffer the loss caused by destruction—*Achuthan v. Parameswara*, A.I.R. 1951 Tr.-Coch. 195. As regards improvements between the date of the contract and that of the conveyance, this section does not contain any express provision; and it seems from a strict construction of the section, that the purchaser is not entitled to them; the benefit of such improvements goes to the seller. Since it is implied by clause (5) (c) that the seller is liable for deterioration of the property between the date of contract and that of completion of the sale, it is just and equitable that he should be entitled to the benefit of improvements occurring within the same period, and to claim an enhanced price. Such a claim implies of course the formation of a new contract, since there is no provision in this section for re-adjustment of price owing to increase in value of the property between the date of contract and the date of completion of the sale.

319. Clause (6) (b)—Charge for purchase-money paid in advance :—This clause is divided into two parts. Under the first part, the purchaser is entitled to certain rights which he can enforce 'unless he has improperly declined to take delivery', which means that he is to lose those rights if the other party can show that he (the purchaser) has improperly declined to accept delivery, and the onus lies on such party. Under the latter part of the clause, the purchaser gets certain additional

rights which he can claim only if he can show that "he has properly declined to take delivery," and the burden of showing it will be upon himself. The latter part of this clause corresponds to sec. 18 (c) of the Specific Relief Act.

This clause does not apply to Court sales—*Kunverji v. Umarshi*, A.I.R. 1932 Kutch 10.

The word "improperly" means owing to a default in the purchaser himself in completing the sale. And the circumstances under which he can "properly" refuse to take delivery are those under which he is justified in, repudiating the contract, e.g., defect of title. The question whether a purchaser by part-payment can obtain a charge on the property depends on whether the default in completing the contracts rests with him or with the vendor. It is a question of fact in each particular case as to who is in default—*Adari Sanyasi v. Nookalamma*, 54 Mad. 708, A.I.R. 1931 Mad. 592 (593), 131 I.C. 487.

A purchaser cannot be said to be acting *improperly* if he refuses to take only a fraction of the property by paying full price, in accordance with sec. 15, Specific Relief Act. That section has been enacted for the benefit of the purchaser and cannot operate to his detriment. That section gives him an option and if he declines to accept an offer which brings him loss, his conduct cannot be called improper—*Sultan Kani v. Meera Rowthen*, 46 M.L.J. 99, A.I.R. 1929 Mad. 189 (190), 115 I.C. 251.

Where the vendor is not able to give the vendee a title free from reasonable doubt, the latter properly declines to complete the sale. The fact that ultimately the Court finds the title clear does not disentitle the vendee to claim return of the earnest money—*Tulsidas v. Pritbai*, A.I.R. 1943 Sind 92, I.L.R. 1942 Kar. 543. The Court will not force a doubtful title on the vendee. Where the purchaser properly declines to accept delivery of the property, he is entitled to get back the earnest money and a charge on the property for the same—*Munnalal v. Zamakal*, A.I.R. 1952 M.B. 145.

This clause undoubtedly gives the buyer a charge over the property which he has contracted to buy for the price, pre-paid. There is no question of ownership involved in the assertion of that charge, for the ownership in the property would still be in the seller until the execution of the conveyance under sec. 54, which in effect provides that a contract for the sale of immoveable property does not of itself create any interest in or charge on such property. But at the same time it does not destroy effectively the equities of parties to the contract—*Hari Bapuji v. Bhagu*, A.I.R. 1937 Bom. 142, I.L.R. (1937) Bom. 140, 162 I.C. 804. When an owner purports by an oral sale to transfer his property and delivers possession to another person, the possession of the transferee must be deemed to be adverse to the owner and a suit for recovery of possession must be filed within 12 years of the delivery of possession—*Dagadu Dhondu Patil v. Trakadu Motiram Patil*, A.I.R. 1957 Bom. 79.

From the moment the purchaser pays a part of the purchase-money, he has a lien on the property to that extent, and he can recover the purchase-money if the sale goes off otherwise than through a default

on his part—*Whitebread & Co. v. Watt*, (1902) 1 Ch. 835 (C.A.); *Balbhadra v. Sheomangal*, A.I.R. 1931 Mad. 592, 54 Mad. 708, 131 I.C. 487; *Abdul Hamid v. Mahomed Ali*, A.I.R. 1952 Bom. 67, 53 Bom. L.R. 817; *Saraswatibai v. Kishenchand*, supra. "There can be no doubt, that when a purchaser has paid his purchase-money though he has got no conveyance, the vendor becomes a trustee for him of the legal estate. When instead of paying the whole money he pays a part of it, it would seem to follow as a necessary corollary that to the extent to which he has paid the purchase-money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien exactly in the same way as if upon the payment of a part of the purchase-money the vendor has executed a mortgage to him of the estate to that extent"—per Lord Cranworth in *Rose v. Watson*, 10 H.L.C. 672 (683); *Kesar v. Munna*, 13 N.L.R. 19, 39 I.C. 50 (51). Thus, if the vendor refuses to grant a proper conveyance, the purchaser is not bound to tender a draft conveyance to the vendor for execution nor to tender any purchase-money, and is entitled to recover the money already paid—*Essaji v. Bhimji*, 4 B.H.C.R. (O.C.) 125. If the vendor received the purchase-money but executed a conveyance which he failed to register within the period of registration, whereupon it became invalid, *held* that the vendee was entitled to a charge under this clause, though he could not claim possession of the property—*Lalchand v. Lakshman*, 28 Bom. 466.

In cases of oral sales, which are invalid, the vendee has a charge on the property for the advance and this charge is not affected by the fact that he is in possession of the property—*Jibhao Hari Singh v. Ajab Singh*, A.I.R. 1953 Bom. 145, 54 Bom. L.R. 971.

The charge mentioned in this clause is created on the property agreed to be sold from the very moment the purchase-money or a part thereof has been paid, and not after a suit for specific performance instituted in pursuance of the agreement to sell has failed—*Kesar v. Munna*, (supra). See in this connection *Mahalakshmi v. Venkatarreddi*, A.I.R. 1944 Mad. 556, (1944) 2 M.L.J. 103. But see *Motiram v. Ramchandra*, 1958 Nag. L.J. (Notes) 99 where it has been held that if in a suit for the specific performance of a contract to sell the Court decrees only refund of the purchase-money there is no statutory charge on the property agreed to be sold. The lien is not created by any agreement between the parties, but arises by operation of law, on payment of the purchase-money, independently of the sale-deed; see *Williams on Vendor and Purchaser*, 4th Ed., p. 1006 and *Mt. Shankri v. Milkha Singh*, A.I.R. 1941 Lah., 407 (F.B.) at p. 412. See also *Ahmed Baksh v. Karam Singh*, A.I.R. 1943 Sind 236, I.L.R. 1943 Kar. 392. This lien can only be lost by reason of the purchaser's failure to carry out his part of the contract—*Balvanta v. Bira*, 23 Bom. 56 (63). It can only be excluded by a contract to the contrary—*Matta Sura v. Mana Rama*, A.I.R. 1937 Mad. 714 (716), (1937) 2 M.L.J. 922. It is not, however, right to place a person holding a statutory charge under this clause on the same footing as a "transferee" contemplated by sec. 134—*Vijjaraghavalu v. Arunachalam*, A.I.R. 1939 Mad. 165, 48 M.L.W. 766.

The mere circumstance that a purchaser may not be entitled to specific performance is by no means conclusive against his right to a return

of his deposit. The question for determination is whether having regard to the terms of the contract and the circumstances of the case the purchaser is justified in refusing to accept such title as the vendor actually gives. If he is justified in refusing to accept such title, he is entitled to a refund of the deposit, which the vendor has no right to retain—*Ibrahimbai v. Fletchers*, 21 Bom. 827 (853) (F.B.); *Balbanta v. Bira*, 23 Bom. 56 (61); *Karsandas v. Gopaldas*, 25 Bom. L.R. 1144, 85 I.C. 491, A.I.R. 1924 Bom. 282 (288); *Howe v. Smith*, (1884) 27 Ch. D. 89. If the contract for sale becomes void by frustration, the vendor is entitled to get back the earnest money and not compensation—*Habib Ali v. Rafik-uddin*; A.I.R. 1968 Assam 26.

Where the guardian of a minor in order to remove pressure on the minor's estate agrees to sell a portion of his property and receives earnest money, this is binding on the minor and if the guardian declines to fulfil the agreement, the purchaser is entitled to a charge on the property affected by the contract of sale to the extent of the minor's interest therein—*Tukaram v. Shree Krishna*, A.I.R. 1939 Nag. 209, 1939 N.L.J. 260, 183 I.C. 456.

The Act does not provide expressly for the return of a portion of the purchase-money when the buyer fails to complete payment and the sale therefore falls through; but the provisions of the Contract Act apply generally to contract of sale of immoveable property. Thus where the buyer refuses to complete the contract of sale and the seller puts an end to the contract under sec. 39, Contract Act, the buyer loses his charge under this clause, but the seller has no right to retain any instalments of price that have been paid, unless they have been paid as deposit or earnest. In such a case the buyer can sue for return of his part payment, but he has no right to interest on his part payment. Where the contract does not provide a penalty, the seller has a right to make a counter-claim for damages which right is something quite independent of the amount of any part payment made—*Madhavdas v. Jan Mahomed*, I.L.R. 1941 Kar. 495, A.I.R. 1942 Sind 37. An improper refusal by the buyer to accept delivery disentitles him to a charge on the property—*Rambadan v. Prasanth Choubey*, A.I.R. 1965 Pat. 404.

Deposit and earnest money :—The deposit or earnest money has two characteristics : (1) it is an earnest or security and (2) it is also a part-payment of the price. In the absence of a contract to the contrary, express or implied, the earnest money is liable to be forfeited when the contract is not carried out owing to the vendee's default—*Naresht v. Ram Chandra*, A.I.R. 1952 Cal. 93. Where the contract could be specifically performed under sec. 13, Specific Relief Act, the vendee is not entitled to get a refund of the earnest money—*Ruldu Ram v. Bhuri Lal*, A.I.R. 1952 Punj. 380.

The deposit paid upon a contract between the vendor and purchaser is in the nature of an earnest or guarantee for the fulfilment of the contract as well as a part payment of the purchase-money—*Hall v. Burnell*, (1911) 2 Ch. 511. Earnest money is part of the purchase-price when the transaction goes forward; it is forfeited when the transaction falls through by reason of the fault or failure of the vendee—*Chiranjit v. Har*

Swarup, A.I.R. 1926 P.C. 1, 24 A.L.J. 248, 94 I.C. 782; *Krishna Chandra v. Khan Mamud*, A.I.R. 1936 Cal. 804, 161 I.C. 166. A vendor obtaining rescission owing to default in completion by the purchaser is entitled to the deposit in the absence of any express stipulation to the contrary—*Hall v. Burnell*, supra. But where the seller has no personal interest in the property there is no statutory charge on the earnest money under this clause—*Shailendra v. Hade Haza*, 59 Cal. 586; *Panchanan v. Nirode*, A.I.R. 1962 Cal. 12. Though there may be nothing specific about the forfeiture, the mere fact that a deposit was demanded carries with it the implication that it should be forfeited if the contract was broken, unless the purchaser proves an agreement to the contrary—*Gopalaratna v. Rajaratna*, A.I.R. 1938 Mad. 246, 173 I.C. 955. It must however be a deposit proper. There may be cases where the Courts may find that the amount of the deposit or part payment in advance is so great in comparison with the amount payable under the contract, that the parties cannot have intended it as a mere security for performance, but rather as a punishment for non-performance of the contract and in those cases the Court may doubtless refuse to allow the retention of the whole of the deposit—*Venkoba v. Sanjivappa*, A.I.R. 1937 Mad. 681, 173 I.C. 233. Where a contract for sale is not completed, the purchaser paying a certain sum in part payment of the price and not as earnest money is entitled to recover it with interest, whether the breach is on his part or on the part of the seller—*Krishna Chandra v. Khan Mamud*, supra. Where a vendee was in the process of paying the balance of purchase-money and was ready to pay it all, and was asking for performance by the vendors of the contract, then the vendee is entitled to recover not only that part of the purchase-price which he had already paid but also the earnest money and he is entitled to have a charge on it—*U Tha v. Chettier Firm*, A.I.R. 1938 Rang. 367. The vendee is entitled to a refund of the earnest money where the transaction falls through for the reason that the vendor is unable to convey a valid title free from doubt, although he was aware of the defect in the vendor's position; but he is not entitled to interest on the amount—*Lachman v. Jawahir*, 70 I.C. 250, 44 P.L.R. 1922.

Where the vendor agrees to sell the land which cannot be transferred without the sanction of the revenue authorities and fails to obtain sanction for lack of diligence he is guilty of breach of his obligation under the contract and is bound to return the sum paid to him including earnest—*Krishanlal Onkardas Goyanka v. Suryadatta*, A.I.R. 1958 Madh. Pra. 239.

The purchaser loses his deposit money if the sale goes off through his default or if he unjustifiably repudiates the contract—*Balvanta v. Bira*, 23 Bom. 56 (61); *Rabina Bibi v. Satyavathi*, A.I.R. 1963 Andh. Pra. 304. Thus, where owing to the non-payment of the balance of purchase-money within the specified time by the purchaser, the vendor is entitled to rescind the contract of sale and does so, he is not bound to return the deposit money to the purchaser—*Natesa v. Appavu*, 33 Mad. 373 (374); *Bishan Chand Radha Kishen*, 19 All. 489 (491); *Ex parte Barrell, In re Parnell*, L.R. 10 Ch. App. 512. And if the sale falls through on account of the purchaser's own default, he cannot take advan-

tage of a simultaneous default on the part of his vendor. Thus, if the purchaser, having accepted the title, pays the deposit but afterwards fails to pay the residue of the purchase-money and the vendor thereupon gives him notice that the contract is rescinded and the deposit forfeited, the purchaser cannot recover the deposit, if the title afterwards turns out to be bad. In other words, the purchaser, having once accepted the title, would be precluded from raising the question of title—*Soper v. Arnold*, 14 App. Cas. 429 (at p. 433). Part payment of the purchase price cannot be forfeited, only the earnest may be forfeited—*Sardarilal v. Shakuntala Devi*, A.I.R. 1961 Punj. 378.

But the fact that the balance of price was not paid on due date by the purchaser, does not entitle the vendor to retain the deposit, if there are no facts found to show that the purchaser has by his delay in payment lost his right of specific performance, or if there is no conduct on the purchaser's part such as to amount to a repudiation of the contract. If in such a case the vendor denies the contract *in toto*, he cannot be allowed to retain the deposit—*Alokeshi v. Hara Chand*, 24 Cal. 897 (899). "I do not say that in all cases where this Court would refuse specific performance the vendor ought to be entitled to retain the deposit. It may well be that there may be circumstances which would justify this Court in declining and which would require the Court according to its ordinary rules, to refuse to order specific performance, in which it could not be said that the purchaser had repudiated the contract or that he had entirely put an end to it so as to enable the vendor to retain the deposit. In order to enable the vendor so to act, in my opinion, there must be acts on the part of the purchaser, which not only amount to delay, sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract"—*per* Cotton, L.J. in *Howe v. Smith*, (1884) L.R. 27 Ch. D. 89 (95). Whether a sum of money was paid as earnest or as part payment towards the discharge of the contract for sale depends upon the intention of the parties and the circumstances surrounding the payment—*Krishanlal v. Suryadatta*, A.I.R. 1958 Madh. Pra. 239.

Enforcement of charge :—Prior to the amendment of 1929, it was held that the purchaser's charge under this section could be enforced not only against the vendor but also against all persons claiming under him *with notice of the payment*, e.g., person who after the creation of the charge obtained a title from the vendor by a consent decree and had *notice of the payment* by the purchaser—*Kesar v. Munna*, 13 N.L.R. 19, 39 I.C. 50 (52). But the words "with notice of the payment" have now been omitted so that the transferees and legal representatives of a seller may not escape any liability for the amount received by the seller by pleading that they had no notice of the payment of the purchase money. The reasons for limiting the seller's lien to third persons having notice of the sale do not hold good in the case of buyer's lien against persons claiming under the original seller.

When the Legislature effects a change of language by the omission of words which occurred in a statute and those words were necessary to convey a particular sense, the omission must be construed as intending to convey a different sense. The omission of the words "notice of pay-

ment" in this clause makes the charge of the buyer for price pre-paid effective not only against the seller, but against all persons claiming under him, irrespective of notice. Therefore, if a buyer has a statutory charge against the property purchased by third persons, he can enforce it against that property and the plea of want of notice on third person's part would be of no avail—*Hari Bapuji v. Bhagu*, A.I.R. 1937 Bom. 142, I.L.R. (1937) Bom. 140, 167 I.C. 804.

Pleading :—Where the only issue presented to the trial Court was simply cancellation of a contract for sale and a contractual charge on the land under a fresh agreement for the purchase-price advanced, the High Court was not justified, on failure of that case, in entertaining the question of a statutory charge under this clause, as owing to its absence from the pleadings and the issues, important questions of fact, arising under the section had not been considered—*M. M. R. M. Chettiar Firm v. S. R. M. S. L. Firm*, 46 C.W.N. 57 (P.C.), A.I.R. 1941 P.C. 47. Where there is no completed sale and there is no valid contract of sale no charge can be claimed on the property purported to be sold for the purchase money paid—*Nadoda Khirna Keshar v. Bombay State*, I.L.R. (1967) Guj. 323.

Agreement for sale need not be registered :—It was held by the Privy Council that, having regard to the provisions of this clause, if a vendor entered into an agreement for sale of any immoveable property in writing and received earnest money as part of the consideration, the purchaser's suit for specific performance would not lie *unless the agreement itself was registered*—*Dayal Singh v. Indar Singh*, 31 C.W.N. 125 (128) (P.C.), 53 I.A. 214, 24 A.L.J. 807, 51 M.L.J. 788, 98 I.C. 508, A.I.R. 1926 P.C. 94. This ruling came as a surprise to the Bench and Bar in India, as being contrary to law and precedents, for the Indian law never required a mere contract of sale of immoveable property to be registered. The Indian Legislature thereupon intervened to rectify this erroneous decision by enacting the Indian Registration Amendment Act (II of 1927), which added the following Explanation to sec. 17 of the Registration Act : "A document purporting or operating to effect a contract for the sale of immoveable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase-money".

Interest and costs :—The purchaser is entitled to recover not only the purchase-money paid by him but also the interest thereon—*Lord Anson v. Hodges*, 5 Sim. 227; *Kesar v. Munna*, 13 N.L.R. 19, 39 I.C. 50 (53). The rate of interest should be 9 per cent. per annum on the analogy of sec. 72—*Kesar v. Munna*, supra. If the contract is rescinded for want of title or misrepresentation or the like, the purchaser is also entitled to the costs of the suit—*Toorance v. Bolton*, L.R. 8 Ch. 118. Interest is not to be paid on the amount of the earnest, *Dhibi Shankarji Shamalji v. Patel Ratilal Rambhal*, A.I.R. 1956 Bom. 443.

This clause, which entitles the vendee to recover interest on the purchase-money he has paid, applies to those cases in which there has been an actual failure of the contract for sale through default of one or

other of the two parties; but where the sale has been actually carried out and the purchaser has obtained possession (so that there has been no failure of the contract) this clause does not apply; and he cannot recover interest, owing to delay in his obtaining possession after the payment of purchase-money where the delay was not through any default on the part of the vendor—*Kapatvanj Municipality v. Ochhaval*, 30 Bom. L.R. 920, A.I.R. 1928 Bom. 328 (332), 113 I.C. 161. Interest can be claimed from the date of the institution of the suit for the refund of the purchase money and not from the date of payment—*Krishanlal v. Suryadatta*, A.I.R. 1958 Madh. Pra. 239.

This clause gives the purchaser a lien for the advance purchase-money and for interests and costs, but not for the *damages* awarded to him—*Sultan Kani v. Meera*, 56 M.L.J. 99, A.I.R. 1929 Mad. 189 (191), 115 I.C. 251. Where the seller did not disclose to the buyer that the permission from the Gwalior Government accorded to the seller for using his land, though agricultural, for building a house on it was non-transferable. *Held* that it was a material defect in the seller's title which the buyer could not with ordinary care discover—*Jhamaklal v. Mishrilal*, A.I.R. 1957 Madh. B. 23.

The Punjab :—Although this Act is not in force in the Punjab, the principle enunciated in clause (6) (b) being a general rule of English law applies as being in accordance with justice, equity and good conscience—*Mt. Shankri v. Milkha Singh*, A.I.R. 1941 Lah. 407 (F.B.).

56. Where two properties are subject to a common charge, and one of the properties is sold, the buyer, is, as against the seller, in the absence of a contract to the contrary, entitled to have the charge satisfied out of the other property, so far as such property will extend.

Sale of one of two properties subject to a common charge.

56. *If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgage-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or any other person who has for consideration acquired an interest in any of the properties.*

Marshalling by subsequent purchaser.

Amendment :—This section has been redrafted by sec. 18 of the T. P. Amendment Act (XX of 1929). It closely follows the language of sec. 81. The actual amendment made in this section is the omission of the words "as against the seller," and the substitution of the words "two or more properties" for "two properties". The reasons are thus stated :—

"Section 56 purports to give effect to the doctrine of marshalling.

In the case of a sale, the right of marshalling is given 'as against a seller.' It has been accordingly held by the High Court of Madras and Allahabad that the buyer has no such right as against a prior mortgagee (31 Mad. 419 : 17 All. 434). In 35 Bom. 395, 13 Bom. L.R. 678, the High Court of Bombay also took the same view and held that section 56 applied only as between a seller and his buyer and not as between a mortgagee of the seller and the buyer. Under section 55 (1) (g), in the absence of a contract to the contrary, it is the duty of the seller to discharge all encumbrances existing at the date of the sale. In practice section 56 does not give any relief to the purchaser.

The section begins with the words 'Where *two* properties are subject to a common charge', and does not provide for the case when there are more properties which are subject to a common charge and some or one of them is afterwards sold. To provide for such cases we propose to amend this section and bring it into line with sec. 81 which deals with the marshalling of securities."—*Report of the Special Committee*.

Principal :—This section enunciates the rule of marshalling as applied to sales, just as section 81 deals with the rule of marshalling as applied to mortgages. The difference between the two sections is that under section 56 the purchaser is entitled to the benefit of the rule whether he had or had not *notice* of the charge, whereas under sec. 81 the rule applies only when the second mortgagee has not notice of the first mortgage.

The meaning of this section may be made clear by an illustration. Suppose A is the owner of two properties X and Y, both of which are mortgaged to a certain person C. B purchases the property X. He will be entitled to insist that his vendor A should satisfy his mortgage-debt out of the property Y (which is still unsold) in the first instance, as far as possible; if after the property Y is exhausted, there still remains any balance of debt unsatisfied, then and then only the property X will be drawn upon. This section does not absolutely relieve the property X, but only postpones it till the debt is satisfied out of the other property (Y) in the hands of the vendor-mortgagor. This section does not curtail the rights of the mortgagee to recover the mortgage amount from all or any of the items mortgaged in any manner he likes—*Thimmakkal v. Kamakshi Ammal*, I.L.R. (1961) Mad. 794.

The principle of this section does not rest on want of notice. It can be applied before another person acquires interest in the property for valuable consideration—*Sain v. Bulaqui*, A.I.R. 1947 Lah. 230.

320. Scope of section :—The words "as against the seller" in the old section showed that the section applied only as between the buyer and the seller, and not as between the buyer and the mortgagee of the seller. That is, the purchaser could not insist upon the *mortgagee* that the other property which was unsold and was still in the hands of the seller should be first sold in execution of his decree before proceeding against the property which he (the purchaser) purchased—*Subraya v. Ganpa*, 35 Bom. 395, 13 Bom. L.R. 678, 11 I.C. 989; *Krishna v. Muthu Kumarasawmiya*, 29 Mad. 217; *Appayya v. Rangayya*, 31 Mad. 419 (F.B.); *Banwari v. Muhammad*, 9 All. 690. See also *Narayanaśami v.*

Vellaya, 47 Mad. 688 and *Amir Chand v. Sheo Pershad*, 34 Cal. 13. The right of the mortgagee to bring any portion of the mortgaged property to sale was not curtailed by the fact of the mortgagor selling a portion of the mortgaged property to a third person; and it was not incumbent upon the mortgagee to proceed first against that portion of the property which had not been sold by the mortgagor—*Dilawar Singh v. Balakiram*, 11 Cal. 258; *Bhikhari v. Dalip Singh*, 17 All. 434; *Subba Rao v. Lakshinarayana*, 22 L.W. 389, 92 I.C. 593, A.I.R. 1925 Mad. 1214; *Ram Raju v. Subbarayudu*, 5 Mad. 387. This was a great disadvantage to the purchaser, consequently the words "as against the seller" have been omitted from the present section. A subsequent purchaser can claim marshalling even though he is the mortgagee of some other property of his seller—*Braham Parkash v. Manbir Singh*, A.I.R. 1963 S.C. 1607.

By amendment the scope of this section has been widened so that it now provides for cases where there are more than two properties, and the word "mortgage" has been used instead of the word "charge". But this does not mean that this section does not now apply to charges—*Md. Yunus v. Special Manager Court of Words*, A.I.R. 1937 Oudh 301, 167 I.C. 962. This section gives the right of marshalling of securities to a subsequent purchaser in such a manner as not to prejudice the rights of the prior mortgagee. The position of a charge-holder is in no sense superior but decidedly inferior to that of the subsequent purchaser. So a charge-holder cannot successfully assert his right to the marshalling of securities to the prejudice of the prior mortgagee—*Lildhar v. Shiwaji*, A.I.R. 1936 Nag. 125, 165 I.C. 550. The omission of the word "charge" from this section shows that it applies to the cases of "mortgage" only. But the principle underlying the section may be availed of in suitable circumstances—*Nilkanthrao v. Satyabhama*, A.I.R. 1944 Nag. 25, I.L.R. 1944 Nag. 340.

The application of the rule as to marshalling has the effect of adjusting the equities between the mortgagor and subsequent transferees from him and can be enforced by a Court against the prior mortgagee provided his interests are not adversely affected by the application of the rule. Marshalling can be enforced only at the instance of the subsequent purchaser or a subsequent mortgagee—*Md. Karimul Rahman v. Saraswati Sugar Syndicate*, I.L.R. 1939 All. 150, A.I.R. 1939 All. 314 (321), 1939 A.L.J. 53. The rule in this section does not apply to a case between *purchaser and purchaser*, the section being limited in its application to the case in which the party claiming marshalling is a purchaser and the party against whom it is claimed is the original mortgagor—*Din Dayal v. Gursaran*, 42 All. 336 (341), 18 A.L.J. 287; *Magniram v. Mehdi Hasain*, 31 Cal. 95 (102); *Sitaram v. Ramrao*, A.I.R. 1931 Nag. 91 (94), 130 I.C. 817. Thus, where the owner of the properties X and Y, both of which are mortgaged, sells the property X to A, and then Y to B, no question will arise as to which property will be primarily liable for the mortgage, but both properties will be liable to contribute to the mortgage-debt in proportion to their values (sec. 82)—*Din Dayal v. Gurusaran*, 42 All. 336 (341); *Magniram v. Mehdi Hosain*, 31 Cal. 95 (102). "For, as between purchasers it is difficult to perceive that either has any superiority of right or equity over the other; on the contrary,

there seems strong ground to contend that the original incumbrance or lien ought to be borne rateably between them according to the relative values of the estates.....Robbing Peter to pay Paul is not a principle of equity, and there is no sound reason, in the absence of special circumstances, for preferring one purchaser for value to another"—*Ghose's Law of Mortgage*, 5th Edn., pp. 392, 393. But where a mortgaged property is sold in two portions to two purchasers, one of whom purchases without notice of the mortgage and with a covenant against incumbrances, and the other person purchases with an *express undertaking to pay off the entire mortgage*, the former purchaser has a right to marshall as against the latter purchaser; and this latter purchaser, if he discharges the entire encumbrance, is not entitled to obtain contribution—*Kamta v. Chaturbhuj*, 8 Pat. 585, A.I.R. 1929 Pat. 664 (669, 671), 120 I.C. 17.

The benefit of the section may be claimed not only by a purchaser, but also by a mortgagee who has foreclosed and who therefore stands in the position of a purchaser; see *Tara Prasanna v. Nilmani*, 41 Cal. 418 (422). See also *Suin Ditta v. Bulaqui Mal.* A.I.R. 1947 Lah. 230, 226 I.C. 366. Similarly, if 45 acres out of 283 acres mortgaged by the mortgagor are purchased at a Court sale in execution of a charge decree and thereafter the mortgagee obtains his decree for sale, he must, first of all, exhaust all his remedies against the balance of 238 acres—*Sarangapani Pillai v. Kumbakonam Bank Ltd.*, I.L.R. (1965) 1 Mad. 160. A subsequent transferee also is entitled to exercise his right of marshalling if no substantial prejudice is caused to the prior mortgagee—*Madan Mohan v. Nand Ram*, A.I.R. 1943 All. 156, 1943 A.L.J. 62; *Braham Parkash v. Manbir Singh*, A.I.R. 1963 S.C. 1607. Where a mortgagee releases major items of mortgaged property to the mortgagor and in collusion with him attempts to throw the entire burden of the decree on a particular item of the mortgaged property purchased by a bona fide purchaser from the mortgagor the Court can pass an order for the sale of all the items of property, and the mortgagee cannot recover from the particular item more than its rateable liability—*Sambandam Pillai v. Ramaswami Naidu*, A.I.R. 1964 Mad. 547.

The rule of this section applies in the absence of a 'contract to the contrary'. Thus, one of the two properties subject to mortgage was sold. It was agreed in the sale-deed and in a deed of agreement which was executed by the vendee that in case it was necessary to pay to the mortgagee more than what the vendor left with the vendee, the vendor would provide the balance and in case of his failure, the same could be recovered from him personally with interest and costs. Held that the stipulation in the sale-deed as to the vendor's personal liability was a 'contract to the contrary' and excluded the statutory charge provided by sec. 56—*Pirthiraj v. Rukmin*, 24 A.L.J. 527, A.I.R. 1926 All. 415, 95 I.C. 343. The contracts contemplated in this section and sec. 82 are identical. Contracts between mortgagors and purchasers from them may be "contracts to the contrary" within this section—*Mangayya v. Achayamma*, A.I.R. 1950 Mad. 224, (1949) 2 M.L.J. 606. See also in this connection *Tulsi Ram v. Maiku Lal*, A.I.R. 1952 All. 163; *Veerappa v. Chandramoulishwara*, A.I.R. 1943 Mad. 637, (1943) 2 M.L.J. 45. The contract to the con-

trary need not be express. It may be implied from the facts and surrounding circumstances—*Venkata v. Venkayamma*, A.I.R. 1946 Mad. 59, (1945) 2 M.L.J. 412.

The statutory charge under this section does not provide for interest and costs—*Pirthiraj v. Rukmin*, *supra*.

The principle of this section should not be applied to leases. See *Lowe & Co. v. Hazarimull*, 30 C.W.N. 183, 94 I.C. 786, A.I.R. 1926 Cal. 525.

This section does not apply to N. W. F. Province but its principles are applicable as principles of equity, justice and good conscience—*Abdul Qaium v. Mt. Turi*, A.I.R. 1941 Pesh. 49.

Execution Sales :—The rule laid down in this section has been applied to execution sales—*Ram Lochan v. Ram Narain*, 1 C.L.R. 296; *Tadigabla v. Lakchmana*, 5 Mad. 385; *Sain Ditta v. Bulaqui Mal*, A.I.R. 1947 Lah. 230, 226 I.C. 366; *Bishonath v. Kishtomohan*, 7 W.R. 488; *Rodh Mal v. Ram Harakh*, 7 All. 711; *Was Dev v. Dheru Mal*, A.I.R. 1940 Lah. 291, 42 P.L.R. 321, 190 I.C. 525. But see contra—*Naubat v. Mahadeo*, 51 All. 606, 1929 A.L.J. 419, A.I.R. 1929 All. 309 (311), 116 I.C. 297, and *Rama Shankar v. Ghulam Hussain*, 43 All. 589 (594). In the last mentioned case, four villages L, P, S and D were mortgaged to a certain person. Out of these properties, P, S and D were sold in execution of a money-decree and purchased by A. The mortgagee then obtained a decree on his mortgage and in execution of it caused the village L, which still remained in the hands of the mortgagor, to be sold by auction. The amount realised being insufficient, the mortgagee caused the village D to be then sold. Held that this section would not apply since the sale in this case was a Court-sale (sale in execution of a money-decree), that the property L would not be primarily liable for the mortgage-debt under this section but that all the four villages would rateably contribute to the mortgage-debt in accordance with the provisions of sec. 82.

Though this section does not in terms apply to execution sales, the equitable principle hereof can be invoked by an auction purchaser sold in execution of a money decree—a *bonafide* purchaser for value without notice of the prior mortgage—*Lachminarayan v. Janmajoy*, A.I.R. 1953 Pat. 193. In the case of executable charge decrees against several properties the Court can sell the charged property or a sufficient part thereof. The Court can decide what properties should be proceeded with without prejudicially affecting the decreeholder's rights—*Nilkanthrao v. Satyabhama*, A.I.R. 1944 Nag. 25; I.L.R. 1944 Nag. 340. If a person purchases one out of the two mortgaged houses from the mortgagor judgment-debtor the purchaser can invoke this section—*Karam Singh v. Shukla*, A.I.R. 1962 Punj. 477.

Discharge of Incumbrances on Sale.

57. (a) Where immoveable property subject to any incumbrance, whether immediately payable or not, is sold by the Court or in execution of a decree, or out of Court, the Court,

Provision by Court for incumbrance and sale freed therefrom.

may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court,—

- (1) in case of an annual or monthly sum charged on the property, or of a capital sum charged on a determinable interest in the property—of such amount as, when invested in securities of the *Central Government*, the Court considers will be sufficient by means of the interest thereof, to keep down or otherwise provide for that charge, and
- (2) in any other case of a capital sum charged on the property—of the amount sufficient to meet the incumbrance and any interest due thereon.

But in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency except depreciation of investments not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reasons (which it shall record) thinks fit to require a larger additional amount.

(b) Thereupon the Court may, if it thinks fit, and after notice to the incumbrancer, unless the Court, for reasons to be recorded in writing, thinks fit to dispense with such notice, declare the property to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

(c) After notice served on the person interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(d) An appeal shall lie from any declaration, order or direction under this section as if the same were a decree.

(e) In this section “Court” means (1) a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, (2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate, (3) any other Court which the, “*State Government*” may, from time to time, by notification in the *Official Gazette*, declare to be competent to exercise the jurisdiction conferred by this section.

Amendment :—In cl. (e) the words “Provincial Government” and “Official Gazette” were substituted for other words by the Government

of India (Adaptation of Indian Laws) Order, 1937. Then the words "State Government" were substituted for "Provincial Government" by A.L.O. 1950.

This section, excepting the last two clauses, has been taken almost word for word from sec. 5 of the English Conveyancing Act, 1881.

"The chapter concludes with a section founded on 44 & 45 Vict. c. 41, (English Conveyancing Act) section 5, providing for the discharge of incumbrances on the sale of encumbered property either by the Court, or in execution of a decree, or out of Court. In case of an annual or monthly sum charged on the property, this is done by paying into Court such amount as when invested in Government securities will be sufficient, by means of the interest, to keep down the charge. In case of a capital sum charged, the amount to be paid into Court is such as will be sufficient to meet the incumbrance and any interest due thereon. Thereupon the Court may declare the property free from incumbrance and make proper orders for giving effect to the sale and for applying the capital or income of the fund in Court. The corresponding section in 44 & 45 Vict., c. 41 has been hailed in England as likely to effect one of the greatest reforms ever made in the law of real property, and there is no reason to believe that it will be equally beneficial in India. But to prevent any chance of error in the exercise of a novel jurisdiction, the Indian Legislature has taken two precautions; first it has confined the jurisdiction to the High Courts, the District Courts, and any other Courts especially empowered by the Local Governments: and, secondly, it has declared that an appeal shall lie from all directions and orders given under this section"—Whitley Stokes' *Anglo-Indian Codes*, Vol. I, p. 731.

Object of the section :—The power which under this section the Court may exercise in the case of any sale is intended to facilitate the alienation of incumbered estates by relieving the land from the incumbrance and substituting for the land another form of security. Shephard and Brown, 7th Edn., p. 218.

321. Application of section :—This section is inapplicable if a decree is obtained on the incumbrance; because in such a case the incumbrance merges in the decree and is taken as having ceased. The mortgagee of certain property obtained a decree for sale upon the mortgage. Thereafter, the petitioner negotiated with the mortgagor for the purchase of the property. The mortgagee having consented to obtain a certain sum in full satisfaction of the decree-debt, the petitioner got from him a written undertaking to that effect. Thereupon the sale was contemplated. However, when the purchaser tendered the agreed sum, the mortgagee refused to receive it. The petitioner applied under this section for permission to pay into Court the sum agreed to be paid and for a declaration that the mortgaged property was free from the said incumbrance. *Held* that this section did not apply, because the mortgage had merged into the decree, and the question involved in this case was one of adjustment of the decree out of Court. But the petitioner was entitled to the declaration asked for, on payment of the money into Court,

and the case was covered by sec. 244 (c) of the C. P. Code, 1882—*Mallikarjuna v. Narashimha*, 24 Mad. 412.

322. Procedure :—The words “upon the application of any party to the sale” show that the Court cannot act *suo motu*. It should exercise its power only on the application of either the vendor or the purchaser.

Again, the power of the Court under this section is discretionary. It will not, upon the application of the purchaser, *compel* the vendor to pay money into Court for the purpose of discharging an incumbrance upon the land, where the result of so doing would be to inflict great hardship on him, as for instance where the incumbrance is a perpetual rent-charge and the sum necessary to procure its discharge would be considerably in excess of the purchase-money of the land—*In re Great Northern Railway Co. and Sanderson*, 25 Ch. D. 788 (793).

Under the English law, the giving of a notice to the incumbrancer is discretionary with the Court. In India, the Court is generally bound to give notice, unless in exceptional cases, the Court thinks fit to dispense with it, the reasons of which must be recorded in writing.

The amount to be deposited in Court shall include the interest of the incumbrance, as well as an extra-charge of one-tenth of the original amount. In England the law is the same—*Ambrose v. Ambrose*, 1 Cox. 194.

CHAPTER IV

OF MORTGAGES OF IMMOVEABLE PROPERTY AND CHARGES.

58. (a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

“Mortgage,” “mortgagor,” “mortgagee,” “mortgage-money,” and “mortgage-deed” defined.

The transferor is called a mortgagor, the transferee a mortgagee ; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a

Simple mortgage.

right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

Mortgage by conditional sale.

(c) Where the mortgagor ostensibly sells the mortgaged property—

on condition that on default of payment of the mortgage money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale :

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

(d) Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

(e) Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

(f) *Where a person in any of the following towns, namely, the towns of Calcutta, Madras, "and Bombay" and in any other town which the "State Government concerned" may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.*

(g) *A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage.*

Anomalous mortgage

Amendment :—The following amendments have been made by sec. 19 of the T. P. Amendment Act (XX of 1929) :—

- (1) A proviso has been added to clause (c). See Note 338.
- (2) The italicised words have been added to clause (d). See Note 342.
- (3) Clauses (f) and (g) defining equitable and anomalous mortgages respectively have been newly added; clause (f) has been taken from the last para of sec. 59, and clause (g) from section 98 with certain modifications.

Not retrospective :—These amendments do not affect transactions entered into and rights and liabilities created before the passing of the aforesaid Amending Act—*Ram Khilawan v. Ghulam Hussain*, 8 Luck. 190. See also Note 1A, *ante*.

The reasons for the amendments have been stated below in proper places.

By the Government of India (Adaptation of Indian Laws) Order, 1937, which came into operation on 1st April, 1937 in paragraph (f) after "Bombay" the word "and" was inserted, after the word "Karachi", the words "Rangoon, Moulmein, Bassein, Akyab" were omitted, "Provincial Government concerned" was substituted for "Governor-General in Council" and "Official Gazette" was substituted for "Gazette of India". Then by A.L.O. 1948 for "Bombay and Karachi" the words "and Bombay" were substituted and by A.L.O. 1950 the words "State Government" have been substituted for "Provincial Government".

Early laws of mortgage :—In the early days of the British rule, mortgages were legislated for in Regulation I of 1798, and later on in Regulations XXIV of 1803 and XVII of 1806, but these Regulations gave a somewhat cumbrous and unsatisfactory procedure, and were confined to *bye-bil-waffas*, *katkobalas*, and other mortgages with possession, and did not cover simple mortgages. "This form of mortgage never having been legislated for, there was no protection to the debtor. The practice was for the creditor to get a money-decree and sell up the mortgaged property without allowing any time for redemption. The sale being an ordinary execution sale of the right, title and interest of the debtor, whatever it might be, it was usual, when the same property was pledged to different creditors in different mortgage bonds, for each creditor to hold a separate sale, and leave the purchasers to fight out in Court the question of what they had brought under their respective sales. There being no machinery for bringing together in one suit the various incumbrances on the property, endless confusion had been the result, and the decisions of the Court upon the almost insoluble problems arising from this state of things had been numerous and contradictory. The result

was that the mortgaged property could not fetch anything like its value. The debtor was ruined, the honest and respectable money-lender discouraged and a vast amount of gambling and speculative litigation fostered. It has been one of the objects of this chapter to remedy those and other similar evils"—Speech of Hon'ble Mr. Evans on the Transfer of Property Bill (1882).

The application of Regulation XVII of 1806 (Bengal Land Redemption and Foreclosure Regulation) is very strict and a mortgagee who relies upon it is bound to show that the proceedings were quite in accordance with sec. 8; and a mortgagee or his representative is not entitled to bring a suit for possession, (where the mortgage is without possession) on the basis of ownership if there has been an irregularity in the foreclosure proceedings—*Ahsan Elahi v. Allaud-Din*, A.I.R. 1938 Lah. 809 (810-11), 40 P.L.R. 798; see also *Madha Prasad v. Gajadhar*, 11 Cal. 111 (P.C.), 11 I.A. 186 and *Munshi Ram v. Nauranga*, A.I.R. 1924 Lah. 176, 72 I.C. 575.

323. Definitions of mortgage:—In section 2 (17) of the Indian Stamp Act, a mortgage is defined as follows :—"Mortgage-deed includes every instrument whereby, for the purpose of securing money advanced or to be advanced, by way of loan, on an existing or future debt, or the performance of an engagement, one person transfers, or creates, to or in favour of another, a right over or in respect of specified property." This definition is much wider and more general than that given in the Transfer of Property Act, because it applies to any specified property both moveable and immoveable, (whereas a mortgage of moveable property is excluded from T. P. Act) and refers to the performance of an engagement and is not restricted to an engagement giving rise to a pecuniary liability only. The two definitions are materially different. For the purpose of ascertaining what stamp-duty is payable on an instrument alleged to be a mortgage, the definition of mortgage as given in the Stamp Act, and not that given in this Act, is to be referred to; but the definition given here, and not the definition given in the Stamp Act, should be the sole guide for ascertaining the nature of a transfer and the incidents to which it may be subject —*Empress v. Debendra*, 27 Cal. 587.

Another definition is to be found in sec. 1 of the Trustees' and Mortgagees' Powers Act :—"Mortgage shall be taken to include every instrument, by virtue whereof immoveable property is in any manner conveyed, pledged, or charged as security for the repayment of money or money's worth lent, and to be reconveyed or released on satisfaction of the debt." This definition is narrower than that given in the T. P. Act, is as much as the purpose of the security is restricted to the repayment of a loan, and does not extend to the performance of an engagement. Moreover, it refers to an existing debt only, and not to a future debt.

The best definition of mortgage is that given in the present section. "Mortgage as understood in this country cannot be defined better than by the definition adopted by the Legislature in sec. 58 of the Transfer of Property Act. That definition has not in any way altered the law, but on the contrary has only formulated in clear language the notions of mortgages as understood by the writers of text books on Indian mort-

gages, and every word of the definition is borne out by the decisions of the Indian Courts of Justice"—*per* Mahomood, J., in *Gopal v. Parsotam*, 5 All. 121 (137).

The general definition of a mortgage is contained in clause (a) in which the general legal effect of a mortgage is predicated. The definitions of the various classes of mortgage contained in the several clauses should not be read as amplifying the *quantum* of interest which a mortgage by law confers upon the mortgagee. These clauses only prescribe the forms in which the various mortgages are to be expressed—*Ansur Subba Naidu v. Secretary of State*, 1917 M.W.N. 794, 41 I.C. 770. Further, in order to determine whether a mortgage falls under any of the classes enumerated in clauses (b) to (g), it is necessary first to refer to clause (a). Clauses (b) to (g) do not give any self-sufficient definition, and do not by themselves declare any transaction whatever to be a mortgage. It is clause (a) which declares what transactions are mortgages, and it is necessary to determine whether there is a mortgage at all before the subsequent clauses are referred to—*Mumtaz v. Lachhmi*, A.I.R. 1929 All. 174 (176), 116 I.C. 807.

The Act in dealing with the definition of mortgage in this section does not lay down that a mortgage is a transfer of the proprietary rights in a case where the mortgagor is the owner of such proprietary rights and makes a mortgage of them. Of course, other rights than proprietary rights may also be mortgaged—*Balbhaddar v. Raghubir*, I.L.R. 1939 All. 484, A.I.R. 1939 All. 369 (372), 1939 A.L.J. 245.

A mortgagor is estopped from asserting that he is not in possession of the property mortgaged—*Judunath v. Isar*, A.I.R. 1939 Pat. 47, 178 I.C. 198; see also *Bholanath v. Balaram*, 27 C.W.N. 607 (P.C.). But where the mortgagee knows already that the mortgagor is not in possession of the mortgaged properties and that he has only a doubtful or disputed title to them, and when in spite of such knowledge he takes a mortgage, the transaction does not amount to a mortgage within the definition of this section—*Gajanand v. Prayag Kumari*, A.I.R. 1938 Cal. 48.

The essence of a transaction by way of loan on security is that the lender unwilling to rely solely on the personal liability of the borrower, requires in addition to be given a right *in rem*; and to insist in the same document a provision by which the borrower bestows the required right *in rem*, and a provision enabling the borrower to destroy it forthwith is a proceeding difficult to contemplate as probable. If it be desired to confer so drastic a power upon a mortgagor in the future, it will be necessary for those who frame the security to make express provision for that purpose in language free from all doubt or ambiguity—*Nathu Mal v. Raman Mal*, A.I.R. 1937 P.C. 124 (126), 67 I.A. 126, 41 C.W.N. 901, I.L.R. (1937) Lah. 245 167 I.C. 786.

A *kootchit* deed executed by a stake-holder of a *chit* fund of his property for the due performance of his obligations in connection with the *chit* transactions falls within the definition of this section, because it effects security of the property for the due performance of engagement which may result in pecuniary liability like simple mortgage-bonds—

Natesa v. Sahasranama, A.I.R. 1927 Mad. 773, 103 I.C. 814. If mouzas A and B are specifically mortgaged and the mortgagee is given the right to sell mouza C if necessary, mouza C too is covered by the mortgage—*Monimala Devi v. Indu Bala Debya*, A.I.R. 1964 S.C. 1295.

324. Characteristics of the several mortgages :—

(1) *Simple mortgage* :—(a) The mortgagor undertakes *personal liability*. (b) No *possession* is delivered. (c) There is *no foreclosure* (sec. 67). (d) No power of sale out of Court, but a decree for sale of the mortgaged property must be obtained. (e) It must be effected by a *registered instrument* even if the consideration is below Rs. 100 (sec. 59).

(2) *Mortgage by conditional sale* :—(a) The mortgagor ostensibly *sells* the mortgaged property. (b) The condition is that the sale shall be absolute in default of payment on a particular date or that the sale shall be void on such payment and the property retransferred. (c) The remedy of the mortgagee is by *foreclosure* and not by sale (sec. 67). (d) It must be by registered writing if the consideration is Rs. 100 or upward; if less than Rs. 100, it may be effected by delivery of the property or by a registered instrument (sec. 59). (e) It must be created by *one document*, and not by two documents (one for sale, and another for agreement of repurchase).

(3) *Usufructuary mortgage* :—(a) There is delivery of *possession* to the mortgagee. (b) He is to retain possession until repayment of the money and to receive rents and profits or part thereof in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest and partly in payment of the mortgage-money. (c) There is redemption when the amount due is personally paid or is discharged by rents and profits received. (d) There is no remedy by sale or foreclosure (sec. 67). (e) If for Rs. 100 or upwards, it must be registered; if below Rs. 100, it may be by registered deed or by delivery of the property (sec. 59).

(4) *English mortgage* :—(a) It is followed by delivery of possession. (b) There is a personal covenant to pay the amount. (c) It is effected by absolute transfer of property with a provision for retransfer in case of repayment of the amount due. (d) The remedy is by sale and *not by foreclosure* (sec. 67). (e) Power of sale out of Court is conferred on certain persons under certain circumstances (sec. 69).

(5) *Equitable mortgage* :—(a) It is created in the towns of Calcutta, Madras, Bombay, Karachi, etc. (b) It is effected by deposit of material title-deeds; no delivery of possession takes place. (c) It is made to secure a debt or advances already made or to cover future advances. (d) No registration is necessary even if there is a writing recording the deposit (sec. 59). (e) The remedy is by sale and not by foreclosure (sec. 67). All provisions in this chapter relating to a simple mortgage are applicable to equitable mortgages (sec. 96).

(6) *Anomalous mortgage* :—(a) It now includes a simple mortgage usufructuary and a mortgage usufructuary by conditional sale. (b) Possession may or may not be delivered. (c) The remedy is by sale; or by foreclosure, if the terms of the mortgage permit it (sec. 67). (d) If

for Rs. 100 or upward it must be registered ; if below Rs. 100, it may be by registered deed or by delivery of possession (sec. 59).

A stipulation for indemnifying the mortgagee in case dispossession takes place does not affect the nature of the mortgage—*Sashi Bhusan v. Madhu Sudan*, I.L.R. (1942) 2 Cal. 28, A.I.R. 1942 Cal. 522.

Enumeration not exhaustive :—This section enumerates six kinds of mortgages. But the Transfer of Property Act was not intended to be exhaustive. There are many mortgages known to English law which it would be difficult or impossible to bring within the terms of this Act, yet there can be no doubt that such mortgages would be enforceable in India—*Bhupendra v. Wajihunnissa*, 2 P.L.J. 293 (300), 39 I.C. 564.

Application in the Punjab :—Though the Act is not in force in the Punjab, the definitions of the various kinds of mortgages given in this section have always been accepted as correctly describing their essential ingredients and incidents—*Lachhman Singh v. Nath Singh*, A.I.R. 1940 Lah. 401 (F.B.), 42 P.L.R. 560, 191 I.C. 583.

325. Construction :—In construing deeds of mortgage, effect should be given to the *intention* of the parties ; and this intention can be gathered from the terms of the deed. It is not the *name* given to a contract by the parties that determines the nature of the transaction. It is the contents of the agreement, the jural relation constituted by it, that determines whether it is, really a conveyance, a lease, a mortgage or a contract of some other nature—*Abdul Bhai v. Kashi*, 11 Bom. 462 ; *Karam Chand v. Faqir*, A.I.R. 1929 Lah. 489 ; *Polivedi Hanumayya v. Addanki Srinivasa Rao*, 1955 Andhra W.R. 178. Thus, a deed, which on the face of it was described as a mortgage, stated that the grantee was already in possession under a previous mortgage by the grantor and was under the second deed to receive the profits in liquidation of interest so far as they would go, and that the grantor was not to be liable to repay the principal money or such balance of interest (if any) as might accrue upon it unless he adopted a son, and the grantee, unless that event happened, was to enjoy the property conveyed in right of purchase for the sum (principal and interest) due to him. *Held*, that the deed was a sale liable to be converted into a mortgage, though it was named by the parties as a mortgage-deed—*Jamnadas v. Brijbhukhan*, 2 Bom. 113. So also, as long as the nature of the transaction is substantially such as to classify it as belonging to a particular kind of mortgage, the mere calling it by a different name will not relegate it to another class—Macpherson on Mortgages, p. 127. But although generally speaking the name given by the parties to a document is not conclusive as to its nature, still the designation is not always to be lost sight of, especially where the document is ambiguous and is susceptible of more than one construction as to its nature and scope—*Kalabhai v. Secretary of State*, 29 Bom. 19. And so Butler in his edition of *Coke on Littleton*, writes :—“It may be laid down as a general rule, and subject to a very few exceptions, that where a conveyance or assignment of an estate is originally intended as a security for money, whether this intention appear from the deed itself or by any other instrument, it is always considered in equity as a mortgage and redeemable, even though there is an express agreement of the parties that it shall not be

redeemable, or that the right of redemption shall be confined to a particular time or to a particular description of persons”.

Language free from all possible doubt would be required to establish a power given to a mortgagor to sell off the mortgaged property without the knowledge and consent of the mortgagee. The provision in the mortgage-deed that in case of a sale of any item of the mortgaged property, he would pay over the entire sale-proceeds to the mortgagee, did not authorize the mortgagor to sell any property without the mortgagee's knowledge and consent, but merely gave him power to redeem part without redeeming the whole—*Nathu Mal v. Raman Mal*, 41 C.W.N. 901 (P.C.).

In the absence of a stipulation that specific properties should be sold in lieu of compensation for loss in respect of the property sold, the document could not be construed to create a fresh mortgage over the property already mortgaged—*Ram Khelawan v. Ramnandan*, A.I.R. 1949 Pat. 505.

326. Agreement of mortgage—Specific performance:—A mortgage is an accomplished transfer, and as such creates a right *in rem*; but a mere agreement of mortgage between the intending debtor and creditor does not create any such right, and such an agreement is not capable of specific performance, *i.e.*, the Court cannot compel the parties to borrow or lend the money—*Rogers v. Challis*, (1859) 27 Beav. 175 (178, 179); *Sheikh Galim v. Sadarjan Bibi*, 43 Cal. 59; *Ram Het v. Pokhar*, 7 Luck. 237; *Sichel v. Mosenthal*, (1862) 30 Beav. 371 (377). The rule that specific performance cannot be granted in respect of a contract to lend money applied to a contract to lend to a company money payable by instalments upon the security of debentures to be issued by the company. The defendant agreed to borrow a sum of money from the plaintiff on certain security. The defendant afterwards obtained better terms from a third person and refused to perform his agreement with the plaintiff, who then brought a suit for specific performance. Held that such a suit would not lie—*Rogers v. Challis* (supra); *South African Territories Ltd. v. Wellington*, [1898] A.C. 309 (in this case it was held that damages would be the adequate relief). But the law on this point has been altered by statute. Sec. 122 of the Companies Act, 1956, provides that a contract with a company to take up and pay for any debentures of the company may be enforced by a decree for specific performance. The case of *Sichel v. Mosenthal*, (supra) was a converse case, and there a suit to compel a man to lend money was dismissed, and the Judge suggested that the proper remedy was an action for damages. A suit for specific performance of a contract to advance money being incompetent, any unpaid balance of the mortgage consideration cannot be attached in execution of a decree against the mortgagor on the ground that it is a debt due to the mortgagor who has only a remedy in a suit for damages—*Sewa Singh v. Milkha Singh*, A.I.R. 1936 Lah. 727, 17 Lah. 270, 164 I.C. 582. A mere agreement to mortgage cannot create any interest in the mortgaged property, nor does it create any charge. It only gives rise to a personal obligation. Where an agreement to mortgage a house was made in favour of A, and subsequently the house was mortgaged to B, and A then filed a suit for specific performance long after B's

mortgage, then assuming that a decree for specific performance can be properly made in that suit, the decree would not relate back to the date of agreement so as to confer on A a priority over B's mortgage—*Waman v. Janardan*; A.I.R. 1938 Bom. 357, 40 Bom. L.R. 545.

A contract to lend money cannot be specifically enforced. But the case of a usufructuary mortgage stands on a different footing, particularly when *possession has been delivered* and the stipulation is that the profits are to be set off against the interest. If, in such a case the mortgagee does not pay the amount contracted to be paid, a suit will lie to recover the money. Here the executant has performed his part of the contract (by delivering possession) but the transferee has not done so. The suit is not really one for specific performance of a mere contract to lend money, but to compel the mortgagee to perform his part of the contract when he has obtained delivery of possession—*Sheopati v. Jagdeo*, 52 All. 761, 1930 A.L.J. 1141, A.I.R. 1931 All. 95 (97), 124 I.C. 764; *Thakar Singh v. Jagat Singh*, A.I.R. 1933 Lah. 1 (2), 140 I.C. 495; *Thakar Das v. Amar Chand*, A.I.R. 1938 Lah. 21. If the usufructuary mortgagee fails to pay a portion of the amount contracted to be paid, the mortgagor is entitled to bring an immediate suit for recovery of the money, instead of going into an account in future when a suit for redemption would be instituted—*Sheopati v. Jagdeo*, supra.

Where the mortgagee *has advanced* the money but the mortgagor refuses to execute a mortgage, the former can bring a suit for specific performance for compelling the mortgagor to execute a deed of mortgage, though of course it will be open to the latter to elect to repay the loan. Ghose's *Law of Mortgage*, 5th Edn., pp. 74-75. Where an agreement between a Company and H provided that "all stock-in-trade of the Company shall be under hypothecation to H, and that the Company will soon execute in favour of H a regular deed of mortgage of the land, etc., for the sum of Rupees five lakhs to meet any deficit that may be due to H for the advances made by him after availing of the stock under hypothecation to H as aforesaid:" held that the agreement created a right in H to obtain a regular deed of mortgage which was to be executed by the Company—*Hukumchand v. Radha Kishen*, 34 C.W.N. 506 (511) (P.C.), A.I.R. 1930 P.C. 76, 123 I.C. 157, 32 Bom. L.R. 533, 58 M.L.J. 453.

In the case of a mortgage by a member of a Hindu joint family of the entirety of a property, the purchaser however should not be compelled to complete the purchase where there is an admission of the mortgagor in the memorandum as to a previous mortgage that his share was only one-third and there were threats by other members of the family to assert their rights—*Benares Bank v. Baloram Dey & Sons*, 41 C.W.N. 520.

An agreement to execute a mortgage of immoveable property does not in India by itself constitute a mortgage or a charge upon the property—*Hukum Chand v. Radha Kishen*, supra; *Venkataramaswami v. Imperial Bank*, A.I.R. 1938 Mad. 889 (892) (F.B.), (1938) 2 M.L.J. 461, 48 M.L.W. 401.

Where a mortgagee-purchaser is deprived of any item of the mortgaged property, by a stranger, the mortgagor must make good the loss

sustained by the purchaser on account of the breach of covenant as to title involved in the contract of mortgage—*Perumal v. Maruthanayaga*, A.I.R. 1936 Mad. 433, 165 I.C. 559.

327. "Transfer of interest" :—According to the definition given in this section, the first requisite of a mortgage is that there should be a *transfer* of an interest in immoveable property. The interest transferred depends upon the character of the mortgage. In a simple mortgage, the interest conveyed is the right to cause the property to be sold. In a mortgage by conditional sale and in an English mortgage, the actual ownership is transferred, subject, however, to a condition. In a usufructuary mortgage, the transfer made is of the right of possession and enjoyment of the usufruct.

Under the English system of law in cases where the ordinary form of mortgage in use in England before the passing of the Law of Property Act of 1925 is adopted, the whole of the mortgagor's interest passes to his mortgagee, notwithstanding that an equity of redemption remains in the mortgagor. This equitable right is, however, an estate in the land and is not merely a personal contract on the part of transferor. But in India, since the passing of the T. P. Act, there is no distinction in Indian law between law and equity in regard to the rights of mortgagors and mortgagees. This Act is a self-contained code by which alone the rights of mortgagor and mortgagee have to be ascertained—*Ram Kinkar v. Satya Charan*, A.I.R. 1939 P.C. 14, 43 C.W.N. 281. The Indian authorities recognize the principle that the distinction between law and equity has no place in Indian law—*Ibid.*, at p. 287. By the Indian law the interest which remains in the mortgagor is a legal interest and its retention may, therefore, prevent the whole of the mortgagor's interest from passing to the mortgagee—*Ibid.*, at p. 288. See also *Bhupati v. Bon Behari*, A.I.R. 1941 Cal. 436. There is no doctrine of law in India which prevents a beneficiary under a trust from dealing with his interest by way of mortgage, though it is true enough that in India such an interest is not technically regarded as an equitable estate—*Hem Chandra v. Suradhani*, I.L.R. (1940) 2 Cal. 436 (P.C.), A.I.R. 1940 P.C. 134, 45 C.W.N. 253.

A mortgage is the transfer of an interest in specific immovable property. On the execution of a mortgage two distinct interests are carved out—(1) the mortgagee's right and (2) the mortgagor's right to redeem—*Bharat v. Mt. Chadi*, A.I.R. 1947 All. 27 (F.B.), A.I.R. 1946 All. 883. The transfer is as security for the repayment of a debt which subsists in a mortgage whereas it is extinguished in a sale—*Manik v. Baldeo*, A.I.R. 1951 Pat. 327.

Mortgage and charge distinguished :—The words "transfer of an interest" distinguishes a mortgage from a charge. In a charge no right *in rem* is created, but the right is something more than a personal obligation, for it is a *jus ad rem*, that is, a right to payment out of property specified, while a simple mortgage is a right *in rem*. There is thus very little difference between a charge and a simple mortgage except that a charge is only good as against a subsequent transferee with notice. When a charge is created by act of party the specification of the particular fund

or property negatives a personal liability and the remedy of the holder of the charge is against only the property charged. When there is in addition a personal covenant the security would become collateral to that personal covenant and the security would in that case appear to become a transfer of a right of sale to support the personal covenant and as the right of sale is a right *in rem* the transaction would be a mortgage. For this reason the absence of a personal liability is the principal test that distinguishes a charge from a simple mortgage—*Benares Bank v. Har Prasad*, A.I.R. 1936 Lah. 482, 163 I.C. 69. See also *Sher Singh v. Daya Ram*, 13 Lah. 660 (667) (F.B.); *Liladhar v. Shiwaji*, A.I.R. 1936 Nag. 125 (127), 165 I.C. 550.

A mortgage is a *transfer* of an interest and in this respect it differs from a *charge*. A charge-holder is only entitled to have his claim satisfied out of a particular property, but neither that property nor any interest therein is *transferred* to him. It is only by virtue of a decree for sale that an interest in the property can pass to him—*Gobinda v. Dwarka Nath*, 35 Cal. 837 (841); *Rajah Siva Prasad v. Beni Madhab*, 1 Pat. 387 (392); *Altaf Begam v. Brij Narain*, 51 All. 612, 116 I.C. 855, A.I.R. 1929 All. 281; *Khemchand v. Mallo*, 10 N.L.R. 81, 26 I.C. 601. "The broad distinction between a mortgage and a charge is this, that whereas a charge only gives right to payment out of particular fund or particular property without *transferring* that fund or property, a mortgage is in essence a *transfer* of an interest in specific immoveable property. The line of division between a charge and a mortgage in England is a very clear one but in this country the division is not so well marked; and in fact there is very little difference between a charge and a simple mortgage as defined in this section"—*per* Das, J., in *Raja Siva Prasad v. Beni Madhab*, *supra*. The creation of a charge in specific property gives the charge-holder a right to recover a certain sum of money from the value of the property charged and to that extent reduces the interest of the creator of the charge in the property. A charge therefore is a transfer of an interest in property in the sense that an interest which has existed in the creator of the charge passes to the holder of the charge and creates an interest almost the same as an interest created by a simple mortgage—*U. P. Government v. Manmohan*, A.I.R. 1941 All. 345 (F.B.) overruling *Manmohan v. Lower Ganges & Co.*, I.L.R. 1940 All. 558, A.I.R. 1940 All. 458, 1940 A.L.J. 449. Where a mortgagor having already mortgaged his lands with possession to the mortgagee, takes a further advance from him, on the security of the land already mortgaged, the second transaction does not amount to a fresh transfer of the land, consequently it is merely a charge and not a mortgage (under the Punjab Alienation of Land Act). But the case is different if the second transaction purports to cancel the earlier one or contains conditions substantially different from those contained in the original mortgage or an additional area of land—*Sher Singh v. Daya Ram*; 12 Lah. 660, A.I.R. 1932 Lah. 465, 139 I.C. 49 (F. B.). In the absence of any express words indicating a transfer of an interest in specific immoveable property, a document which entitles the creditor to recover his dues by attachment and sale of the property, and which contains a covenant against alienation does not create a mortgage but merely effects a charge—*Royzuddi v. Kali Nath*, 33 Cal. 985. Where a document simply

creates a lien on a property and does not contain any words showing that there is a transfer of interest in the property and no question of redemption is involved, the deed does not constitute a mortgage but merely creates a charge—*Sikandar Ara v. Hasan Ara*, A.I.R. 1936 Oudh 196, 165 I.C. 70. The difference between the two is material in this respect that while the transfer of an interest creates a right *in rem* which is available against all subsequent transferees irrespective of notice, a plea of purchase without notice is a good defence against a prior claimant who has merely a charge falling short of an interest in the property—*Kishun Lal v. Ganga Ram*, 13 All. 28. In other words, a mortgagee can follow the mortgaged property in the hands of any transferee from the mortgagor, whereas a charge can be enforced against a transferee only if it is shown that he has taken with notice of the charge—*Royzuddi v. Kali Nath*, 33 Cal. 985. This is now expressly provided in sec. 100. A mortgage is created only by act of parties, while a charge may be created either by act of parties or by operation of law. (See sec. 100).

It is not essential for the creation of a mortgage that there should be an *express* transfer of interest. It is sufficient if the instrument taken as a whole operates such transfer—*Kola Venkatanarayana v. Vuppala Ratnom*, 29 Mad. 531 (533); *Balasubramania v. Sivaguru*, 21 M.L.J. 562, 11 I.C. 629 (632); *Ramabrahman v. Venkatanarasu*, 23 M.L.J. 131, 16 I.C. 209 (210); *Venkatarama v. Suppa Nandan*, 27 M.L.J. 58, 24 I.C. 24. In a simple mortgage, the interest transferred is the right to have the property sold, and this need not necessarily be provided for in the deed in so many words; it may be inferred from the language used, and where such an agreement can be inferred, then there is a transfer of an interest—*Dalip Singh v. Bahadur*, 34 All. 446; *Har Prasad v. Ram Chunder*, 44 All. 37 (44) (F.B.), 19 A.L.J. 807, 63 I.C. 750; see also *Sampuran Singh v. Ahmad Din*; A.I.R. 1941 Lah. 274, 43 P.L.R. 277. Such a transfer may be implied from the nature of the transaction and the circumstances of the case. Thus, where a document, hypothecating a house as security for the payment of a debt, contained a full description of the boundaries of the house, and consolidated the several amounts due on prior mortgages of the same house, and further contained a covenant to pay, with an undertaking not to redeem a certain usufructuary mortgage before the present mortgage was redeemed, *held* that the parties intended to create a mortgage, that if it lacked apt words in expressing the transfer of interest, the defect was due to the imperfect power of expression of their minds, and that it was improbable that the creditors would have accepted a mere personal bond in substitution for two prior mortgages—*Ponnuranga v. Thandavarada*, 1915 M.W.N. 21, 26 I.C. 274; see also *Har Prasad v. Ram Chunder*, (*supra*). Though a deed does not expressly contain any words involving a transfer of any specific interest in immoveable property, still if it contains a provision "that as a guarantee for the repayment of the principal money we hereby mortgage and hypothecate the properties mentioned below, and we further declare that until repayment of this debt we shall not transfer the properties in any way," *held* that the deed is a valid mortgage and not a charge—*Ananda Ram v. Dhanpat*, 1 P.L.J. 563 (567, 568), 38 I.C. 37; *Sheoratan v. Mahipal*, 7 All. 258 (264) (F.B.). A bond contained the following words: "I am borrowing Rs. 300 from you, and executing this

mortgage bond.....I promise to pay the money in the month of Magh, 1299.....As security for the payment of the money I do mortgage the following properties.....Until the said money is paid up I shall not alienate these properties in any way. If I raise any dispute in paying the money, you should institute a suit and recover the money by attachment and auction-sale of the said properties". *Held* that the deed created a mortgage and not a mere charge, although there was no transfer of any interest—*Nabin Chand v. Raj Coomar*, 9 C.W.N. 1001 (1002). In fact, this is the usual form in which mortgage bonds are drawn up in this country, and it is the universal judicial practice to treat documents in this form as simple mortgages—*Ibid.* The word 'panayam' when used in documents executed in Malabar means a mortgage, if the property covered by the 'panayam' deed is immoveable property; and when such a document contains a personal covenant by the mortgagor to pay the amount, the document is a document of simple mortgage, even if the transfer of interest is not formally expressed in it—*Samandan v. Mamkoth*, 33 M.L.J. 679, 42 I.C. 349. Where a document calling itself *diggu lhogyam* (a telegu word for usufructuary mortgage) provided that the creditor should receive rents and profits from a tenant in possession of the land for a certain number of years for the total of the principal and interest due, and it recited that the consideration was taken on the security of the land, *held* that the document was a mortgage-deed, as there was a transfer of an interest in immoveable property, and not merely an assignment of the income for the period—*Anantha Iyer v. Ramaswami*, 1914 M.W.N. 891, 26 I.C. 71. A bond contained the following stipulation: "In respect of this we have given to you in writing as a *nazar gahan* (i.e., sight mortgage) the fields which belong to ourselves and which we ourselves are enjoying.....If we do not pay according to contract you may sell the said fields through the Court and recover amount. If any balance remains, we will pay it off personally or by means of our other property"; *held* that the above stipulations created a mortgage and not a mere charge—*Onkar v. Goverdhan*, 14 Bom. 577. A borrowed a sum of money from B and mortgaged certain properties. A charge was created afterwards in favour of C by a consent decree. Subsequently B made a further advance to A and this sum was secured by an instrument described as a "further charge". The provisions in the first mortgage-deed transferring the property to the mortgagee by way of security was also incorporated in the deed of further charge: *held* that the deed of further charge was a transfer and therefore a mortgage and the rights of B under the deed of further charge ranked in priority to the rights of C under the consent decree—*Bhupati v. Bon Behari*, A.I.R. 1941 Cal. 436.

But a *security bond* for refund of sale-proceeds in case of reversal of the decision in the appellate Court does not amount to a mortgage-deed when it does not expressly say that it is a hypothecation or mortgage and does not mention any person to whom the security is given. The liability in such a case is undertaken to the Court and the Court is not a juridical person and it can neither sue nor take property nor assign it (*Raj Raghubir v. Jai Indar*, 42 All. 158, 46 I.A. 228). A security bond which does not name the person to whom the money is to be paid does not create a charge also—*Mehdi Ali v. Chuni Lal*, A.I.R. 1929 All. 834, (1929)

A.L.J. 902, 119 I.C. 81. Where a security bond, after reciting an order of the Court made upon an application that the possession of certain immoveable property should not be delivered over to the plaintiff, stated that "we have for a sum not exceeding Rs. 300 made the properties mentioned below security", *held* that the document did not transfer an interest in the property but that it merely created a charge and not a mortgage—*Rama Chariar v. Daraswami*, 29 I.C. 605 (Mad.). A deed set out that the executant had borrowed a sum of money. Certain immoveable properties were specified without anything more. There was a covenant to repay and also a covenant not to alienate until repayment of the loan. *Held*, that there was merely an undertaking by the borrower not to alienate the property until the loan was repaid; but there was no transfer of an interest in the property to the creditor, nor did it give the creditor a right to put the property to sale; therefore the transaction was not a mortgage within this section and it is doubtful also whether it even created a charge on the property—*Mohan Lal v. Indomati*, 39 All. 244 (251, 252) (F.B.); *Jawahir v. Indomati*, 36 All. 201 (*per* Richards, C.J.).

328. 'Specific' immoveable property :—The next requisite of a mortgage is that the immoveable property must be distinctly specified. The property intended to be mortgaged must be described so that it may be readily recognised and identified—*Najibulla v. Nasir*, 7 Cal. 196 (198); *Bhoneswar v. Ram Khelawan*, 5 I.C. 654. The object of having the property defined specifically is to render the identification as easy as possible, and to shut the door against fraud and controversy—*Carpenter v. Deen*, 23 Q.B.D. 566 (at p. 574). Thus, where under a bond the obligor agreed that if the principal and interest be not paid up within the stipulated period, the obligee would have liberty to realise the amount due from "my moveable and immoveable property," *held* that the language of the bond was too vague to create a charge on any, *definite* estate—*Collector v. Betti Moharani*, 14 All. 162; *Baldeo Rai v. Murli Rai*, 10 A.L.J. 120, 16 I.C. 638. A mortgage of "my house and landed property" is void for uncertainty—*Darshan Singh v. Hanwanta*, 1 All. 272. In *Ramsiddh v. Balgovind*, 9 All. 158, the obligors of a bond described themselves as residents of a certain place and said that they pledged their property for a debt; the hypothecation was held to be too indefinite to be acted upon. But if they had described themselves as the owners of certain property and then gone on to pledge their rights and interests therein, the case would have been different—*Deoji v. Pitambur*, 1 All. 275. For instance, where the mortgagor described certain property as belonging to him and then recited that "my rights and property in the aforesaid talook shall remain pledged and hypothecated for this debt," *held* that the recital created a good mortgage as the property was clearly defined—*Bishan Dayal v. Udit Narain*, 8 All. 486. Where the property was described, as "villages granted to the executant by Government in perpetuity," *held* that the property was sufficiently identified, although the names of the villages were not mentioned—*Kanhia Lal v. Muhammad*, 5 All. 11. See also *Land Mortgage Bank v. Abdul Kasim*, 26 Cal. 395 (P.C.). A deed describing the mortgaged property as "my zemindary property" without any further specification was *held* not void for uncertainty, as the words were capable of being made certain by proof of the

mortgagor having at the date of the deed owned a specific zemindary interest—*Shadi Lai v. Thakur Das*, 12 All. 175. A document of mortgage did not give the boundaries of the lands, but specified them as "my *jirayati* and *inam* lands which I own at the village of my residence". Held that the description was sufficient to satisfy the requirements of this section and that it created a mortgage—*Dakkata v. Sasanapuri*, 1 L.W. 96, 22 I.C. 524.

Where a mortgagor mortgages his right to recover rent from the tenant in respect of a certain holding and makes reference to the area of such holding and the amount of rent due thereof in the mortgage-deed, the mortgage is really a mortgage of an interest in immoveable property, as rent is the first charge on the holding—*Ramzan v. Babu Lal*, A.I.R. 1938 Pat. 16, 18 P.L.T. 801, 173 I.C. 64. Mortgage with possession of fruit-bearing trees is a mortgage, either of immoveable property or at least of an interest in immoveable property—*Shiv Dayal v. Puttoo Lal*, A.I.R. 1933 All. 50, 54 All. 437, 140 I.C. 491.

Under sec. 3 growing crops are not immoveable property. Therefore, a mortgage of such crops does not require registration. A mortgage of crops not in existence amounts to a mere agreement to hypothecate the future crops when they come into existence. Such an agreement is valid. As soon as the crops grow, the hypothecation becomes complete and attaches to the crops and creates equitable interest in the mortgagee. Such a charge can be enforced against all subsequent transferees with notice but will be of no avail against a transferee without notice—*Babu Ram v. Ram Sarup*, A.I.R. 1926 All. 164, 89 I.C. 410.

It may be held, as a general rule, that if there is a mutual mistake in a mortgage in the description of property and the same mistake is reproduced in the decree, equity may go back to the original transaction and re-form both the mortgage and the decree so as to make them conform to the intention of the parties, but in a case where the decree has been executed and title has passed to a purchaser, fresh considerations may arise—*Bipin v. Priya Brata*, 26 C.W.N. 36.

329. Consideration of mortgage :—A mortgage must be supported by consideration ; without consideration a mortgage becomes unenforceable and no charge can be created on the property—*Ramasami v. Sundara*, 23 I.C. 805 (Mad.) ; *Kumarappan v. Narayana*, 35 I.C. 455 (Mad.) ; *Ralla Ram v. Malawa Ram*, 123 P.W.R. 1911, 12 I.C. 308. A mortgage is not rendered invalid by the mere fact of non-payment of a part of the consideration by the mortgagee. This fact does not entitle the mortgagor to rescind the contract at his option—*Manicka v. Arumugha*, A.I.R. 1945 Mad. 340, (1945) 2 M.L.J. 7. But where a person granted along with another a mortgage which was for the benefit of the latter and undertook joint liability for the mortgage-debt, it has been held that he is bound by the mortgage, although he may receive no part of the consideration money and the entire amount is received by the other mortgagor—*Annamoyi v. Umesh*, 40 C.W.N. 339. Where the mortgagor completes his part of the contract, but the mortgagee fails to discharge the consideration, the mortgagor has a transferable claim and his assignee is entitled to sue the mortgagee for the amount—*Sardar Khan v. Ram Mal*,

A.I.R. 1936 Lah. 196, 162.I.C. 698; *Sheopati v. Jagdeo*, A.I.R. 1931 All. 95.

The consideration of a mortgage may be either (1) money advanced or to be advanced by way of loan; (2) an existing or future debt; or (3) the performance of an engagement giving rise to a pecuniary liability.

'Money advanced' includes "existing debt" and something more, for it will comprehend a debt which has become barred by limitation or otherwise irrecoverable, whereas an 'existing debt' means a debt which is not so barred.

Where there is a sale for a price and a mortgage on the same property for the price, the mortgage being the consideration for the sale, if it is found that the vendor had no title to the property conveyed, the mortgage is devoid of consideration—*Ramanujulu v. Gajraja Arumal*, A.I.R. 1950 Mad. 146, (1949) 2 M.L.J. 560.

Proof :—Where a mortgage-deed is proved to have been executed and the document contains an acknowledgement of the receipt of consideration, this is strong *prima facie* evidence that the consideration was actually received—*Naranjan v. Ghulam Mahammad*, A.I.R. 1938 Lah. 463, 40 P.L.R. 313. Where there is an endorsement by the Sub-Registrar upon the mortgage-deed about the payment of money in his presence, the onus lies upon the mortgagor or his legal representatives to rebut the endorsement—*Mt. Mangala v. Mahadeo*, A.I.R. 1937 Oudh 443, 170 I.C. 523.

"For the purpose of securing, etc." :—A mortgage is created for the purpose of securing a debt or other obligation. A transfer which is made by way of *discharging* a debt is not a mortgage—*Nidha Sha v. Murli*, 25 All. 115 (P.C.); *Abdulbhai v. Kashi*, 11 Bom. 462.

Money advanced :—But the terms of an agreement entered into by the plaintiff and defendants, a pending suit was compromised, and payment of an ascertained balance found due from the plaintiff was secured by the defendants (creditors) being placed in possession of the plaintiff's lands for a certain number of years, with the right of enjoying all rents and profits thereof subject to the payment of a fixed rent, part of which was to be paid to the plaintiff and the remainder to be retained by the creditors towards payment of the debt. *Held* that the agreement was a mortgage, and redeemable on the usual terms—*Mashook Ameen v. Marem Reddy*, 8 M.H.C.R. 31. Similarly, a document whereby the executant gave possession of his land to his creditor to secure his debt and to have the debt discharged out of the rents and profits, was held to be a mortgage—*Venkateswara v. Keshava*, 2 Mad. 187.

"To be advanced" :—A mortgage may be given not only for an existing debt but also as a security against advances to be made in future. Such a case may arise where for instance a mortgage is given as a running security for the balance of an account—*Henniker v. Wigg*, 4 Q.B. 792; *Ahmedabad People's Co-operative Bank Ltd. v. Pradip Amratlal*, A.I.R. 1959 Bom. 482. Where the mortgagor allows a portion of the mortgage-money to remain with the mortgagee in a deposit account in such a way that he could draw upon it and obtain the money at any time,

the consideration of the mortgage is not only the money actually taken, but also the money left in the hands of the mortgagee and 'to be advanced' when occasion requires—*Hari Ram v. Sheo Dayal*, 11 All. 136.

If the consideration for a mortgage is a mere promise to pay a particular debt, the mortgagee may claim repayment of the full amount of the debt. But where the liability is in respect of amounts advanced by the mortgagee for the discharge of a particular debt, he is entitled only to what he has actually paid to discharge the debt—*Sundaram v. Mannadiar*, A.I.R. 1947 Mad. 197, I.L.R. 1947 Mad. 411.

Future debt :—A mortgage-deed provided : "The mortgagee shall enjoy the profits of the mortgaged land in lieu of interest. I, the executant, shall continue to pay to the mortgagee every year the deficiency in the amount of interest ; and in case of default of payment of the same in any year the mortgagee shall in that year have power to recover it from a nine-anna Zemindary share, and other moveable and immoveable property." *Held* that the document created a valid mortgage of the nine-anna Zemindary share for securing the payment of deficiency of interest that might arise in future—*Bhola Das v. Bish Nath*, 10 A.L.J. 162, 16 I.C. 982.

A bond addressed to the Registrar of the High Court was as follows. "We the appellants to England put a portion of our Zemindary as per schedule in security for the Rs. 4,000, being the amount of costs of the respondents to England, stipulating that till passing of an order by the Privy Council we shall not sell, mortgage or create encumbrance of any other kind." *Held* that the bond amounted to a mortgage, because its effect was to transfer to the Registrar an interest in specific immoveable property to secure a future debt which might become due from the appellants to the respondents—*Tokhan v. Girwar*, 32 Cal. 494 (496); *Girindra v. Bejoy Gopal*, 26 Cal. 246 (249); *Nagaruru v. Tangatur*, 31 Mad. 330 (332). But see *Janki Kuar v. Sarup*, 17 All. 99 (102).

Contingent liability :—The hypothecation of property for the purpose of securing a future liability to pay the mortgage-money in case the mortgagee should be deprived of possession of the mortgaged property, amounts to a mortgage, because a mortgage can be created for the discharge of contingent liability—*Nand Lal v. Dharamdeo*, A.I.R. 1925 Pat. 288, 78 I.C. 457. Ghose's Law of Mortgage, 5th Edn., p. 198.

Engagement giving rise to a pecuniary liability :—The word "engagement" is not defined either in this or the Contract Act, but it clearly means a contract as defined in sec. 2 of the latter Act. Thus, where the object of the mortgage was to secure the delivery by the mortgagors of a certain quantity of indigo on a certain day, and the parties had assessed the amount of the pecuniary liability which might arise in anticipation of a breach, the mortgage was held to be valid, being for the purpose of securing the "performance of an engagement" as provided by the definition. See Macnaghten's Mortgage, 7th Ed., p. 654. See also *Bhola Das v. Bish Nath*, 10 A.L.J. 162, 16 I.C. 982, cited above, which was a case of mortgage for securing the performance of an engagement, *viz.*, the payment of deficiency of interest.

The term "pecuniary liability" means a legal obligation to pay damages whether liquidated or not—*Naib Ram v. Shib Dut*, 5 All. 238. A vendor executed a document of indemnity agreeing that if any prior lien or charge should be disclosed on the property, he would repay the whole money with interest, and he hypothecated certain property to secure repayment of the money; *held* that there was clearly an engagement which gave rise to a pecuniary liability and that the terms amounted to a mortgage—*Niaz Ahmad v. Mangu Lal*, 5 A.L.J. 723; *Narayana-samy v. Ramasamy*, 12 L.W. 674, 60 I.C. 611. The defendant borrowed paddy from the plaintiff and executed a bond agreeing to repay the paddy with interest thereon (payable in paddy), and as security for the realisation of the paddy, hypothecated certain immoveable property. The bond provided that in default of payment of the paddy the plaintiff would be entitled to realise the claim with interest thereon by sale of the property hypothecated. *Held* that the transaction was a mortgage. The essence of the matter was that the land was made security for the value of the paddy, because upon failure to deliver the paddy the mortgagee became entitled to recover the price thereof by sale of the land. So, the parties entered into an engagement which, if not performed by the delivery of the paddy, would give rise to a *pecuniary liability*—*Ramchand v. Iswar Chandra*, 48 Cal. 625 (632) (F.B.), 25 C.W.N. 57, 61 I.C. 539.

330. Part-payment of consideration :—A mortgage does not cease to be enforceable merely because only a *part* of the consideration has been paid and the balance remains unpaid. The mortgagee is entitled to a lien on the mortgaged property to the extent of the amount actually advanced—*Venkatapathi v. Venkata*, 47 I.C. 563 (Mad.); *Navunni v. Ramaswami*, 52 I.C. 738, 10 L.W. 169; *-Zemindar of Karvetnagar v. Subbaraya*, 1918 M.W.N. 146, 43 I.C. 871; *Makhan Lal v. Hanuman-baksh*, 2 P.L.J. 168, 38 I.C. 877; *Bajrangi Sahai v. Udit Narain*, 10 C.W.N. 932; *Rajani Kumar v. Gour*, 35 Cal. 1051 (1057); *Rashik Lal v. Ram Narain*, 34 All. 273; *Rajai Tirumal v. Pandla Muthial Naidu*, 35 Mad. 114, 9 I.C. 289; *Motichand v. Sagun*, 29 Bom. 46; *Bhagabati v. Narayan*, 31 Bom. 552. See also *Hukmichand v. Pioneer Mills Ltd.*, 2 Luck. 299, A.I.R. 1927 Oudh 55 (58), 99 I.C. 483; *Fazal v. Milkha*, A.I.R. 1933 Lah. 193, 145 I.C. 182; *State of Kerala v. Cochin Chemical Refiners Ltd.* A.I.R. 1968 S.C. 1361. Thus, where a part only of the money mentioned in the mortgage-deed has been advanced, and there is no suggestion that the mortgagor has cancelled the contract or that he had power to do so, the mortgage is perfectly valid to the extent of the money actually advanced, and the mortgagee is entitled to a decree—*Bajrangi Sahai v. Udit Narain*, *supra*. Where part of the consideration is void or fails or the mortgagee makes default in paying it, the right principle seems to be that the mortgage is good to the extent of the consideration that has validity passed—*Rajai Tirumal v. Pandla Muthial*, 35 Mad. 114 (118), dissenting from *Subba Rau v. Deva Shetti*, 18 Mad. 126. "If the mortgagee advances only a part of the sum contemplated in the mortgage, it is a valid security for so much as he does advance and for so much only. For the advance actually made, the mortgage is good against the mortgagor's assignee in bankruptcy"—Jones on Mortgages, Vol. I, Sec. 387. Where the execution and registration of a bond have created in favour of the mortgagee a transfer of an interest in the mort-

gaged property, the mere non-payment of a portion of the consideration does not render the bond inoperative and invalid, *unless there was an intention* on the part of the parties that the terms of the bond would not be given effect to until the entire consideration money was paid. This intention is to be proved in each case—*Makhan Lal v. Hanumanbakhsh*, 2 P.L.J. 168 (174, 175), 38 I.C. 877. The validity of a mortgage does not depend upon passing of consideration at its creation. Where the debtors executed a mortgage to secure the interest of the Bank with regard to the demand loan account of the debtors, the mortgage does not become invalid because the consideration shown therein was not credited by the Bank on the date of execution towards the amount due from the debtors—*Thomcos Bank v. Mathew*, A.I.R. 1956 Trav.-Co. 234.

Remedy of mortgagor :—Where the mortgagee paid only a portion of the consideration of the mortgage, a suit by the mortgagor to compel the mortgagee to pay the balance of the consideration is not maintainable; but it is open to the mortgagor to sue the mortgagee for damages for breach of the agreement to lend money or he may redeem the mortgagee on payment of the amount actually received—*Anakaran v. Saidamadath*, 2 Mad. 79; *Yadavendra v. Srinivasa*, 47 Mad. 698 (699), A.I.R. 1925 Mad. 62, 80 I.C. 5; *Sheikh Galim v. Sadarjan*, 43 Cal. 59 (61, 63). But in the case of a possessory mortgage where the mortgage has been completed and possession given but the full amount of the consideration has not been paid, a suit by the mortgagor for the balance of the amount due has been held to be maintainable as a suit for compensation and the measure of the compensation is the difference between the amount stipulated to be paid and the amount actually paid. Such a suit is not for the specific performance of the contract—*Thakur Das v. Amar Chand*, A.I.R. 1938 Lah. 21.

331. Mortgage-money—Interest :—A mortgagee, in the absence of any contract to the contrary, is entitled to treat the interest due under a mortgage as a charge upon the mortgaged property; and the mortgagor, at the time of redemption, is bound to pay the interest also, and not the principal debt alone—*Ganga Ram v. Natha Singh*, 5 Lah. 425 (427, 428), (P.C.), A.I.R. 1924 P.C. 183, 80 I.C. 820, 29 C.W.N. 558; *Badhawa v. Akbar Ali*, 9 Lah. L.J. 428, 103 I.C. 752, A.I.R. 1927 Lah. 817 (819); *Ram Kishore v. Ram Nandan*, 25 A.L.J. 1086, A.I.R. 1928 All. 99 (101), 108 I.C. 149; *Abbas v. Ramdas*, 9 Lah. 140, A.I.R. 1928 Lah. 342 (343), 112 I.C. 153; *Ram Ratan v. Aditya*, 3 Luck. 459, 112 I.C. 481, A.I.R. 1928 Oudh 273 (275); *Sir Md. Ejaz Rasul v. Sayid Ali*, A.I.R. 1941 Oudh 498 (501), 1941 O.W.N. 768, 194 I.C. 615; *Suraj Mal v. Chander Bhan*, A.I.R. 1939 Lah. 129, 41 P.L.R. 80. Even though the mortgagors make themselves personally liable for the payment of the interest, such personal liability is not incompatible with the fact that the interest forms also a charge on the property—*Manghi v. Dial Chand*, 27 P.L.R. 643, A.I.R. 1924 Lah. 624, 96 I.C. 477. In spite of personal liability undertaken by the mortgagor to pay deficiency in profits, the mortgagee in possession is entitled to recover the interest from the mortgaged property—*Sir Md. Ejaz Rasul v. Saiyid Ali*, *supra*. So also, the mere fact that there is an express reference to interest in the personal covenant, and no express reference to interest in the hypothecation clause,

does not show that interest is not charged on the property—*Rang Raj v. Sheonarain*, 9 P.L.T. 785, A.I.R. 1928 Pat. 398 (399), 110 I.C. 594.

The mortgaged property is liable to be sold not only for the principal sum secured but also for the interest—*Jainandan v. Baij Nath*, 2 P.L.T. 229, 63 I.C. 297 (301). But this section does not enable a mortgagee to make a claim to interest which is not given to him by the mortgage-bond. Thus, a property was mortgaged with possession to the plaintiff; under the terms of the mortgage the profits were to be enjoyed in lieu of interest and if after the stipulated period the principal amount was not paid, it was to be recovered without interest by sale of the mortgaged property. *Held* that under the terms of the bond the property was a security only for the amount borrowed and not for interest, that the interest was payable only out of the profits, and the plaintiff was entitled to recover only the principal amount by sale of the mortgaged property—*Manik Chand v. Rangappa*, 45 Bom 523 (526, 527), 22 Bom. L.R. 1435, 59 I.C. 765. See also *Nammalwar v. Krishnaswami*, 16 L.W. 743, A.I.R. 1923 Mad. 71, 72 I.C. 987.

A mortgagee is under no duty to recover his mortgage-money as soon as possible and if he does not do so he does not lose his right to get interest—*Bhag Chand v. Sujan Singh*, A.I.R. 1938 Pesh 73 (75).

Post diem interest :—Unless the terms of a mortgage document show that it was the intention of the parties that no interest should be paid subsequent to the date when the mortgage falls due, *post diem* interest is payable till the date when the money is actually realised by the mortgagee. Even though the mortgage is an English mortgage and confers a power of private sale on the mortgagee in default of payment of principal on the due date still the mortgagee will be entitled to *post diem* interest, and he is not bound to exercise the power of sale under penalty of losing his right to subsequent interest—*Agnes Campbell v. Audikesavalu*, 20 L.W. 153, 82 I.C. 399, A.I.R. 1924 Mad. 736 (740). When the deed is silent as to the payment of *post diem* interest, the presumption is that the mortgagor will continue to pay interest at the stipulated rate calculated up to the time of tender or payment or the institution of a suit by the mortgagee—*Mahadeo v. Dhiraj*, 44 All. 772 (774), following *Mathura Das v. Raja Narindra*, 19 All. 39 (P.C.); *Bundesri v. Ganga Saran*, 20 All. 171 (P.C.); *Sarala v. Jogendra*, 25 Cal. 246; *Amar Singh v. Baij Nath*, A.I.R. 1926 Oudh 378, 93 I.C. 958. The Lahore High Court also holds that if the mortgagor fails to make payment of the mortgage-debt within the stipulated time, and the deed contains no express provision for the payment of interest after the due date, the mortgagee is entitled to damages for non-payment of the debt in due time, and the measure of damages would usually be the same as the *rate of interest* stipulated for by the parties—*Budhu v. Niamat*, 4 Lah. 406, 75 I.C. 375, A.I.R. 1923 Lah. 632 (633); *Motan Lal v. Muhammad Bakhsh*, 3 Lah. 200 (F.B.), 66 I.C. 771, A.I.R. 1922 Lah. 254; *Abbas v. Ramdas*, 9 Lah. 140, A.I.R. 1928 Lah. 342 (344), 112 I.C. 153.

Other Cases :—Where the mortgagees are to enjoy the profits of the property in lieu of interest, presumably the interest contemplated by the parties is the prevailing rate of interest—*Thakur Singh v. Jagat Singh*, A.I.R. 1933 Lah. 1, 140 I.C. 495.

Where a mortgage-bond contains independent personal covenant to pay interest at some regular intervals, besides providing for principal with interest on demand, the mortgagee can sue for interest every time there is a breach of the covenant—*Ma Shive v. Maung Ba*, A.I.R. 1938 Rang. 113.

A mortgagee is entitled to the rate of interest stipulated for in the mortgage-deed, and unless there are good grounds for depriving him of that right, the rate agreed upon cannot be disallowed—*Waman v. Janardan*, A.I.R. 1938 Bom. 357, 40 Bom. L.R. 545; *Jagmohan v. Jugal Kishore*, 36 C.W.N. 4 (P.C.). As regards a stipulation for higher rate of interest in default the rule in England has been stated thus: "It is well-settled, if not an intelligible rule, that if the mortgagee wishes to stipulate for a higher rate of interest in default of punctual payment, he must reserve the higher rate as the interest payable under the mortgage and provide for its reduction in case of punctual payment, and he cannot effect this object by reserving the lower rate and making the higher the penalty for non-payment at the appointed time, because it is said an agreement of the latter kind being *nomini pænae* is relievable in equity"—*Fisher & Lightwood's Law of Mortgage*, 7th Edn. (1931), p. 745.

By an arrangement between the parties the consideration for a mortgage was left with the mortgagee for payment of certain debts of the mortgagor. The mortgagee paid the debts some time after: held that in settling the account between the mortgagor and mortgagee interest should be calculated on the debts paid only from their dates of payment by the mortgagee—*Sm. Nathuni v. Dharanidhar*, A.I.R. 1937 Pat. 156 (158), 15 Pat. 742, 165 I.C. 310.

331A. Restriction on rate of interest:—Hindu Law—Under the Hindu law a debtor is not liable to pay at one time interest which exceeds the principal and the excess ceases to be recoverable—*Govind v. Malkarjunappa*, A.I.R. 1928 Nag. 133, 107 I.C. 205. This rule of *damdupat* is in force in the Presidency of Bombay (including Sind) [*Dhondhu v. Narayan*, 1 Bom. H.C.R. 47; *Gopal v. Gangaram*, 20 Bom. 721; *Ali v. Shabji*, 21 Bom. 85; *Dauood v. Vullubhdas*, 18 Bom. 227; *Har Lal v. Nagar*, 21 Bom. 38; *Dagdusa v. Ram Chandra*, 20 Bom. 611; *Nusserwanji v. Laxman*, 30 Bom. 452], in Berar [*Jairam v. Debidayal*, 46 I.C. 789; *Ram Chandra v. Radha*, 10 N.L.R. 96] and the area subject to the ordinary original jurisdiction of the Calcutta High Court [*Nabin v. Ramesh*, 14 Cal. 781], but it is not applicable outside such jurisdiction [*Het Narain v. Ram Deni*, 12 C.L.R. 590] or in the Madras Presidency [*Annaji v. Raghubai*, 6 Mad. H.C.R. 400; *Subramania v. Subramania*, 18 M.L.J. 245]. The rule is applicable in the above-mentioned areas only in cases where the debtor is a Hindu—see *Dauood v. Vullubhdas*, supra; *Hari Lal v. Nagar*, supra; *Jeewanbai v. Manordas*, 35 Bom. 199; *Ali v. Shabji*, supra; *Abdul v. Sheikh Nizam*, 102 I.C. 41; *Narayan v. Syed Hafiz*, A.I.R. 1925 Nag. 21 (25), 87 I.C. 264.

The rule of *damdupat* is applicable to mortgages—*Kunja Lal v. Narsamba*, 42 Cal. 826; *Jeewanbai v. Manordas*, supra; *Asanand v. Tulsan*, 15 I.C. 824. The Madras High Court has, however, held that the rule does not apply to mortgages executed after the Transfer of Property Act

came into force—*Madhwa v. Venkata*, 26 Mad. 662. But it is submitted that there is nothing in this Act which can be construed as abrogating the rule of *damdupat*.

Statute Law :—Under the Usurious Loans Act, X of 1918 (as amended by Act XXVIII of 1926), secs. 2 and 3, where in a suit for enforcement or redemption of any security, whether heard *ex parte* or otherwise, the Court has reason to believe that the interest is excessive, the Court may re-open the transaction, take an account and relieve the debtor of all liability in respect of any excessive interest and if anything has been paid or allowed in account in respect of such liability, order the creditor to repay any sum which it considers to be repayable in respect thereof. The Act does not definitely say what rate of interest is "excessive", but in a general way indicates what may be regarded as excessive—sec. 3 (2) of the above Act. Where in a mortgage-bond the rate of interest stipulated was 24 per cent *per annum* and the mortgagee allowed the interest to accumulate obviously with the intention of absorbing the entire property, it was held that the interest was very high and it was reduced to 6 per cent.—*Ram Ajodhya v. Feringi Tewari*, A.I.R. 1936 Pat. 3, 160 I.C. 681; see also *Jessore Loan Co. v. Shailaja Nath*, 59 Cal. 722. But where interest on a mortgage was payable at 12 per cent. *per annum*, merely because compound interest was payable on default to pay interest regularly, the rate of interest was not held to be excessive—*Abdul v. Sheo Dayal*, A.I.R. 1934 All. 152, 55 All. 496, 151 I.C. 900.

A mortgage-deed provided that the sum of Rs. 2,000, which was borrowed thereunder, should be repaid in eight annual instalments of Rs. 250 each, such instalments to count both towards principal as well as interest on the entire sum. It was further provided that "in default of payment of sums due in any instalment the sum remaining unpaid on that date shall be added to the principal and the entire amount become payable at once irrespective of future instalments, the entire sum carrying interest at 1 per cent. *per mensem* compound with yearly rests. *Held*, that the stipulation for payment of compound interest at the rate of 12 per cent. *per annum* was in the nature of penalty and was not binding on the mortgagor—*Ramamurti v. Subbarao*, A.I.R. 1939 Mad. 481, (1939) 1 M.L.J. 491, 1939 M.W.N. 323. Where the security was good and there was no reason why the suit should have been delayed for 13 years, the High Court reduced the rate of interest from 1 per cent. compound to 1 per cent, simple *per mensem*—*Sitaram v. Krishnarao*, A.I.R. 1940 Nag. 156, 1940 N.L.J. 179, 190 I.C. 641.

The Provincial Legislatures have, however, in many Provinces definitely provided what rates of interest are to be regarded as excessive. Thus, the Bengal Money Lenders Act, VII of 1933, has enacted that where in any suit in respect of any money lent after the commencement of the Usurious Loans Act, 1918, it is found that the interest charged exceeds the rate of 15 per cent. *per annum* in the case of a secured loan or 25 per cent. *per annum* in the case of an unsecured loan or that there is a stipulation or rests at intervals of less than 6 months, the Court shall presume for the purposes of section 3 of the Usurious Loans Act, 1918, that the interest charged is excessive. In secs. 4 and 6 of the said Bengal Act the rule of *damdupat* has been adopted, "notwithstanding any-

thing in any other act". Section 5 of the same Act enacts that interest exceeding 10 per cent. *per annum* shall not be recoverable in respect of any loan made, after the commencement of the Act, under a contract which provides for the payment of compound interest. The rate of interest has further been scaled down by sec. 30 of the Bengal Money-lenders Act, 1940.

For more or less similar provisions and other similar Acts recently passed by other Provincial Legislatures see the Central Provinces Act, XI of 1934, Assam Money Lenders Act, IV of 1934.

332. When mortgage takes effect :—In the absence of a contract or stipulation to the contrary, a mortgage is complete and a 'transfer of interest' is effected, not when the consideration for it is paid or made good, but when the mortgage-contract is entered into regardless of whether and when consideration is paid or made good. The covenant or stipulation to the contrary may be express or implied, the question in such cases being—When did the parties intend that the transfer should take effect? The presumption would be in favour of immediate transfer, but this presumption could be rebutted by proof of an express stipulation to the contrary or by proof of facts and circumstances from which a contrary intention might reasonably be inferred—*Allah Ditta v. Nazar Din*, 53 P.R. 1916 (F.B.). Delivery of possession is also not essential unless it is specifically agreed that the mortgage bond will not be effective if the deed is not delivered—*Ram Rup v. Jang Bahadur*, A.I.R. 1951 Pat. 566, 30 Pat. 391. A mortgage is perfected by registration, and unless the bond provides to the contrary it takes effect from the date of registration and not from the date when the consideration money is subsequently paid. The words "future debt" show that a mortgage will become effective even though the consideration has not yet been paid. Therefore, where after the registration of a mortgage the mortgagor sold the property to a third person by a registered deed, and subsequently the mortgagee paid the consideration money for the mortgage to the mortgagor, *held* that mortgagee's right prevailed over that of the vendee—*Raghunath v. Amir Baksh*, 1 Pat. 281, 3 P.L.T. 307, 65 I.C. 329, A.I.R. 1922 Pat. 299. The language of sec. 58 is clear, and unless the parties contemplated the bringing into existence of the mortgage on a future date, the rule is that the mortgage takes effect on the date of execution of the mortgage, even though it is made to secure a future debt. And a second mortgagee cannot obtain priority on the ground that at the time when the first mortgage was created there was no debt owing from the mortgagor to the first mortgagee—*Narayanasamy v. Ramasamy*, 12 L.W. 674, 60 I.C. 611 (613).

A mortgage by the administrator on the grant of probate does not become invalid merely on account of subsequent revocation of the probate by the Court—*Neogi v. Neogi*, A.I.R. 1938 Rang. 43, 174 I.C. 186. Twelve years possession on the basis of an unregistered mortgage deed does not give rise to a mortgage by prescription and hence a suit for redemption must be dismissed—*Hansia v. Bakhtawarmal*, A.I.R. 1958 Raj. 102.

Transfer :—Where a mortgage is transferred without the privity of the mortgagor, the transferee takes subject to the state of account between the mortgagor and mortgagee at the date of the transfer, but

not subject to any independent debt in no way connected with the mortgage—*Subramania v. Subramania*, 40 Mad. 683.

Renewal :—The existence of a mortgage for a certain fixed period does not prevent the parties from renewing the mortgage and cancelling the old one before the expiry of its term—*Kizhakkepati v. Chekunni*, A.I.R. 1937 Mad. 520, 170 I.C. 242.

SIMPLE MORTGAGE::—*Vernacular names* :—In Bengal a simple mortgage is called *Bandhaki Khat* or *Rehan*; in U.P. it is known as *Rehan*, *Arh* or *Mushtaghraq* with grammatical variations. In Bombay, it is called *drista Bandhaka*, *nazar gahana* or *taran gahan*. In Madras, it is designated as *drista bandhaka* or *Idu adamanam*. In the Ganjam district, it is known by the name of *Tanaka*.

333. Incidents of simple mortgage :—The characteristics of a simple mortgage are : (1) that there must be a loan ; (2) that the mortgagor must have bound himself personally to repay the loan ; (3) that to secure the loan he has transferred to the mortgagee the right to have specific immoveable property sold in the event of his having failed to repay ; and (4) that possession of the property has not been and is not to be transferred to the mortgagee during the pendency of the mortgage—*Om Prakash v. Mukhtar Ahmad*, A.I.R. 1940 Lah. 486, 42 P.L.R. 660 ; *Dalip Singh v. Bahadur*, 34 All. 446 ; see also *Haji Khan v. Choithu Ram*, A.I.R. 1939 Pesh. 41, 184 I.C. 585. These stipulations may be express or appear by necessary implication from the terms of the particular transaction. Thus a promise to pay necessarily arises out of the acceptance of the loan. It is implicit in the transaction itself that the obligor is under a personal liability to repay, unless this liability is excluded by the terms of the contract, expressly or impliedly, as for example, in the case of a usufructuary mortgage or a mortgage by conditional sale, where the agreement is to repay out of a particular property or fund alone and in a particular manner—*Om Prakash v. Mukhtar Ahmad*, supra ; see also *Ram Narain v. Adhindra*, 44 I.A. 87, 44 Cal. 388 (P.C.). The mortgagee, in the case of a simple mortgage, has, in the event of default being made in the payment of the debt, two causes of action, the one arising out of the breach of the personal obligation, and the other arising out of the contract of hypothecation. He may put both these causes of action in suit at once or he may pursue the one remedy at one time and the other at another. If he sues on the personal undertaking only, he obtains what is known as a money-decree ; if he sues on the contract of hypothecation, he obtains an order for the sale of the property—*Wahid-un-nissa v. Gobardhan*, 22 All. 453. Both remedies may be pursued at the same time, although of course the claimant cannot recover more than the amount due on the obligation—*Muni Reddi v. Venkata*, 3 M.H.C.R. 241. His failure to seek one or other of the two remedies in the same suit does not in any case bar his right to enforce the remaining remedy by a separate suit, since the causes of action in the two cases are different—*Piari v. Khiali Ram*, 3 All. 857.

Notwithstanding the pledge, the mortgagor remains the owner of the property, and may deal with it in any manner he pleases, not inconsistent with the condition of the mortgage. Subject to the charge created by the mortgage, he may alienate his property in part or wholly—*Wahid-*

un-nissa v. Gobardhan, 22 All. 453. In the absence of express provision to the contrary, the rents and profits from the property forming the subject-matter of a simple mortgage belong to the mortgagor, and do not form part of the security for repayment of the mortgage-money or the interest of the loan—*Ma Hnim v. Chettyar Firm*, A.I.R. 1939 Rang. 321 (F.B.), (1939) R.L.R. 403, 183 I.C. 728 (F.B.).

A simple mortgage is a contract creating a personal obligation to repay the loan. It also operates as a conveyance of an interest in the property mortgaged. It is "a right *in rem* realizable by sale given to a creditor by way of accessory security to a right *in personam*." Interest which passes to the mortgagee is not the ownership of the property which notwithstanding the mortgage remains in the mortgagor together with the right of redemption. Until the property is actually sold and the sale becomes absolute, ownership in the property continues in the mortgagor—*Dhapubai v. Chandra Nath*, A.I.R. 1938 Cal. 524, 42 C.W.N. 721. It is not necessary for a simple mortgage that there should be an express provision giving the mortgagee a power of sale. A personal covenant carries with it by necessary implication a power of sale. The fact that the mortgage-deed authorized the mortgagee in case of default to enter into possession of the mortgaged property cannot take away the power of sale implied in the personal covenant, more particularly when it is found that the mortgagor failed to put the mortgagee in possession—*Ram Lochan v. Bachhu*, A.I.R. 1934 Oudh 255 (256), 148 I.C. 1197. The recitals in a mortgage-deed are important in considering the nature and scope of the implied authority which arises as between the mortgagor and the mortgagee, when the mortgagor is allowed to remain in apparent possession and ownership of the mortgaged property—*Anand v. Dhanpat*, 38 I.C. 37 (38), 1 Pat. L.J. 563.

A condition in a mortgage-deed that if the mortgagor sold a part of the mortgaged property, twelve annas per rupee shall be paid to the mortgagee to be credited towards the mortgage-money, does not destroy the mortgagee's lien on the mortgaged property and in case of sale, the mortgagee can follow the mortgaged property, if he is not paid the three-fourths of the said money—*Alliance Bank of Simla v. Khan Singh*, 25 I.C. 856.

But where a deed speaks of repayment of the loan and promises not to transfer the property till such repayment, but does not give the right to have the property sold to the mortgagee, it is not a simple mortgage—*Mohan Lal v. Indomati*, 39 All. 244 (F.B.).

Where the mortgage deed provided (1) payment of mortgage money by instalment, and (2) that in default it would be realised by sale of the mortgaged property: *held* that the first clause was an express covenant to pay personally and the second clause gave the mortgagee impliedly, if not expressly, the power to bring the mortgaged property to sale. Consequently it was a simple mortgage—*Ramgopal v. Ramchandra*, A.I.R. 1949 Nag. 354, I.L.R. 1949 Nag. 284.

Where in a simple mortgage for Rs. 8,000, Rs. 360 was deducted towards first year's interest in advance, it was *held* that there was no reduction in principal—*Haji Abdulla v. Dand Mahomed*, A.I.R. 1953 Sau. 84.

334. Covenant to pay :—A covenant to pay is an *essential element* of a simple mortgage, and in this respect it differs from a charge. If there is a covenant to pay, it is not necessary that there should be an express transfer of an interest or an express power to bring the property to sale—*Ramabrahman v. Venkatanarasu*, 23 M.L.J. 131, 16 I.C. 209 (210); *Balasubrahmaniam v. Sivaguru*, 21 M.L.J. 562 (568), 11 I.C. 629 (632).

335. No delivery of possession :—The outstanding characteristic of a simple mortgage is that possession is not delivered to the mortgagee, but remains with the mortgagor. If possession subsequently passes to the mortgagee, that possession cannot be explained or accounted for by the instrument of simple mortgage—*Maung Ok v. Ma Pu*, 4 Rang. 368 (F.B.), A.I.R. 1927 Rang. 33 (34), 99 I.C. 519. Where possession is not delivered to the mortgagee, but there is merely a stipulation in the deed that if the mortgagor fails to pay interest in any year, he will deliver the property to the possession of the mortgagee, it does not convert the simple mortgage into a usufructuary mortgage—*Yashvant v. Vithal*, 21 Bom. 267 (272); *Lingam Krishna v. Sri Mirza*, 15 C.W.N. 441 (443) (P.C.), 21 M.L.J. 1147, 10 I.C. 72; *Rajah Sethrucheria v. Maharaja of Jaypore*, 1916 M.W.N. 334, 35 I.C. 411 (412); *Ramayya v. Venkatarama*, 13 M.L.J. 2; *Sochet Singh v. Hadayatullah*, 13 Lah. 508, A.I.R. 1932 Lah. 630 (632); *Chhinga Ram v. Nihal Singh*, A.I.R. 1963 Raj 100. In *Lalta Prasad v. Hari Lal*, 16 O.C. 90, 19 I.C. 748, this kind of mortgage was treated as a combination of a simple and usufructuary mortgage, in this sense that it was convertible from a simple mortgage-bond into a usufructuary mortgage on the happening of a certain event, and until that contingency happened all conditions of a simple mortgage appertained to it. It seems that this sort of mortgage would now fall under the new definition of anomalous mortgage given in clause (g) of this section.

336. Right to have the mortgaged property sold :—The most essential of the elements which constitute a simple mortgage is the *right to cause the property to be sold*—a right without which the transaction, whatever else it may be, certainly cannot be called hypothecation, pledge, or simple mortgage. This right does not come into existence when the actual sale takes place by virtue thereof, but it comes into existence at the time when the mortgage is made; it subsists in the property ever afterwards so long as the mortgage-money remains unpaid: it limits the interests of the mortgagor as they were at the time of the mortgage—*Gopal v. Parshotam*, 5 All. 121 (138). If an instrument is expressly stated to be a mortgage, and gives the power of realisation of the mortgage-money by sale of the mortgaged premises, it should be held to be a mortgage. If, on the other hand, the instrument is not on the face of it a mortgage, but simply creates a lien or directs the realisation of money from a particular property *without reference to sale*, it creates a *charge*—*Govinda v. Dwarka*, 35 Cal. 837 (844), 12 C.W.N. 849.

The right of sale is an essential incident in a simple mortgage and inheres as well in puisne and mesne as in prior mortgagees. The puisne or mesne mortgagee is not bound by the terms of the prior mortgage or mortgages, but is entitled to bring the mortgaged property to sale subject to such prior mortgage or mortgages—*Matadin v. Kazim*, 13 All. 432 (F.B.).

The words "cause the mortgaged property to be sold" imply that the mortgagee has no power to sell the property without the intervention of the Court—*Kishan Lal v. Ganga Ram*, 13 All. 28. A simple mortgage does not directly confer on the mortgagee the power of private sale; in order to make his security available, he must obtain an order of a Civil Court for sale—*Wahid-un-nissa v. Gobardhan*, 22 All. 453. See also *Ma Hnim v. Chettyar Firm*, A.I.R. 1939 Rang. 321 (F.B.) (1939) R.L.R. 403, 183 I.C. 728.

The right to cause the mortgaged property to be sold may be conferred by implication, not necessarily by express words—*Ponnuranga v. Thandavarada*, 1915 M.W.N. 21, 26 I.C. 274; *Venkatarama v. Suppa Nandan*, 27 M.L.J. 58, 24 I.C. 24. Words of hypothecation and simple mortgage have always been understood to import the right of the mortgagee to bring the property to sale for satisfaction of his claim, and no express words conferring such right are insisted upon as necessary to create such right—*Kishan Lal v. Ganga Ram*, 13 All. 28; *Balasubramania v. Sivaguru*, 21 M.L.J. 562, 11 I.C. 629 (632); *Yeshvant v. Vithal*, 21 Bom. 267 (271). Such words, for instance, as *rehan* (mortgage) *arh* and *mushtaghaq* have been held to be themselves sufficient to convey the right—*Gouhar v. Ajudhia*, 20 I.C. 870 (Oudh); *Kishan Lal v. Ganga Ram*, 13 All. 28; *Dalip Singh v. Bahadur Ram*, 34 All. 446. Security mortgages such as *nazar gahan* or *taran gahan* mortgages are mortgages proper, even though the right to bring the property to sale is not expressly given to the mortgagee, the power of compulsory sale to realise the debt in such a transaction is itself a right or interest in immoveable property transferred to the creditor—*Datto Dudheswar v. Vithu*, 20 Bom. 408 (F.B.).

Where the mortgagor stipulated that if he failed to pay the interest in any year or any instalment of principal the mortgagee would be entitled to take possession of the property, held that the mortgagee had the right either to bring the property to sale or to sue for possession; his remedy was not limited to a suit for possession—*Lingam Krishna v. Sri Mirza*, 15 C.W.N. 441 (442, 443) (P.C.), 13 Bom. L.R. 447, 8 A.L.J. 594, 10 I.C. 72, 21 M.L.J. 1147; *Rajah Sethrucharla v. Maharaj of Jaypore*, 1916 M.W.N. 354, 34 I.C. 411 (412); *Lalta Prosad v. Hari Lal*, 16 O.C. 90, 19 I.C. 748. Whether his primary remedy is a suit for possession or a suit for sale depends upon the construction of the deed; see *Deputy Commissioner v. Rampal*, 11 Cal. 237 (243, 244) (P.C.). Where a lessee creates a simple mortgage in respect of his leasehold interest undertaking personal liability to pay but under a separate deed the mortgagee is given possession of the mortgaged property, the mortgage is not converted into a usufructuary mortgage, and the remedy of the mortgagee is to enforce his mortgage and not to resist the decree for ejectment obtained by the lessor against the lessee—*Kshiroda Sundari v. Bhupendra Mohan*, A.I.R. 1961 Assam 70.

MORTGAGE BY CONDITIONAL SALE :—*Vernacular names :—*In Bengal, *Katkobala*; in Orissa, *Katbandhaka*; in U.P. and C.P. *bye-bil-wafa*; in Madras, *Muddata Kriyam* or *Drishtabandhaka*; in Bombay, *Gahan Lahan*; in Malabar, *Pornathan*.

Regulations :—This form of mortgage was introduced by the Mahomedans whose religion did not allow the taking of interest on a loan. By resorting to this form of mortgage the lender got his principal and interest in the shape of an enhanced price of repayment, and at the same time his money as well as his conscience was safe. This form of mortgage, commonly known as *bye-bil-wafa*, was given a legal recognition in the Bengal Regulation I of 1798, which provided that in case of the lender refusing to receive the money on the day named the borrower was empowered to deposit the amount due on or before the stipulated date in the Court. But the borrower had to labour under this hardship, that if he failed to pay the money on the stipulated date, either to the lender or in Court, the property automatically passed to the mortgagee without any further action on his part or the intervention of the Court. The mortgagor had then no right of redemption and the transaction once closed could not be reopened. This hardship was removed by the Bengal Regulation XVII of 1806 under which the mortgagee had to make an application for foreclosure and to give notice to the mortgagor, and had to obtain an order of the District Judge foreclosing the mortgage, before he could obtain an absolute title to the property; if the property was not in his possession he had to bring a suit for possession. On the other hand, the Regulation gave the mortgagor a right of redemption within one year from the time of the service of the above notice in the foreclosure proceedings instituted by the mortgagee.

These rules of procedure are no longer of any importance, since the present Act will now govern the procedure, even though the mortgage might have been created before the passing of this Act. See Note 11 under section 2.

337. Previous Law—Transaction contained in two documents :—

According to the definition given in this section, a mortgage by conditional sale is an ostensible sale on condition that upon repayment of the money being made on a certain date the buyer shall transfer the property to the seller. The question then arises whether the condition in the sale-deed is expressed with sufficient clearness so as to convert the sale into a mortgage or whether it merely gives the vendor a right to repurchase. In England, where the drafting of documents is in the hands of trained and skilled men, it is easy to find out the true nature of the transaction; but in this country where documents are drawn up by patwaris and petition-writers in stereo-typed phraseology, the solution of the question becomes a matter of extreme difficulty. The line of division between a mortgage by conditional sale and a sale with provision for repurchase is a very fine one, and, as Dr. Ghose observes in his *Law of Mortgage* (5th Edn., p. 88), to a layman it seems to be a distinction without a difference.

Prior to the addition of the proviso to clause (c) of this section, a mortgage by conditional sale was usually made by *two documents*, one being a sale-deed, and the other containing the condition of reconveyance; and the question frequently arose whether the second document operated to convert the sale into a mortgage so as to give the vendor the right of redemption such as a mortgagor enjoys, or it simply stipulated that the vendor would have a right of repurchase.

The following tests were applied for the determination of the question:—

(1) One important test was to consider whether the sale was *subject* to the agreement for reconveyance or *was independent* of it; that is, whether the two documents were part and parcel of the *same transaction* or were mutually *independent*. If the two were separate transactions altogether, the sale could not possibly be said to have been subject to any condition of repurchase—*Mathura v. Jagdeo*, 49 All. 405, A.I.R. 1927 All. 321 (326), 104 I.C. 504. Where two documents, one for sale and another for agreement of reconveyance, were executed on the same date, and the sale was expressed to be "*subject to the terms of the deed of agreement executed by the vendee*", it was held that the sale-deed incorporated the deed of agreement and that the two deeds read together constituted a mortgage by conditional sale and were not separate transactions—*Wajid Ali v. Shafakat Husain*, 33 All. 122 (123); *Ram Charan v. Dharam Singh*, 46 All. 173 (174); *Md. Hamiduddin v. Fakir Chand*, 18 A.L.J. 478, 58 I.C. 717 (720).

(2) Another test was whether *possession* was delivered to the purchaser or whether the vendor retained some hold on the property. Where a document purported to be a sale out and out, and under it the purchaser took *possession* of the property, and on the same day an *ekrarnama* was executed to the effect that if the purchase-money was repaid within four years, the purchaser would give up the property, *held* that the transaction was a sale and not a mortgage—*Mohammad Yusuff v. Jashodha*, 2 I.C. 930 (931). See also *Madhusudan v. Hridoymoni*, 6 C.W.N. 192 (194); *D. Koteswara Rao v. M. Sambiah*, (1964) 2 Andh. W.R. 190. See also *Kinuram v. Nitye Chand*, 11 C.W.N. 400, where one of the contemporaneous documents purported to be a deed of sale and the other provided that on the vendor repaying the purchase-money with costs within a fixed period, the vendee would return the land and in case he did not do so, the vendor would deposit the money in Court and take possession, it was held that the two documents together did not constitute a mortgage.

(3) If the document containing the agreement of reconveyance gave the vendor a power to get the property reconveyed to him *as of right*, on repayment of the purchase-money, the presumption arose that the covenant converted the sale into a mortgage—*Abdul v. Rahamat*, A.I.R. 1933 Lah. 155. But if that document stipulated that the vendee, as a *matter of grace*, would cancel the sale on payment of the purchase-money within ten years, the transaction could not be construed as a mortgage—*Jhanda Sing v. Sheikh Wahiduddin*, 38 All. 570 (579) (P.C.); *Bhagwan Sahai v. Bhagwan Din*, 12 All. 387 (391) (P.C.).

(4) A stipulation regarding the payment of *interest* on repayment of the purchase-money was material as tending to show that the transaction was not a sale but a mortgage (though such a stipulation was not always a conclusive evidence)—*Ali Ahmed v. Rahamtulla*, 14 All. 195; *Bai Mativahu v. Mamu Bai*, 21 Bom. 709; *Maruti v. Balaji*, 2 Bom.L.R. 1058 (1068); *Madhu Sudan v. Hridoymoni*, 6 C.W.N. 192 (195); *Baldea Prasad v. Chet Ram*, 1 O.L.J. 703, 26 I.C. 706; *Muhammad Hamiduddin*

v. *Lala Fakirchand*, 58 I.C. 717 (718), 18 A.L.J. 478; *Gulzar Singh v. Sheo Nath*, 11 O.L.J. 275, 78 I.C. 547, A.I.R. 1925 Oudh 11.

(5) Another test to apply was whether the two documents were executed on the *same date*. If the two deeds were not executed on the same date but on *different* dates, and were also registered in different dates, *held* that it might be reasonably inferred that the parties intended that the transactions should be kept *separate* and distinct and that the two deeds were not intended to be parts of the same transaction so as together to constitute a mortgage by conditional sale—*Jhanda Singh v. Wahiduddin*, 33 All. 585 (588); see also *Uthandi v. Ragavachari*, 29 Mad. 307. If they were executed on the *same date*, the Court would infer that the transaction was a mortgage—*Ram Charan v. Dharam Singh*, 46 All. 173; see also *Kastur Chand v. Jakhia*, 40 Bom. 74 (80); *Madhavrao v. Shebrao*, 39 Bom. 119; *Mohini v. Sarat Sundari*, A.I.R. 1925 Cal. 862, 86 I.C. 353; *Durga v. Paresh*, A.I.R. 1925 Cal. 105, 76 I.C. 335, and *a fortiori*, where the two documents were executed on the *same date*, written by the *same scribe*, attested by the *same witnesses*, registered on the same date, and the parties were identified before the Registrar by the *same witnesses*—*Kirpal v. Sheoambar*, 28 A.L.J. 610, A.I.R. 1930 All. 283 (285), 126 I.C. 366. If the deeds were executed on different dates but registered on the same day the effect was the same, and they must be construed together as forming a single transaction in the nature of a mortgage by conditional sale; see *Palaniyappan v. Subbaraya*, 1914 M.W.N. 222, 22 I.C. 4 (6).

(6) Another test to apply was whether the *relation of debtor and creditor* subsisted between the parties. "The rule of law on this subject is one dictated by common sense, that *prima facie* an absolute conveyance containing nothing to show that the relation of debtor and creditor, is to exist between the parties does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase"—*per* Lord Cranworth in *Alderson v. White*, (1858) 2 DeG. & J. 97 (105). If there was nothing to indicate an intention that there should be a relationship of debtor and creditor or that the lands should be a security for the debt, or that there was any question of repayment of the debt, then the transaction could not be interpreted as a mortgage—*Maruthai v. Dasappa*, 31 M.L.J. 375; *Ganesa Mudaliar v. Gnanasikamani Mudaliar*, 47 M.L.J. 385; *Ma Hnin v. Osman*, 5 Bur.L.T. 99, 15 I.C. 423; *Maung Tha v. Maung Mya*, 3 Bur.L.T. 136, 8 I.C. 981 (982); *Md. Yusuff v. Jasadha*, 2 I.C. 930 (931); *Jhanda Singh v. Sheikh Wahiduddin*, 38 All. 570 (580) (P.C.). But if the apparent price was treated and regarded as a continuing *debt* between the parties, the transaction was a mortgage, and not a sale—*Kastur Chand v. Jakhia*, 40 Bom. 74 (82, 83), 31 I.C. 388. Thus, where the agreement for repurchase stipulated that whenever within 5 years the vendor's paid the vendees the amount of the consideration money together with interest thereon (at a certain rate) but deducting therefrom the actual profits realised by the vendees from the property, the vendors would get the property reconveyed, *held* that the provision as to the accounting at the time of the demand for reconveyance showed clearly that the relation of debtor and creditor existed between the parties, and that the two documents taken together

showed that the transaction was a mortgage by conditional sale—*Mad. Hamiduddin v. Fakir Chand*, 18 A.L.J. 478, 57 I.C. 717 (719).

(7) The amount paid as consideration was an important test. Thus two deeds were executed on the same date. The vendor sold the villages for a price which was an amount immediately required to prevent a sale under a decree; and the purchaser paid that amount without any inquiry as to the property, and the whole transaction (namely the sale and the agreement to resell) was not the result of any bargaining as to the value of the property sold or as to the price to be paid. The consideration for the sale was grossly inadequate, and a clause in one of the deeds indicated that time was not of the essence of the contract for repurchase. *Held* that the transaction was not a sale but a loan, i.e., a mortgage by conditional sale—*Narasingerji v. Parthasarathi*, 47 Mad. 729 (743, 744) (P.C.), 47 M.L.J. 809, 29 C.W.N. 246, 23 A.L.J. 161, 27 Bom.L.R. 4, 82 I.C. 993, A.I.R. 1924 P.C. 226; *Asvath v. Chimanbai*, A.I.R. 1926 Bom. 107 (108), 27 Bom.L.R. 1246, 91 I.C. 330; *Butagana Kamaraju v. Anem Siva*, I.L.R. (1961) Cut. 487; *Darshan Dass v. Gangaluse*, A.I.R. 1962 Pat. 53. If the price paid was a fair and proper price for the land, that would be a good reason for presuming the transaction to be a sale. See *Madhusudan v. Hridaymoni*, 6 C.W.N. 192 (194).

(8) Where the parties in one document were not the same as the parties in the other document, the transaction could not be deemed a mortgage. Thus, where three vendors together sold some property to the purchaser, and some months afterwards the latter executed an agreement to resell in favour of *one* of the vendors, *Held* that since the two transactions were not between the *same* parties, the latter agreement could not be used to modify the earlier transaction and to convert the sale into a mortgage—*Uthandi v. Raghavachari*, 29 Mad. 307 (308); *Ramakanta v. Kalijoy*, 11 I.C. 124 (125) (Cal.).

(9) If the sale-deed expressly and unequivocally declared that the "sale is absolute and final, that the contracting parties have no right to cancel the sale and to demand restitution of the consideration-money and that the vendor has no right to any part of the property sold" the words must be construed in their literal meaning to constitute an out and out sale, and the contemporaneous covenant of repurchase would not convert it into a mortgage—*Ghulam Nabi v. Niazunnişsa*, 33 All. 337; *Ram Din v. Rang Lal*, 17 All. 451 (453). An instrument designated and executed as a sale-deed should be so treated unless the contrary is manifest—*Ayyavayar v. Rahimansa*, 14 Mad. 170 (at p. 172).

(10) The best general test as to the nature of the transaction was "the existence or non-existence of a power in the original purchaser to recover the sum named as the price for such re-purchase; if there is no such power, there is no mortgage." *Dart on Vendors and Purchasers*, 3rd Ed., p. 536; *Sugden's Vendors and Purchasers*, 13th Ed., p. 166; *Coote on Mortgages*, 3rd Ed., pp. 14, 21; *Perry v. Meddowcroft*, 4 Beav. 197, 203; *Verner v. Winstanley*, 2 Sch. & Lef. 393; *Bell v. Carter*, 17 Beav. 11; *Cogden v. Battams*, 1 Jur. N.S. 791; *Williams v. Owen*, (1840) 5 My. & Cr. 303, 48 R.R. 322; *Alderson v. White*, 2 DeG. & J. 95 (97). Thus, if the amount agreed upon as the price of repurchase was the *same* as the con-

sideration for the original sale, the deed was clearly a *mortgage* by conditional sale, and not a *sale* with agreement of repurchase—*Maung Po Gyi v. Hakim Ally*, 2 Rang. 113 (116), A.I.R. 1924 Rang. 235, 3 Bur.L.J. 44, 80 I.C. 759; *Mt. Gomti v. Meghraj*, A.I.R. 1933 All. 443, 145 I.C. 147.

The whole thing has been thus summed up by Butler in his edition of *Coke on Littleton*. "If the money paid by the grantee was not a fair price for the absolute purchase of an estate conveyed to him; if he was not let into immediate possession of the estate; if instead of receiving the rents for his own benefit he accounted for them to the grantor and only retained the amount of interest; or if the expense of preparing the deed of conveyance was borne by the grantor; each of these circumstances has been considered by the Courts as tending to prove that the conveyance was intended to be merely pignorititious."—Cited in *Ghose's Law of Mortgage*, 5th Edn., p. 91.

In construing the documents, the main question for enquiry was the *intention* of the parties, and this intention had to be gathered from the language of the documents themselves, the circumstances attending their execution and from the conduct of the parties—*Jhanda Singh v. Sheikh Wahiduddin*, 33 All. 585 (602); on appeal, 38 All. 570 (574) (P.C.); *Ramdas v. Brindaban*, 1931 A.L.J. 571, A.I.R. 1931 All. 113 (120, 121, 123); *Madhwa v. Venkata*, 26 Mad. 662. The case had to be decided upon a consideration of the documents themselves with such extrinsic evidence of the circumstances as might show in what manner the language of the documents was related to existing facts—*Balkishen v. Legge*, 22 All. 149 (P.C.). If the documents purported to connote an absolute sale, it lay on the party who contended that it was a mortgage to prove his contention—*Ramdas v. Brindaban*, *supra*. In *Situl v. Lachmi*, 10 Cal. 30 (35) (P.C.), their Lordships looking at the surrounding circumstances, among other things, at the value of the property and at the relation of the parties came to the conclusion that the transaction was, in fact, what it purported to be, a perpetual lease with a condition as to cancellation. See also *Narayan v. Vighneshwar*, 40 Bom. 378; *Ma Tok v. Maung Chek*, A.I.R. 1927 Rang. 132, 101 I.C. 204; *Ganesh v. Gnanasikhamani*, A.I.R. 1925 Mad. 37, 47 M.L.J. 385, 84 I.C. 505 and *Gobardhan v. Raghubir*, A.I.R. 1930 All. 101, (1930) A.L.J. 799, 124 I.C. 405, where the transactions were held to be out and out sale.

Where it is alleged that the deeds, though in form absolute transfers were intended to be only mortgages, sec. 92 of the Evidence Act is no bar to the admission of evidence to show what was the true nature of the transaction—*Maung Kyin v. Ma Shwe*, 45 Cal. 320 (P.C.). In considering the question it should be remembered that where documents are executed by Muhammedans they conceal or at least try to conceal the real nature of the transaction and attempt to make out that the transaction is an out and out sale, although as a matter of fact the intention of the parties is to create a mortgage. Mere absence of a certain date in the document within which the money was to be repaid would not indicate that the deed was not one of mortgage—*Md. Usman v. Abdul Rahaman*, A.I.R. 1925 Cal. 1151 (1152), 42 C.L.J. 74, 90 I.C. 100.

In a transaction entered into in 1915 it has been *held* that the two

documents were evidence of one transaction and it was a mortgage by conditional sale and not a sale—*Prag Dutt v. Hari Bahadur*, A.I.R. 1947 All. 334, 1947 A.L.J. 271.

338. Present Law—Effect of proviso :—The proviso, newly added by the Amendment Act of 1929, lays down that “no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.” If a deed purporting to effect a sale after the amendment in cl. (c) came into force contains any one of the three conditions mentioned in that clause, the deed is a mortgage by conditional sale—*Debi Singh v. Jagdish Saran*, A.I.R. 1952 All. 716 (F.B.). The amendment is not retrospective—*ibid* per Chandersamani, J.

Two things are laid down in the proviso:—(1) *first*, the mortgage by conditional sale is to be effected by *one* document; and thus the various criteria for determining whether the two documents operate to create a mortgage will no longer be necessary. But the mere fact that the condition of repurchase is contained in the same document which effects the sale does not render the transaction a mortgage by conditional sale, unless there is a relationship of debtor and creditor between the parties—*Kuppa Krishna v. Mhasti*, 33 Bom. L.R. 633, A.I.R. 1931 Bom. 371 (373), 134 I.C. 337. (2) *Secondly*, the condition which converts the sale into a mortgage must be embodied in the document, so that no extrinsic evidence will be admissible to prove that a document which purports to be an absolute sale is in reality a mortgage.

The effect of the Proviso is that an ostensible sale with a condition for re-purchase cannot be regarded as a mortgage unless the condition is contained in the same document. The object of the amendment is to shut out the inquiry whether such a sale is a mortgage when the stipulation is contained in a separate document—*Venkata v. Veeraswami*, A.I.R. 1946 Mad. 456, (1946) 1 M.L.J. 342; *Suryaprakasa v. Venkatraju*, A.I.R. 1935 Mad. 830; *Meri Mal v. Mt. Sharifan*, A.I.R. 1949 All. 194, (1948) O.W.N. 382; *Lakhmichand v. Yasoda*, A.I.R. 1953 Nag. 337; *Govindsa v. Ismail*, A.I.R. 1950 Nag. 22, I.L.R. 1949 Nag. 933; *Samsherkhan v. Vithaldas*, A.I.R. 1946 Nag. 264, I.L.R. 1946 Nag. 278; *Rangubai v. Govind*, A.I.R. 1949 Nag. 243; I.L.R. 1943 Nag. 78; *Jaggarnath v. Butto Krishto*, A.I.R. 1947 Pat. 345, 25 Pat. 666; *Soshil v. Madan*, A.I.R. 1953 Punj. 292; *Muniswamappa v. Nanjundachari*, A.I.R. 1952 Mys. 56. A transaction intended to be a mortgage, but evidenced by a sale deed and a separate agreement to reconvey, though hit by the proviso, may still amount to a loan in substance under the Bengal Money Lenders Act—*Banku Behari v. Kalyani*, A.I.R. 1967 Cal. 351. The question whether a deed is a sale or mortgage is purely a question of fact and very little assistance can be derived from the construction put by the Courts on different documents before them—*Sundar Lal v. Mohan Lal*, A.I.R. 1953 M.B. 143.

In two Calcutta cases, evidence was admitted of the acts and conduct of the parties to show that the document which purported to be a sale was in reality a mortgage by conditional sale—*Khankar v. Ali Hafez*, 28 Cal. 256 (258); *Mahamed Ali v. Nazar Ali*, 28 Cal. 289 (291). These cases are no longer good law.

It has been laid down by the Privy Council that oral evidence of intention is not admissible for the purpose of construing the deed or ascertaining the intention of the parties, nor can evidence of oral agreement be admitted for the purpose of contradicting, varying or adding to the terms of the instrument—*Balkishen Das v. Legge*, 22 All. 149 (P.C.). The rule is invariable that in considering whether a transaction is a mortgage or an out and out sale the Court must look into the *substance* behind the *form*. Where oral evidence is not available or contradictory the Court should not depart from the written evidence of the document—*Ramdhandas v. Ram Kisondas*, A.I.R. 1946 P.C. 178, 51 C.W.N. 202, 40 Bom. L.R. 244; *Ahmad Husain v. Azhar Ali*, A.I.R. 1944 Oudh 305, (1944) O.W.N. 399; *Bhaiyalal v. Kishorilal*, A.I.R. 1950 Nag. 198, I.L.R. 1950 Nag. 719. Where the transaction is a sale on the face of it, the *onus* of showing that it is really a mortgage is on the person who contends against the tenor of the document—*ibid.* See also *Srinivasa v. Kahainma*, A.I.R. 1947 Mad. 60, I.L.R. 1947 Mad. 265; *Nilmmoni v. Mrityunjaya*, A.I.R. 1951 Or. 365 (F.B.), I.L.R. 1951 Cut. 281; *Hans Raj v. Mat Ram*, A.I.R. 1952 Punj. 181; *Bhaskar Waman Joshi v. Shrinarayan Rambilas Agarwal*, A.I.R. 1960 S.C. 304.

The proviso is of the nature of the law of evidence—*Farsram v. Tarachand*, A.I.R. 1936 Sind 14, 161 I.C. 518. The amendment does not provide that if a transaction is embodied in one document, it must of necessity be regarded as a mortgage by conditional sale and not an out and out sale—*Bishan Lal v. Banwari Lal*, A.I.R. 1939 All. 713 (714), 1939 A.L.J. 946, 185 I.C. 487; *Shambhu v. Jagadish*, A.I.R. 1941 Oudh 582, 1941 O.W.N. 994, 196 I.C. 432; *Rajat Chandra Deka v. Dhani Ram*, A.I.R. 1965 Assam 90. In the case of a sale deed executed in favour of a Mahomedan there is no presumption in Oudh that it is really a concealed mortgage on the ground that a Mahomedan would not charge interest which is inevitable in a mortgage deed—*Ahmad Husain v. Azhar Ali*, A.I.R. 1944 Oudh 305, (1944) O.W.N. 399. Whether a deed is a mortgage by conditional sale or an out and out sale is a question which falls to be determined on a consideration of the terms of the deed itself and of the surrounding circumstances—*Bishan Lal v. Banwari Lal*, supra, relying on *Jhanda Singh v. Wahibuddin*, 43 I.A. 284, 38 All 570 (P.C.). The period during which the property may be repurchased and the adequacy of the consideration are some of the tests. If the period of time given to the vendor to repurchase is a short one, it suggests that it is an out and out sale—*Shambhu v. Jagadish*, supra. The best general test is the existence or non-existence of a power to recover the sum named as the price for such re-purchase; if there is no such power, there is no mortgage; also if the amount agreed upon as the price of re-purchase was the same as the consideration for the original sale, the deed is a mortgage by conditional sale and not a sale with condition of repurchase—*Ibid.* For an illustration of this principle, see *Bishan Lal v. Banwari Lal*, supra. The word "mortgagor" occurring in cl. (c) must be understood in the light of the definition given in cl. (a). Clause (c) presupposes the existence of a mortgage as defined in cl. (a), i.e., the parties must stand to each other in relation of creditor and debtor. The test to determine this relation is to see whether the purchase-money recited in the sale-deed represents the market value of the property and whether the possession was intended

to be transferred and was transferred in accordance with the sale—*Ramnarayan v. Ramratan*, A.I.R. 1934 Nag. 18, 149 I.C. 354. Where the recitals in a sale-deed showed that the intention was to transfer possession to the vendee and the vendor stipulated to pay back exactly the amount of the purchase-money which he received and the purchase-money closely approximated to the market value of the property, the transaction was one of sale and not of mortgage—*Ibid.*

The Proviso being in a negative form, it cannot be said that wherever there is a condition of reconveyance in a deed of sale the transaction is to be regarded as a mortgage—*Bhaiyalal v. Kishorilal*, A.I.R. 1950 Nag. 198, I.L.R. 1950 Nag. 719; *Hayath v. Bharamanna*, A.I.R. 1953 Mys. 105, I.L.R. 1952 Mys. 247. It will still depend upon the intention of the parties as gathered from the contents of the document itself and the surrounding circumstances—*Quyumunnissa v. Rashidul Malik*, A.I.R. 1952 All. 200. The real test in such cases is to see the intention of the parties which can be judged only from the surrounding circumstances. If the Courts go by the language of the deed, there would hardly be any case of sale which can be treated as a mortgage—*Bidha Ram v. Chhidda*, A.I.R. 1950 All. 430. As a matter of construction, the fact that a transaction is embodied in one document and not two and its terms are covered by sec. 58 (c) may give rise to the inference that the transaction is a mortgage by conditional sale—*Veeravunni Haji v. Koyammu*, A.I.R. 1957 Ker. 169; *Debnath Bhagat v. Bhoju Mandal*, A.I.R. 1958 Pat. 371. Where a property is sold and on the same day a reconveyance of the property sold is agreed upon by a separate registered deed, the transaction is a sale with option to repurchase and not a mortgage by conditional sale—*Parbati Kueri v. Sujan Chand Hain*, A.I.R. 1967 Pat. 415; *Arjan Ali v. Kala Mia*, I.L.R. (1957) 9 Assam 109.

To determine whether a transaction is a sale or a mortgage by conditional sale, the tests to be applied are as follows:—(1) The existence of a debt; (2) the period of repayment—a short period being indicative of a sale and a long period of a mortgage; (3) the continuance of the grantor in possession indicates a mortgage; (4) a stipulation for interest on repayment indicates a mortgage; (5) a price below the true value indicates a mortgage. However, any of these circumstances will not necessarily prove that a sale-deed with a condition of repurchase is in fact a mortgage by conditional sale—*Abdul Rahman v. Mt. Bismillah Begam*, A.I.R. 1939 All. 539 (541), 1939 A.L.J. 377. See also *Md. Amin v. Bajrangi*, A.I.R. 1949 All. 335, I.L.R. 1949 All. 348; *Mahabirsingh v. Venkateswaran*, A.I.R. 1952 Mad. 11; *Hans Raj v. Mt. Ram*, A.I.R. 1952 Punj. 181; *Jadam Bai v. Janki*, A.I.R. 1944 Mad. 237, (1944) 2 M.L.J. 30; *Nilamoni v. Mrityunjaya*, A.I.R. 1951 Or. 362 (F.B.), I.L.R. 1951 Cut. 281; *Srinivasa v. Kaliamma*, A.I.R. 1947 Mad. 60, I.L.R. 1947 Mad. 265; *Chhuttu v. Kayam*, A.I.R. 1963 Bhop. 18; *Narayanan v. Kochupennu*, A.I.R. 1954 Tr.-Coch. 142; *Bhoju Mondal v. Debnath Bhagat*, A.I.R. 1963 S.C. 1906. In order to bring a transaction within the category of a mortgage the relationship of debtors and creditors must subsist between the parties. When a document on the face of it appears to be a sale-deed, the burden of proving it to be a deed of mortgage will rest on the party alleging it to be so. To discharge the burden the contemporaneous contract of the parties

may be proved, if it is permissible under Proviso (b) to sec. 92 of the Evidence Act—*Ibid*; see also *Deschand v. Jagannath*, A.I.R. 1940 Nag. 84, 187 I.C. 594. A document after declaring that certain land had been sold and title transferred contained a further stipulation that if within a certain time the purchase amount was returned with interest after deduction of the income which the vendee might derive from the land, there should be a re-conveyance: *held* that the document was a mortgage and not an out and out sale with a condition of repurchase—*Ibid*, at p. 87. A document incorporated an absolute conveyance and said that possession was delivered on the same day. It however provided, "If I pay the sum of Rs. 1300 on 26.6.45, you shall have to take the same and return the house. And within five years (I) will neither mortgage the aforesaid house nor will I sell the same and I will not effect any change in the building." *Held* that the transaction amounted to a mortgage—*Md. Ibrahim v. Sugrabi*, A.I.R. 1955 Nag. 272. The inclusion of the condition of repurchase in the document must now be taken as a token of mortgage in the first instance—*Ibid*.

Without a debt there can be no mortgage: Where after a deed of sale there was an agreement by the vendee to convey the property back to the vendor on his fulfilling certain conditions but it was not in any way a condition in the deed of sale and there was nothing to show in either of the documents that the vendor was in any sense of the word debtor of the vendee, it was held that the two transactions together did not constitute a mortgage by conditional sale—*Ko Po v. Maung Lu*, A.I.R. 1937 Rang. 402. A compromise during the pendency of an application under Or. 21 r. 90, C.P.C. to the effect that if the decretal amount be paid within 12 months the sale is to be set aside, otherwise to be confirmed, cannot be construed as a mortgage by conditional sale—*Ram Chandra Seth v. Srinath Singh*, A.I.R. 1959 Pat. 239.

A mortgage by conditional sale is essentially different from a sale with a condition of repurchase. In the latter case the ownership vests in the transferee from the date of the document and there is no question of any debt being in existence after the transaction. In a case of mortgage by conditional sale the debt subsists and a right to redeem remains with the debtor—*Abdul Latif v. Abdul Gani*, 43 C.W.N. 1221, A.I.R. 1939 Cal. 730, 185 I.C. 393; *Unrichirakutty v. Kuttimalu*, I.L.R. (1967) 2 Ker. 69; *Jakeria Mondal v. Md. Isman Ali Mondal*, 63 C.W.N. 430. The right to repurchase is lost if the original vendor fails to act punctually according to the terms of the contract to reconvey and there is no question of granting relief against forfeiture—*K. Simrathmull v. Manjalingiah Gowder*, A.I.R. 1963 S.C. 1182.

339. Incidents of mortgage by conditional sale:—The incidents of a mortgage by conditional sale under the present Act are the same as those under the Bengal Reg. XVII of 1806. On the one hand, the mortgagee has the right of foreclosure; on the other, the mortgagor is entitled to redeem. Under Reg. XVII of 1806, in a mortgage by way of conditional sale, the mortgagee could not enter into possession, even after the lapse of the time fixed by the agreement, without taking legal steps for foreclosure. If he entered without doing so, he was a mere trespasser and could be ejected by the mortgagor—*Hub Ali v. Wazirunnissa*, 28 All. 496

(P.C.). But in Madras, C. P. and other provinces where the Bengal Regulation was not in force, the mortgagee had not to bring a suit for foreclosure, but on the expiry of the stipulated period of repayment the mortgage executed itself and the transaction was closed and became one of absolute sale, without the intervention of the Court. See *Thambusamy v. Hossein*, 1 Mad. 1 (P.C.). But after the passing of the Transfer of Property Act, the law is uniform in all provinces, and now under a mortgage by conditional sale, the ownership will not be vested in the mortgagee in default of payment on due date until there is a decree absolute for foreclosure—*Raghunath v. Sheolal*, 13 N.L.R. 69, 39 I.C. 849; *Afsar Sheik v. Sauraba Sundari*, 25 C.L.J. 560, 40 I.C. 371. The essential characteristic of a mortgage by conditional sale is that on the breach of the condition of repayment within the stipulated period the contract executes itself and the transaction is closed and becomes one of absolute sale, *to be enforced by foreclosure*—*Sheoram v. Babu Singh*, 48 All. 302, 24 A.L.J. 295, A.I.R. 1926 All. 493, 94 I.C. 849.

The words "a certain date" occurring in the first sub-clause of this clause should be read as confined only to that sub-clause, and should not be imported into the other two sub-clauses. That is, the words "on such payment being made" in the other two sub-clauses should not be interpreted as "on payment being made on a certain date". The "certain date" refers only to the 'default of payment' mentioned in the first sub-clause, and not to the 'payment' referred to in the two clauses following. A certain date of payment is not necessary where the transaction is a mortgage by conditional sale, but only where the transaction is an out and out sale with an agreement to resell; because, it is conceivable that between the date of the sale and the time when the seller may elect to exercise his option and demand reconveyance of the property on payment of the money, considerable time might have elapsed, and the price of the property might have doubled or trebled, and in such a case it would be strange to suppose that without fixing any certain date of payment and without any regard whatever to the possible and probable changes in the price of the property the parties would agree to grant a resale whenever the other party might wish to demand the same. But in a mortgage by conditional sale, no regard is had to the change in the price of the property, and consequently no date is fixed for payment—*Padmanabha v. Sitarama*, 54 M.L.J. 96, 106 I.C. 158, A.I.R. 1928 Mad. 28 (31). But in *Kinuram v. Nitye*, 11 C.W.N. 400; and *Haji Mahomed v. Asraf Ali*, 25 I.C. 93 (Cal.); and *Chuttu v. Abdul Jabbar*, A.I.R. 1956 Bhopal 59 it has been held that a certain date of payment is essential in a mortgage by conditional sale. In the last-mentioned case it has been further held that the words "on a certain date" mean "on or before a certain date," so that the mortgagor may make payment on an earlier date. The Oudh Chief Court also holds that 'certain date' of payment distinguished a mortgage by conditional sale from an out and out sale. That date is generally a date more appropriate to the redemption of a mortgage than to reconveyance by way of sale—*Mahabir v. Bharat*, 11 O.L.J. 312, A.I.R. 1924 Oudh 417 (418). If the sale by an occupant and an agreement to resell by the purchaser are registered on the same date and the vendor obtains reconveyance within the stipulated time the transaction does not attract the right of pre-emption—65 Bom. L.R. 224.

A mortgage by conditional sale is essentially a mortgage, and therefore it is necessary that the *relation of debtor and creditor* should exist between the parties. Thus, a deed of sale ran thus: "I have sold this land to you for Rs. 600, and have given the land into your possession. If at any time I require back the land I will pay you the aforesaid Rs. 600 and any money you may have spent for bringing the land into good condition, and purchase back the land." *Held* that the document was not a mortgage, because no *debt* existed between the parties. It was a sale with an option of repurchase—*Gurunath v. Yamanava*, 35 Bom. 258 (260).

In this class of mortgage, the mortgagor *ostensibly* sells the mortgaged property. The word "ostensible" means that the object bears the appearance of a sale, but is *not really a sale*. If the parties have *intended it to be a sale*, then of course it cannot be a mortgage. The test is the intention of the parties—*Mumtaz v. Lachmi*, A.I.R. 1929 All. 174 (178), 116 I.C. 807. A mortgage by conditional sale is an *ostensible sale*; that is, it is executed in the form of a sale (with a condition attached to it). But where the mortgagor puts the mortgagee in possession of the mortgaged property and the deed provides that the mortgagee shall enjoy the property, paying the revenue to Government, that the principal and interest shall be repaid on a certain date, and that in default the mortgagor shall give up the lands as sold to the mortgagee and *shall execute a proper sale-deed*, the transaction is not a mortgage by conditional sale, but is a combination of a simple mortgage and an usufructury mortgage—*Kandula Venkiah v. Donga Pallaya*, 43 Mad. 589 (599) (F.B.). In this form of mortgage, there must be an ostensible sale to begin with, and if the document neither ostensibly nor otherwise purports to be a sale-deed, it does not satisfy the requirements of a mortgage by conditional sale—*Ibid* (at p. 603). Where a deed of *sale* of land contained a clause by which the purchaser undertook to resell the land to the vendor at his request within three years for the same amount as the consideration of the sale, *held* that the deed was clearly a mortgage by conditional sale—*Maung Pe Gyi v. Hakim Ally*, 2 Rang. 113 (116), A.I.R. 1924 Rang. 235, 80 I.C. 759, 2 Bur. L.J. 44.

This section provides that where a mortgagor has ostensibly sold his property on condition that on payment of the mortgage-money the buyer shall retransfer the property to the seller, the transaction is a mortgage by conditional sale. And this would be so even though the language of the document itself does not use the word 'mortgagor', 'mortgaged property' or 'mortgage-money.' The conveyance may ostensibly be a deed of sale, with all the phraseology employed in drafting sale-deeds, but if that sale is in reality subject to a condition of a retransfer on payment of the amount, the law regards it as a mortgage by conditional sale. The presence in the deed of such words as imply a mortgage is not absolutely necessary. The cardinal point is whether the sale is subject to a condition of repurchase on payment—*Mathura v. Jagdeo*, 49 All. 405, 104 I.C. 504, A.I.R. 1927 All. 321 (326); *Lalta Prasad v. Jagdish*, 48 All. 787, 24 A.L.J. 1057, A.I.R. 1927 All. 137 (143), 98 I.C. 961.

The "mortgage-money" in this clause means the purchase-price, along with interest or without it, and after deduction or addition of any further sum, according as this Act prescribes such interest, addition or deduction—*Lalta Prasad v. Jagdish*, *supra*.

Even though the transaction is contained in one document, it is not by itself sufficiently conclusive that the transaction is a mortgage. The intention of the parties is material for deciding whether the transaction is a sale or a mortgage—*Mumtaz Begum v. Lachhmi*, A.I.R. 1929. All 174 (178, 179, 180), 116 I.C. 807; *Bairagi Charan v. Lakshmidhar*, A.I.R. 1964 Orissa 17. A mere agreement to reconvey does not convert the sale into a mortgage, irrespective of the intention of the parties—*Muthuvelu v. Vythilinga*, 42 Mad. 407 (418) (F.B.); *Rajat Chandra Deka v. Dhani Ram*, A.I.R. 1965 Assam 90.

Where a term in a document provides that the person placed in possession should pay certain portion of the produce to the executant equivalent to a net annuity, it is not inconsistent with the document being a mortgage—*Gurunath v. Suryakant*, I.L.R. 1940 Bom. 453, A.I.R. 1940 Bom. 225, 42 Bom. L.R. 399.

A mortgagor does not lose his title or his right to possess on the date of the mortgage, even if the mortgage is by conditional sale—*Gangaprasad v. Iswarsingh*, A.I.R. 1939 Nag. 287, 1939 N.L.J. 429.

The English rule that once a mortgage always a mortgage applies to a mortgage by conditional sale and consequently the condition that if the mortgaged property were not redeemed within the period stipulated, the mortgagee should become the absolute owner thereof, cannot be enforced—*Venkatasubbiah v. Jumma Mosque*, A.I.R. 1941 Mad. 666, (1941) 1 M.L.J. 754, 1941 M.W.N. 532.

In Kutch where a mortgage by conditional sale has been executed in St. 1867, there is no right of redemption after the expiry of the time limit—*Modiji v. Jagatsingji*, A.I.R. 1949 Kutch 10.

340. **Instances of mortgage by conditional sale:**—Where the vendor ostensibly sold his property by executing a sale-deed and the vendee by another document agreed to reconvey the property on payment of the price thereof after the expiry of a fixed period, the transaction amounted to a mortgage by conditional sale—*Nathu Lal v. Mt. Gomti Kugr*, I.L.R. 1940 All. 625 (P.C.), A.I.R. 1940 P.C. 160, 45 C.W.N. 29; see also *Narsingerji v. Parthasarathi*, 51 I.A. 305, 47 Mad. 729, A.I.R. 1924 P.C. 222; *Janki v. Jai Dei*, 9 O.C. 147. A document described as a "conditional deed of sale" enumerated the amounts borrowed from the mortgagee and then ran thus: "I shall pay the said principal and interest on 26th June, 1879 and take back this bond. If I fail to pay accordingly on the due date, my land mentioned in the patta I shall give up to you treating the principal and interest hereof as sale proceeds." Held that this was a deed of mortgage by conditional sale—*Kola Venkatanargyana v. Vuppala Ratnam*, 29 Mad. 531. (533). Where a person executed a document by which he purported to sell the property in consideration of a loan due by the executant, but it was agreed that if the executant paid the amount within 3 years, the property would be "released," held that the transaction amounted to a mortgage by conditional sale and not an out and out sale—*Mumtaz Begam v. Lachhmi*, 1930 A.L.J. 1435, A.I.R. 1931 All. 196 (197), 130 I.C. 15. A document which purported on the face of it to be a deed of sale of a share in a certain village contained the following provision:—"If within six years

in the month of Jeth, I, the executant, pay the consideration Rs. 3,000, and the arrears of rent which may then be due against the tenants, the vendee shall reconvey the vended property to me, otherwise the property will not be reconveyed." Further in the body of the document the consideration for the transfer was described as mortgage-money. *Held* that the transaction was a mortgage by conditional sale and not an out and out sale—*Mohindra v. Maharaj Singh*, 45 All. 72 (75), 20 A.L.J. 810, A.I.R. 1923 All. 48. A document was framed and worded exactly in the same manner as a mortgage by conditional sale in English precedents of conveyancing; the consideration was stated to be the same amount that was specified as the sale-price, and there was a direction that after paying certain creditors of the executant the transferee should obtain the debt-bonds with an endorsement of discharge on them, and that he should keep them with him as vouchers in support of the sale-deed. *Held* that the document was not one of outright sale but a mortgage by conditional sale; for if it were an outright sale, it would be difficult to understand why the transferor should have required the transferee to obtain those bonds and keep them in support of the deed—*Padmanabha v. Sitarama*, 54 M.L.J. 96, A.I.R. 1928 Mad. 28 (30). The plaintiff executed a document in favour of the defendant for Rs. 4000/- in the form of a sale deed the market value of the property being Rs. 8000/-. There was a stipulation in the document that the defendant should reconvey the property to the plaintiff on his repaying Rs. 4000/- after 5 years and before the end of the 7th year. *Held* that the transaction was a mortgage by conditional sale and not a sale with option to repurchase—*Bapuswami v. Pattai Gounder*, A.I.R. 1966, S.C. 902; *V. Venkatarama Iyer v. K. Ranganathan Pillai*, (1965) 2 M.L.J. 480. See also *Satyadeo Sharma v. Ramsarup Sharma*, A.I.R. 1964 Pat. 193. Where a deed of conditional sale provides that the property is to be returned on repayment of consideration the transaction is a mortgage by conditional sale—*Bai Kanku v. Victorbhai*, A.I.R. 1969 Guj. 239.

Where the document on the face of it is a mortgage-deed, the mere fact that the conditions of the deed are onerous does not alter the real nature of the transaction—*Milkhil Ram v. Gujar Mal*, A.I.R. 1933 Lah. 104, 141 I.C. 494. But where the document is one of outright sale with no agreement for repurchase, and the agreement for repurchase is contained in a subsequent document, the transaction will not be deemed to be one of mortgage; it shall be deemed to be one of sale—*Ma Sein v. Maung San*, A.I.R. 1935 Rang. 212, 157 I.C. 179. A document was expressed to be a kobala and the transferee was in possession of the property. There was a clause that the transferor was to get back the property if he paid the purchase-money and an equal amount within eight years from the date of document. In the margin of the document there happened to be an expression *kat kabala*: *held* that the transaction was an out and out sale—*Altapali v. Uzirali*, A.I.R. 1933 Cal. 381 (386), 60 Cal. 167, 144 I.C. 220; *Duddu v. Motumarru*, A.I.R. 1966 Andh. Pra. 252; *Banku Behari v. Kalyani*, 70 C.W.N. 139.

The essential characteristic of a mortgage by conditional sale is that on breach of the condition of repayment within a stipulated period, the contract exhausts itself and the transaction is closed and becomes one of

absolute sale to be enforced by foreclosure—*Badri v. Besu*, A.I.R. 1933 Lah. 174, 145 I.C. 159. Where a deed was ostensibly a sale-deed with a condition for re-transfer on payment of the amount and the condition was embodied in the document itself, it was a mortgage by conditional sale and not an out and out sale—*Ram Dhani v. Ram Rekha*, A.I.R. 1931 All. 548, 53 All. 607, 131 I.C. 594; *Laxmiamma v. Narasinha*, 11 Law Report, 767. As under cl. (c) the transaction is ostensibly a sale and as the parties to it are referred to as “the buyer” and “the seller,” the use in a deed of expressions usually found in a deed of absolute sale in itself cannot be a valuable guide in considering whether the transaction is a sale with a condition of repurchase or a mortgage by conditional sale. The distinction between the two is one of intention to be gathered from the deed itself and the extrinsic evidence of circumstances—*Fazal Ahmad v. Afaqul Rahaman*, A.I.R. 1938 Oudh 57, 172 I.C. 536. Thus, where in such a deed there was no bargaining as to the price and the deed was quickly followed by another which was regarded as mortgage by conditional sale, the former deed was held to be a mortgage by conditional sale also—*Ibid*. In a suit for possession by plaintiff on the strength of a sale deed it is open to the defendant to allege and prove that the real transaction was a mortgage and not a sale—*Saraswatibai v. Pt. Ramchandralal*, 1962 M.P.L.J. (Notes) 199. In *Sayyad Ahmed Ali v. Bhageerathi Ammal*, A.I.R. 1961 Mad. 301 the transaction was held to be sale and not a mortgage by conditional sale; so also in *Pattay Gounder v. P. L. Bapu Swami*, A.I.R. 1961 Mad. 276.

The effect of a *lahan gahan* mortgage is the same as that of a mortgage by conditional sale; and mortgages in form similar to that of *lahan gahan* (e.g., *katkobala* or *bye-bil-wafa*) stand on the same footing as mortgages by conditional sale—*Mahomed Haji v. Ramappa*, 25 N.L.R. 187 (F.B.) A.I.R. 1929 Nag. 254 (255), 119 I.C. 684. The provision that the mortgagor will have no connection with the mortgaged property in future is the usual covenant in a *lahan gahan* mortgage, and this coupled with the use of the words *lahan gahan* shows that the mortgage is a *lahan gahan* mortgage—*Sitaram v. Krishnarao*, A.I.R. 1940 Nag. 156, 1940 N.L.J. 179, 190 I.C. 641.

Where the mortgagee in a mortgage by conditional sale did not take foreclosure proceedings under the Bengal Regulation XVII of 1806 no suit for possession lay—*Badri v. Besu*, A.I.R. 1933 Lah. 174, 145 I.C. 159. But Rangnekar, J. held otherwise in *Ganpat v. Hanamgouda*, A.I.R. 1933 Bom. 439, 57 Bom. 593.

USUFRUCTUARY MORTGAGE :

Vernacular names :—In Bengal, *khai khalasi* or *bhoga bandhaki khat*; in Madras, *diggu bhogyam*, *swadhin adamanam*.

342. Amendment :—The words “or expressly or by implication binds himself to deliver possession” have been newly inserted in this clause. In an early Bombay case also it has been held that it is not necessary for usufructuary mortgage that possession should be actually delivered to the mortgagee. If a right of entry is given to the creditor, there is a transfer of an interest in immoveable property just as much as if possession were actually delivered. Therefore, where a deed contains the

words "we have this day put the said land and house into your possession", but the mortgagee has not actually taken possession, the mortgage is still a usufructuary mortgage—*Motiram v. Vitai*, 13 Bom. 90 (100). But in a Madras Full Bench case it was held that a mortgagee did not become a usufructuary mortgagee under sec. 58 (d) until the mortgagor had given him possession of the mortgaged property—*Subbamma v. Narayya*, 41 Mad. 259 (263) (F.B.). The Full Bench further held that since the mortgagee had not been given possession of the property, he became entitled to sue for the mortgage-money under sec. 68; in other words, the mortgage-money "became payable" to him; and as he was not a usufructuary mortgagee, for the reasons stated above, the proviso (a) of section 67 did not apply to him, and he was entitled to sue for foreclosure or for sale under sec. 67, which entitles a mortgagee to do so at any time after the mortgage-money has become "payable." There was an anomaly in this decision which the Full Bench failed to notice, viz., that the mortgagee was treated as a usufructuary mortgagee for the purpose of sec. 68 (which applies to usufructuary mortgagees) and as not a usufructuary mortgagee for the purpose of applying proviso (a) of sec. 67.

The effect of this amendment is that a usufructuary mortgagee is none the less so even if possession is not delivered to him; it is sufficient if he is *entitled to possession* under the terms of the deed. This amendment overrules the above Full Bench decision.

A deed of mortgage styled as *rehan* deed provided that the mortgagor bound himself to deliver possession of the property and authorized the mortgagee to retain possession until a certain time when the executant bound himself to pay the money. It further provided that the mortgagee would be entitled to retain possession until payment of the money advanced: *held*, the mortgage was a usufructuary mortgage—*Harnath v. Ambika Devi*, A.I.R. 1941 Pat. 301, 193 I.C. 272.

Where the transaction is a usufructuary mortgage, the parties are precluded, as between themselves by sec. 92, Evidence Act, from adducing oral evidence as to their subsequent conduct to show that the transaction was not a mortgage but an out and out sale—*Bhagwat v. Ramasis*, A.I.R. 1952 Pat. 431.

343. Incidents of usufructuary mortgage :—The characteristics of a usufructuary mortgage are : (1) possession of the property is delivered to the mortgagee; (2) the mortgagee is to get rents and profits in lieu of interest or principal or both, (3) no personal liability is incurred by the mortgagor; and (4) the mortgagee cannot foreclose or sue for sale—*Md. Saied v. Abdul Alim*, A.I.R. 1947 Lah. 40 (F.B.), I.L.R. 1946 Lah. 805; *Dasabhai Vasan*, A.I.R. 1953 Kutch 4 (*vatantar* transactions). The essential feature of a pure usufructuary mortgage is that the mortgagee cannot sue for the payment of his debt, but is only entitled to remain in possession of the mortgaged property till the principal and interest are defrayed according to the terms of the agreement—*Atma Ram v. Surjan*, A.I.R. 1928 Lah. 355, 110 I.C. 81; *Janaki Nath v. Asad Reza*, (1934) 14 Pat. 560. In such a mortgage there is no personal liability of the mortgagor. Where the rents and profits of the property mortgaged are to be set off against interest and the mortgagee is entitled to retain

possession until such time as the mortgagor chooses to redeem on payment of the principal sum secured, the transaction is a usufructuary mortgage—*Lachman Singh v. Natha Singh*, A.I.R. 1940 Lah. 401 (F.B.), 42 P.L.R. 560, 191 I.C. 583. A mortgagor stated in a mortgage-deed : "I have now mortgaged with possession and pledged the entire property....."; held that the transaction was not a usufructuary mortgage pure and simple—*Wahid-ud-Din v. Makhan Lal*, A.I.R. 1938 All. 564 (566), (1938) A.L.J. 872. -

The rights of a usufructuary mortgagee form a very large and important part of the bundle of rights which constitute ownership; the remainder still remains with the mortgagor and can be transferred by him—*Thakur v. Raghubar*, A.I.R. 1952 Pat. 469. The usufructuary mortgagee may not be the absolute owner of the property, but for all practical purposes he may be deemed to be the owner while he is in possession—*Fateh Singh v. Raghubir*, A.I.R. 1938 All. 577 (584, 585) (S.B.), (1938) A.L.J. 881. Where there was an arrangement between the plaintiff and the defendant under which the latter borrowed a sum of money from the plaintiff and passed a simple money-bond in his favour and executed a lease subletting the land (occupancy-holding) to the plaintiff for 5 years, the understanding being that the interest payable on the sum advanced should be set off against the rent payable under the sub-lease, it was held that the transaction did not amount to an usufructuary mortgage of an occupancy holding. The plaintiff is liable to be evicted from the land at the end of five years and cannot insist on retaining the land till the money is paid (because under sec. 25, Agra Tenancy Act, an occupancy tenant can sublet his holding, only for 5 years and no more). A usufructuary mortgagee, on the other hand, is entitled to continue in possession till payment of his dues in full—*Chotey Lal v. Mohanian*, 1930 A.L.J. 332, A.I.R. 1930 All. 375 (376); 127 I.C. 425, or the mortgage-debt is wiped off from the rents and profits of the property—*Narasimhe v. Sheshayya*, A.I.R. 1925 Mad. 825, 90 I.C. 138. A mortgage is not necessarily for securing payment of money advanced. It may also be for securing, "performance of an engagement which may give rise to a pecuniary liability" [see 2nd para of cl. (a)]. Where the mortgagee is entitled under the mortgage-deed to remain in possession of the mortgaged property until payment of the mortgage money, the transaction is a usufructuary mortgage—*Raman v. Gowri*, A.I.R. 1954 Tr.-Coch. 7. But where the rental agreement showed that the mortgagee was not bound to enter into possession and liquidate the debt by the usufruct and there was an express covenant to pay, the mortgage was not a purely usufructuary mortgage—*Madhwa v. Venkata*, 26 Mad. 622. Equity of redemption not being specific immoveable property is not capable of a usufructuary mortgage—*Gohel Dhulabhai Kalubhai v. Gohel Mahbai Himatsingh*, A.I.R. 1961 Guj. 129.

If the mortgagor expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee the transaction is a usufructuary mortgage although actual possession has not been delivered—*Subburaya v. Subramanyam*, A.I.R. 1952 Mad. 856. See also *Chouth Mal v. Hiralal*, A.I.R. 1950 Aj. 59. Where under the terms of a mortgage-deed, the possession is to be delivered to the mortgagee

subsequent to the date of the mortgage, the transaction is still a usufructuary mortgage—*Bisheshar v. Debi Baksh*, 16 O.C. 56, 17 I.C. 329 (332). The mortgagor is to deliver such possession to the mortgagee as the mortgaged property is capable of on the date of the mortgage—*Ram Khelwan v. Ghulam Hussain*, 8 Luck. 190. In the case of a tenanted property, the only way in which possession can be given to a usufructuary mortgagee is to give him the right to realize the rents and appropriate them towards the mortgage-money—*Butto Kristo v. Gobindram*, A.I.R. 1939 Pat. 540, 182 I.C. 132. Where a landlord executes a usufructuary mortgage in favour of his tenant, the rights of the tenant as tenant and as mortgagee do not however merge, and if the tenant subsequently sells his right as possessory mortgagee, the transferee bringing a suit on the basis of the sale, is not entitled to eject the tenant but is merely entitled to possession as a usufructuary mortgagee, *i.e.*, to realize rents from the tenant. He cannot claim actual cultivatory possession of the land—*Jag Mohan v. Ram Kishen*, A.I.R. 1936 Oudh 322, 163 I.C. 922; *Venkatashiah v. Venkatakrishniah*, A.I.R. 1958 Mys. 20. Where the mortgagor covenanted to put the mortgagee in possession of certain village on a subsequent date, and to pay interest at 24 per cent. until possession was delivered, held that the mortgage was a usufructuary mortgage—*Partab Bahadur v. Gajadhar*, 24 All. 521, (530, 531) (P.C.). A subsequent oral agreement under which the mortgagee was put in possession of some property and the mortgagee was to pay himself out of the usufruct of the property can undoubtedly be proved in order to prove payment. If the mortgagee has entered into possession of any property prior to the mortgage-deed, the matter cannot be investigated in the mortgage suit in the absence of subsequent agreement by which the mortgagee was asked to remain in possession in order to pay himself for the mortgage—*Subh Karan v. Kedar Nath*, A.I.R. 1941 All. 314, 1941 A.L.J. 345. There need not be an express stipulation to appropriate the profits in lieu of interest. If, by the terms of the instrument the profits are not to be appropriated in satisfaction of the principal, the only inference must be that they are to be appropriated in lieu of interest—*Kandula Venkiah v. Donga Pallaya*, 43 Mad. 589 (600) (F.B.), 57 I.C. 274. Where possession of part of the property is not delivered to the mortgagee, he cannot claim by way of interest the profits of that part of the property which has not been delivered to him—*Nurul Hassan v. Mahbub Bux*, A.I.R. 1945 All. 202 (F.B.), I.L.R. 1945 All. 676. If a usufructuary mortgage contains a stipulation for the sale of the property and the suit for sale is dismissed, the mortgagee's right to possess is not thereby destroyed—*Bharoselal v. Daryao*, 1961 Jab. L.J. 1207. A clause authorising the mortgagee to possess is essential to the creation of a usufructuary mortgage—*Bachan Singh v. Waryam Singh*, A.I.R. 1961 Punj. 477. Where the mortgage and the lease back to the mortgagor are part of the same transaction the mortgage cannot be said to be a usufructuary mortgage—*Sm. Savitri Devi v. Sm. Beni Devi*, A.I.R. 1968 Pat. 222. But where the mortgage and the lease back from distinct transactions the mortgagor is entitled to redeem leaving the mortgagee to seek other remedies for the rent in arrears—*Thommen Varkey v. Govindan Nair*, A.I.R. 1959 Ker. 155. Where a usufructuary mortgage is executed for 2 years and on the very next day the mortgagee gives a lease back to the mortgagor

at a rent equal to interest, the mortgagee is not entitled to file a mortgage suit on his failure to recover anything in execution of a money-decree for rent passed on an earlier suit, because the lease formed a component part of the mortgage—*Haji Muhammad v. Shah Akhtar*, A.I.R. 1960 Pat. 106.

Where there was a covenant that the mortgagor would pay interest every year but that *if he failed to pay interest, the mortgagee could take possession*, and would appropriate the usufruct towards interest and pay the balance (if any) to the mortgagor, *held* that the transaction was a simple mortgage, and not a usufructuary mortgage, because no present possession was delivered, but possession was merely contingent on the failure to pay interest—*Yeshvant v. Vithal*, 21 Bom. 267 (272). For similar cases see Note 335, *ante*. It seems that such a mortgage will now be treated as an anomalous mortgage. See Note 335. Where the creditor is given the right to take the mango crop in lieu of interest the transaction is not a mortgage—*Rehman v. Nathulal*, I.L.R. (1960) 10 Raj. 978.

Since a usufructuary mortgagee is entitled to remain in possession "until payment of the mortgage-money", *no time can be fixed* during which the mortgage is to subsist; and if the parties stipulate that the mortgage is for a definite period (e.g., 4 years), it is no longer a usufructuary mortgage but becomes an anomalous mortgage—*Hikmatulla v. Imam Ali*, 12 All. 203 (205); *Chhathi v. Bindeshwari*, 8 Pat. 16, A.I.R. 1929 Pat. 605 (608), 120 I.C. 32, 11 P.L.T. 68. But see *Rameshwar v. Paniram*, A.I.R. 1934 Pat. 217, where it has been held that in such a mortgage nothing can prevent the parties from estimating in advance the period in which the mortgage-debt would be paid off and thus fixing the minimum period in which the mortgagee should have possession. *Bhutnath v. Gopal Prasad*, 44 C.W.N. 761, A.I.R. 1940 Cal. 436 relying on *Luchmeshwar v. Dookh Mochan*, 24 Cal. 677. See also *Bawa Kishan v. Nathu Ram*, A.I.R. 1939 Lah. 235, 41 P.L.R. 270; *Shaikh Idrus v. Abdul Rehman*, 16 Bom. 303; *Sadashiv v. Venkatarao*, 20 Bom. 296; *Krishna v. Hari*, 10 Bom. L.R. 615. A usufructuary mortgage comes to an end with the payment of the mortgage money; if the mortgagee refuses to perform the acts he is bound to do under sec. 60 the mortgagor can enforce his rights under sec. 60—*Prithi Nath Singh v. Suraj Ahir*, A.I.R. 1963 S.C. 1041.

If a usufructuary mortgagee is dispossessed from some properties and does not take additional security for the debt, he is not entitled to claim interest on the mortgage-money on account of such dispossession—*Prasanna v. Girish*, A.I.R. 1934 Cal. 149, 37 C.W.N. 1162, 58 C.L.J. 80, 149 I.C. 667.

It is open to the mortgagor to pay off the mortgage or not as he pleases, and as there is no personal covenant for payment by the mortgagor, the mortgagee cannot compel payment of the mortgage-amount—*Chathu v. Kunjan*, 12 Mad. 109 (110). In a pure usufructuary mortgage, any personal liability on the part of the mortgagor is excluded. Such personal liability may, however, arise under the circumstances mentioned in sec. 68—*Ram Narayan v. Adhindra*, 44 Cal. 388 (400, 401) (P.C.); *Chathu v. Kunjan*, *supra*.

If the deed itself contains a personal covenant, the mortgage becomes a combination of a simple and a usufructuary mortgage. But where all the elements of a usufructuary mortgage are present in the mortgage it does not cease to be a usufructuary mortgage and become an anomalous mortgage only because it contains a personal covenant to pay—*K. Nataraja Iyer v. Subbiah Ambalam*, (1962) 1 Mad. L.J. 397.

Till the mortgagee demands possession the mortgagor is entitled to remain in possession—*Ponnu v. Sambasiva*, A.I.R. 1933 Mad. 293, 56 Mad. 546, 141 I.C. 372. If the mortgaged properties are not delivered the mortgagee is not bound to sue and obtain possession from a trespasser and the mortgagor has a right himself to sue the trespasser for possession in order that he may fulfil his statutory duty. But there is no such statutory duty when the mortgagee is dispossessed by a trespasser after being put in possession—*Kizhakkekara v. Soopiatatath*, (1939) 1 M.L.J. 646, A.I.R. 1939 Mad. 887, 1939 M.W.N. 391. Where a mortgagee files a suit for possession *simpliciter*, on the mortgage-deed, the Court need not consider as to whether full consideration has passed—*Fazal v. Milkha*, A.I.R. 1933 Lah. 193, 145 I.C. 182. The recital in the usufructuary mortgage that the mortgagor will pay the principal after three years and redeem the property amounts to a covenant to pay and a suit for the sale of the security will lie—*S. S. Ahobala Sastriar v. S. P. Kalimuthu Pillai*, A.I.R. 1962 Mad. 308.

Limitation.—A breach of covenant to deliver possession under a usufructuary lease arises once for all at the time when the mortgagee is first entitled to recover possession. A claim brought more than 6 years after that date would be barred by limitation—*Nurul Hassan v. Mahbub Bux*, A.I.R. 1945 All. 202 (F.B.), I.L.R. 1945 All. 676.

Lease.—The usufructuary mortgagee may lease out of the mortgaged property either to third parties or to the mortgagor himself—*Md. Karamat v. Ganeshi*, A.I.R. 1927 All. 552, 49 All. 658, 101 I.C. 516; *Md. Ishaq v. Chheda Lal*, A.I.R. 1948 All. 312, 1948 A.L.J. 110; *Uthuppan v. Nilkanta*, A.I.R. 1951 Tr.-Coch. 154. A tenant who accepts from his landlord a pure usufructuary mortgage of the tenanted house is not entitled to continue in possession, after the mortgage is redeemed—*Ramrao v. Pahlumal*, A.I.R. 1963 M.P. 296. If a usufructuary mortgagee leases out the mortgaged property to the mortgagor, a suit for rent by the mortgagee on the basis of the lease is maintainable—*Ganpat Turi v. Mohammad Asraf Ali*, A.I.R. 1961 Pat. 133. See also *Ramlal v. Mahant Atmaramji*, 1960 Jab. L.T. 950. There is no single test as to whether the mortgage and the lease form the same transaction—*Kuttyal v. Sanjiva*, A.I.R. 1952 Mad. 877. See in this connection *Beevathuma v. Lakshmi*, A.I.R. 1952 Tr.-Coch. 92. Such a lease granted to the mortgagor, even if contemporaneous, will generally be regarded as a separate transaction—*Amar v. Taus*, A.I.R. 1936 Pesh. 38, 162 I.C. 658; *Kuer Mahammad v. Behari Lal*, A.I.R. 1937 All. 478, I.L.R. (1937) All. 621, 169 I.C. 1004; *Sundar Das v. Official Receiver*, A.I.R. 1937 Lah. 790; *Ram Udhar v. Hari Chand*, A.I.R. 1958 Punj. 140. But see *Feroz Shah v. Sobhat Khan*, A.I.R. 1933 P.C. 178, 37 C.W.N. 993, 60 I.A. 273, 143 I.C. 659, where such documents have been held to have constituted as a possessory mortgage. See

also *Harilal Bhagwanji v. Shastri Hemshanker*, A.I.R. 1958 Bom. 8; *Lalchand v. Nenuram*, A.I.R. 1963 Raj. 69.

Where a usufructuary mortgage-deed becomes invalid for want of registration the mortgagee can retain possession of the land till the debt is repaid though no charge is created by such a deed—*Maung Tun v. Maung Aung*, A.I.R. 1925 Rang. 1, 2 Rang. 313, 84 I.C. 1023.

Lekha mukhi mortgage :—A *lekha mukhi* mortgage in the Punjab is a usufructuary mortgage by which the land is made over to the mortgagee who has to look to its produce for the payment of the mortgage-debt, the mortgagor undertaking no personal liability and the mortgagee not being entitled to sue for the debt—*Gahi Mal v. Shera*, 90 P.R. 1881; *Khandu Lal v. Fazal*, 51 I.C. 956 (957); *Karam Chand v. Shera*, A.I.R. 1931 Lah. 498, 133 I.C. 655. *Rattigan's Customary Law*, 8th Edn., p. 151. See also Ghose's *Law of Mortgage*, 5th Edn., p. 109.

344. Zur-i-peshgi leases :—A *Zur-i-peshgi* lease (i.e., a lease for a consideration) is a lease granted on a sum of money being advanced—*Bengal Indigo Co. v. Rogobar*, 24 Cal. 272 (279) (P.C.). The difference between a *Zur-i-peshgi* lease and a usufructuary mortgage lies in this, that under a usufructuary mortgage the mortgagee is authorised to retain possession until the mortgage-money is satisfied, but in *Zur-i-peshgi* lease the mortgagee is to retain possession for a *definite period only*—*Chhathi v. Bindeshwari*, 8 Pat. 16, A.I.R. 1929 Pat. 605 (608), 120 I.C. 32, 11 P.L.T. 68; *Tulshi v. Muna Kuar*, A.I.R. 1937 Oudh 146, 12 Luck. 161, 162 I.C. 225. Where a lease does not intend to create relationship of debtor and creditor and reserves no right to redemption to the lessor but simply asks the lessee to quit the land without any payment on the part of the lessor at the expiry of the term of the lease, it is a *Zur-i-peshgi* lease and not a mortgage—*Ibid* at p. 148; *Mahesh Bhagat v. Ram Baran Mahto*, A.I.R. 1968 S.C. 1466. On the other hand a document which purports to be a lease, but fulfils the definition of a usufructuary mortgage, is a mortgage and the mere fact that it describes itself as a lease does not make it a lease—*Jabbarshah v. Kanchhedi*, A.I.R. 1939 Nag. 166, 1939 N.L.J. 308, 182 I.C. 239. A *Zur-i-peshgi* lease is a lease granted by the debtor to his creditor on a fixed rent reserved by the lease, which is generally a little over the amount of interest agreed to be paid by the debtor. The surplus, if any, is payable to the debtor or may be applied towards reduction of the principal. These leases were devised to evade the laws against usury which limited the maximum rate of interest to be 12 per cent. per annum. The criterion for distinguishing such a lease from a mortgage is whether a right of redemption is expressly or impliedly reserved to the lessor, in which case the transaction is to be deemed a mortgage—*Basant Lal v. Tapeswari*, 3 All. 1; *Gopal v. Desai*, 6 Bom. 674. Another test for distinguishing the two is whether the object of the instrument was to create a relationship of debtor and creditor or of simple landlord and tenant—*Abdulbhai v. Kashi*, 11 Bom. 462; *Sheikh Muhammad Hanif v. Moorav. Mahton*, 4 P.L.W. 146, 44 I.C. 153. Another test is to find out whether there is a secured debt and a right of redemption—*Dildar v. Saddip*, A.I.R. 1938 Pat. 35, 172 I.C. 935. Where a person takes settlement of land by a registered *kabuliyat* on payment of *Zarpeshgi* amount and agrees to pay annual rent, the transaction is not

a mortgage, and the landlord is not entitled to get possession of the land by payment of the *Zarpeshgi* amount—*Ramautar v. Latak Behari*, A.I.R. 1952 Pat. 312. Where a *thicka patta* did not give the *thickdar* the right to remain in possession after expiry of the period of the *thicka*, until repayment of the *peshgi* money, the *patta* could not be regarded as *Zarpeshgi* amounting to a mortgage—*Budhan v. Ramanugrah*, A.I.R. 1947 Pat. 78, 13 B.R. 332. The transaction is really one in which rent is paid in a lump sum in advance instead of by instalments during the term. Where, however, the interest created in the lessee continues after the expiration of the term until the advance is paid, the transaction has the essential characteristics of a mortgage—*Maharaja Kesho Prasad v. Chandrika Prasad*, 2 Pat. 217, 3 P.L.T. 797, 69 I.C. 394, A.I.R. 1923 Pat. 122. In construing a document as to whether it is a lease or a mortgage the following test may be applied: If it is not a security for the payment of any money or for the performance of any engagement; if no accounts are to be rendered or required; if there is no provision for redemption, express or implied; it is simply a lease even though it may be described as a mortgage—*Hussain Ali v. Sardar Ali*, A.I.R. 1933 Lah. 786, following *Tasadug Rasul v. Kashi Ram*, 25 All. 109 (P.C.), 30 I.A. 35. See also *Mahadeo v. Rameshar*, A.I.R. 1935 All. 150, 157 I.C. 364; *Ramdhan Puri v. Bankey Bihari Saran*, A.I.R. 1958 S.C. 941; *Neelakanda Pillai v. Sankaran Padmanavan*, A.I.R. 1967 Ker. 70; *Subramania Iyer v. K. R. Anantanarayana*, A.I.R. 1963 Ker. 261; *Frenchikkose Thommi v. Chacko Devasia*, A.I.R. 1963 Ker. 75. On the other hand, if the transaction is one of mortgage the fact that it is called a lease will be quite irrelevant—*Sarajbhashini v. Baijnath*, A.I.R. 1938 Pat. 388, following *Shah Mukhun Lal v. Sree Kishen*, 12 M.I.A. 157. Thus, where the essence of a transaction was one of loan and security and the creditors secured the net profits of the land for a term of years without entering into possession, the transaction was a usufructuary mortgage—*Sarajbhashini v. Baijnath*, supra, at p. 389. Where a person executed an instrument purporting to be a mortgage of certain villages with possession for a period of 14 years, by which it was provided that on the expiration of the term the mortgagor "shall come into possession of the mortgaged villages without settlement of accounts, that on the expiration of the term the mortgagee shall have no power whatever in respect of the said estate, and that after the expiration of the term this mortgage-deed shall be returned to the mortgagor without his accounting for (paying) the mortgage-money secured under the document", held that the instrument was not a mortgage in any proper sense of the word. It was simply a grant of land for a fixed term free of rent in consideration of a sum made out of past and present advances—*Nidha Sah v. Murlidhar*, 25 All. 115 (P.C.). Such deeds should not be held to be mortgages merely because the parties used such nomenclature, although the fact of the parties having designated the same in such a way shows that they believed themselves to be clothed with all the rights and remedies incidental thereto—*Tukaram v. Ramchand*, 26 Bom. 252 (258) (F.B.): *Ankajah v. Veeraiah*, A.I.R. 1957 Andhra Pra. 504. A document styled a lease, under which, in consideration of money advanced, the claimant under it was only to enjoy certain specified lands for a certain number of years, but which contained nothing as to repayment of the borrowed

amount, nor provided for payment of any rent as such, was not a lease, but usufructuary mortgage, under which the rents and profits had been estimated to be sufficient to satisfy both principal and interest, so that no subsequent accounting might become necessary on either side—*Reference under Stamp Act*, 21 Mad. 358 (F.B.); *Reference under Stamp Act*, 7 Mad. 203. A executed a document in favour of B, under which possession of land was delivered to B on receipt of Rs. 1000. Although period of 10 years was mentioned in the deed, B was to pay rent to A, who was not entitled to bring the property to sale. B was to hand over possession to A not at the end of the term but on return of the consideration to him by A sometime after the end of the term. *Held*, the transaction was a usufructuary mortgage and not a lease—*Apaya Dundyappa v. Govinda Dattatraya*, A.I.R. 1956 Bom. 625. Where by a thika zurpeshgi lease the mortgagee obtains a thika lease at a certain reserved rent retaining for himself a fixed amount of the rent as specified interest upon the *Zuripeshgi* money and agrees to pay the balance to the mortgagor, it is a usufructuary mortgage—*Bachu Lal v. Jang Bahadur*, A.I.R. 1939 Pat. 427, 180 I.C. 795. A deed purporting to be a mortgage-deed with possession regarding land provided that in consideration of a debt of Rs. 240 due by the plaintiff (an agriculturist) to the defendant, the latter was to take possession of certain lands for ten years and appropriate the income thereof in liquidation of the debt, and that after the expiry of the said period the right to the land was to cease. The mortgagor having sued to redeem before the expiration of the ten years, it was held that the transaction amounted to an anomalous mortgage and not a lease, and that the mortgagor was entitled to redeem—*Tukaram v. Ramchand*, 26 Bom. 252. Where under a Zurpeshgi lease the mortgagor lessee holds over the remedy of the mortgagee is to institute not a suit for rent but a suit for the enforcement of the mortgage—*Gaya Prasad v. Chitrakut*, A.I.R. 1960 Pat. 485.

A mortgage-bond which purported to be *Zuripeshgi* stipulated that the mortgagee would retain possession of the mortgaged property till the term of the *Zuripeshgi* which was specifically fixed for three years. There was no provision that after the expiry of the term the mortgagee would be entitled to retain possession until repayment of the money: *held* that it was not a usufructuary mortgage and as there was an implied contract to repay the mortgage-debt on expiry of the term, the suit for recovery of the mortgage-money was maintainable—*Chhati Lal v. Bindeshwari*, A.I.R. 1929 Pat. 605, 8 Pat. 16, 120 I.C. 32. See *Mt. Jaleshwar v. Sheonarayan*, A.I.R. 1934 Pat. 1, 148 I.C. 23. When two documents are executed on the same day, one a simple mortgage under which the mortgage amount is to be paid within three years and the other a lease for five years in favour of a member of the mortgagee's family, the documents read together do not constitute a usufructuary mortgage—*Ram Pal v. Ram Anjar*, 1967 All. L. J. 996.

In a *Zuripeshgi* mortgage-deed it was provided that the mortgagee should appropriate the entire produce which he might have in excess as profit in lieu of interest. The mortgagee had settled certain *bakasht* land and had realized premium of certain amount; *held*, the premium obtained by the settlement of the *bakasht* land was not the produce of the land—*Rameshwar v. Naramdeshwar*, A.I.R. 1940 Pat. 627, 188 I.C. 39. For

distinction between a usufructuary mortgage and a lease see *V. V. Mahomed v. P. V. Savithri*, 1963 Ker. L. T. 125 ; *Sankaran Kutty v. Karipal*, 1967 Ker. L. J. 835 ; *Iravi Krishnan v. Ulahannah Anthony*, 1968 Ker. L. R. 309.

ENGLISH MORTGAGE

345. Incidents:—The three essentials of an English mortgage as defined in this section are (i) that the mortgagor should bind himself to repay the mortgage money on a certain day ; (ii) that the mortgaged property should be transferred absolutely to the mortgagee ; and (iii) that such absolute transfer should be made subject to a proviso that the mortgagee will reconvey the property to the mortgagor, upon payment by him of the mortgage-money on the day on which the mortgagor bound himself to repay the same. An English mortgage closely resembles an *absolute sale* with a condition of repurchase—*Narayana v. Venkataramana*, 25 Mad. 220 (235) ; *Satyacharan v. Ram Kinkar*, 62 C.L.J. 28. In the former case it has been observed that it is the characteristic feature of an English mortgage that the operative words should be the same, as in an *absolute conveyance*, and consequently, the transfer should be by conveyance, assignment, demise or otherwise, according to the nature of the property ; and therefore where the deed of mortgage in case of a free-hold estate contained the words “the mortgagors do hereby *mortgage* and assign to the mortgagee the coffee estate described in the schedule hereto annexed,” etc., it was held that the word “mortgage” was inappropriate in the deed of English mortgage, and precluded the possibility of holding that the transfer was intended to be absolute, but that as the word “assign” was used it might be said that the requisite of an English mortgage was fulfilled—*Narayana v. Venkataramana*, 25 Mad. 220 (235). This case was decided according to the practice prevailing in England. But, as has been observed in a recent Calcutta case, the law and practice obtaining in England ought not to be applied in interpreting an English mortgage executed in India. The provisions of the Transfer of Property Act must be regarded first before resorting to English practice. According to this Act, the definition of an English mortgage as given in sec 58 (e) must be read subject to the definition gives in clause (a) of the section, and consequently an English mortgage can hardly be regarded as the transfer of the *entire* interest of the mortgagor to the mortgagee. Some estate is left in the mortgagor and only an interest thereon is transferred to the mortgagee—*Fala Krista v. Jagannath*, 59 Cal. 1314, 36 C.W.N. 709 (720), A.I.R. 1932 Cal. 775, 140 I.C. 788 ; *Rowther v. Uma*, 34 I.C. 24. The case of *Fala Krista v. Jagannath*, supra, has recently been approved by the Privy Council in *Ram Kinkar v. Satya Charan*, A.I.R. 1939 P.C. 14, 43 C.W.N. 281 (289), where their Lordships state: “Section 58 (e) deals with the form, not substance. The substantial rights are dealt with in secs. 58 (a) and 60. Whatever form is used, nothing more than an interest is transferred and that interest is subject to the right of redemption.” Their Lordships recognize in this case that the wording of sec. 58 (e) undoubtedly gives rise to some difficulty (at p. 288). That section speaks of the mortgagor transferring the mortgaged property *absolutely* to the mortgagee. “In using those words does it mean that no interest or no legal interest in the property remains in the mortgagor? Their Lordships cannot think so”—*Ibid*, at p. 289. In this case the Privy Council affirmed *Satya Charan v.*

Ram Kinkar, supra, and overruled *Bengal National Bank v. Janaki*, 54 Cal. 813, 31 C.W.N. 973 followed in *Shiva Prasad v. Smith*, 17 Pat. 499, A.I.R. 1939 Pat. 146, 20 P.L.T. 46. See in this connection *Imperial Bank, Petitioner*, I.L.R. (1940) 1 Cal. 197, A.I.R. 1940 Cal. 429, 191 I.C. 559.

Where the mortgagor binds himself to pay the money lent on a certain day and conveys the property absolutely to the mortgagee and there is the provision for reconveyance by the mortgagee to the mortgagor on payment of the loan, simply because the mortgagor undertakes to pay the taxes, etc., on the mortgaged property will not change the character of the mortgage from an English mortgage. In India a mortgage is the transfer of an interest in specific immoveable property. In substance it is not the transfer of the whole interest of the mortgagor to the mortgagee. In determining such questions clause (a) of sec. 58 cannot be ignored—*per* R. C. Mitter, J. in *Cohen v. Baidyanath*, A.I.R. 1936 Cal. 646 (648), 40 C.W.N. 1270. The same view was taken in *Janaki Nath v. Asad Reza*, A.I.R. 1936 Pat. 211, 14 Pat. 560, 158 I.C. 738.

A provision in the bond requiring the mortgagor to pay in addition to the mortgage debt and interest thereon further advances and sums paid by the mortgagee for the protection and preservation of the mortgaged properties and Government revenue, rents and all other costs, charges and expenses, etc., does not affect the character of the mortgage as an English mortgage—*Janaki Nath v. Asad Reza*, supra. There is nothing inconsistent with an English mortgage in the mortgagor granting a power of attorney to the mortgagee entitling him in the grantor's name, to collect the rents and profits of a portion of the mortgaged properties for ensuring the payment of interest, or in the fact that the agreement expressly provides that such management and collection by the mortgagee or by a substitute appointed by him would be as the agent of the mortgagor—*Ibid*. The possession taken by the mortgagee under the power of attorney or the appointment by him of a substitute has not the effect of placing the mortgagee in the position of a mortgagee in possession. Therefore he is not accountable on the footing of wilful default, but on the basis of actual receipts—*Ibid*.

The fact that the mortgagor has stipulated in an English mortgage to pay the insurance costs and other charges including quit rents, taxes etc. does not detract from the absolute character of the transfer—*Rajagopala v. Ramachandra*, A.I.R. 1942 Mad. 628, 55 M.L.J. 417. See also *Fozmal v. Shridhar*, A.I.R. 1946 Bom. 499, 48 Bom. L.R. 327. The fact that in certain event the date of payment was changed did not mean that the mortgagor had not agreed to pay the debt on a certain date within cl. (e) of this section—*Rajagopala v. Ramachandra*, supra.

The appointment of attorney by the mortgagor to recover, receive and give effectual discharges for all rents and royalties from tenants is common enough in English mortgages and is designed to save the mortgagee from the liability of accounting on the footing of wilful default as a mortgagee in possession—*Jharia Water Board v. Jagadamba Loan Co.*, A.I.R. 1938 Pat. 539, (1938) P.W.N. 635.

Where the mortgaged property is situated in the mofussil, and one of the parties is a Hindu, a mortgage though styled as an English mort-

gage does not transfer an absolute interest in favour of the mortgagee—*Ansur Subba Naidu v. Secretary of State*, 1917 M.W.N. 794, 41 I.C. 770; *Shurnomoyee v. Srinath*, 12 Cal. 614; *Pitchey Meera Rowther v. Pathumakutty*, 8 L.B.R. 413, 34 I.C. 24; but the mortgagor remains owner subject to the mortgage, and can exercise the ordinary rights of an owner in possession—8 L.B.R. 413.

According to the strict provisions of an English mortgage under the English law, the mortgagor is not entitled to remain in possession; but if he remains, as he usually does, it is only by sufferance, and he is liable to ejectment at any time without notice and without being entitled to reap what he has sown or to the standing crops. The mortgagee may provide that on the mortgagor committing a certain default, the mortgagee would be entitled to enter into actual possession. In such a case if the permission is withdrawn the mortgagee is entitled under sec. 41, Presidency Small Cause Courts Act, 1882 to institute proceedings for ejectment—*Sequeira v. Mrs. Nadershaw*, A.I.R. 1954 Bom. 81. Under the Indian law, though the mortgage does not contain in so many words a covenant for possession, a right of entry on the part of the mortgagee may be implied from the terms of the deed. Even though the mortgagee enters into possession of the property by reason of a purchase at an execution sale under a decree which subsequently turns out to be invalid, he cannot be ousted from possession either by the mortgagor or by a person claiming under him, without the mortgage redeemed—*Rukmini Kanta v. Baldeo*, 28 C.W.N. 920, 81 I.C. 1025, A.I.R. 1925 Cal. 77. Where the mortgagor had sold and handed over possession of the property to the purchaser without the knowledge of the mortgagee in the English form who has become entitled to possession, it can not be said that the possession of the purchaser was adverse to the mortgagee—*Jasraj v. Sugrabai*, A.I.R. 1940 Sind 195, 191 I.C. 483. Under an English mortgage the mortgagee is entitled to immediate possession and retain possession until he is paid—*Sree Yellamma Cotton etc. Co. Ltd.* in the matter of, A.I.R. 1969 Mys. 280.

Construction :—In construing English mortgages English decisions are a valuable source of elucidation as they are in a form prevalent in England and have been borrowed from there—*Imperial Bank, Petitioner in Prudential Assurance Co. v. Galstaun*, I.L.R. (1940) 1 Cal. 197, A.I.R. 1940 Cal. 429, 191 I.C. 559. No construction of a particular document is necessarily a guide when a similar document comes to be construed—*Fozmal v. Shridhar*, supra.

Limitation :—Art. 147 of the Limitation Act continues to be applicable to suits instituted on English mortgages where they have been executed before 1st April, 1930,—the date on which the amending Act XX of 1929 came into force—*ibid.*

EQUITABLE MORTGAGE :—See the new clause (f). The provision for equitable mortgage was previously contained in the third para of sec. 59 which ran as follows :—

“Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein, Akyab and in any other town which

the Governor-General in Council may, by notification in the *Gazette of India*, specify in this behalf, by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon."

No amendment has been made; the language is practically the same, except that the mortgage has now been specifically described as a "mortgage by deposit of title-deeds."

The object of the Legislature in providing for this kind of mortgage is to give facility to the mercantile community, in cases where it may be necessary to raise money all on a sudden before an opportunity can be afforded of investigating the title-deeds and preparing the mortgage-document.

The term "equitable mortgage" in the English law is of much wider import than under this Act. An equitable mortgage under the English law might be of several kinds and one of them is by deposit of title-deeds—*Ponnu v. Sambasiva*, A.I.R. 1933 Mad. 293, 56 Mad. 546, 141 I.C. 372.

An equitable mortgage should not be looked upon with disfavour or bias—*Official Assignee v. Sind Provincial Co-operative Bank*, I.L.R. 1942 Kar. 479, A.I.R. 1943 Sind 36. An equitable mortgage by deposit of title-deeds is recognised and enforceable by law in the Punjab, although this Act does not apply to that province—*Ram Mohan v. Bharat National Bank*, 3 Lah. L. J. 373. See also *Mrs. Stewart v. Bank of Upper India*, 31 P.R. 1916, 34 I.C. 937. As Delhi was before 1912 in the Province of the Punjab, even after its separation in that year such a mortgage by deposit of title-deeds can be validly created though the property may be situated elsewhere, e.g., in Karachi—*Ralli Brothers v. Punjab National Bank*, A.I.R. 1930 Lah. 920, 11 Lah. 564, 129 I.C. 21; *Mt. Kanwal v. Babu Lal*, A.I.R. 1937 Lah. 819, 172 I.C. 508.

By a Government Notification, this provision has been extended to the Civil and Military Station of Bangalore; and a mortgage by deposit of title-deeds can be effected in that town. See *Papiah Naidu v. Naganatha Sethupathi*, 61 M.L.J. 408 (P.C.), 35 C.W.N. 1061 (1064), A.I.R. 1931 P.C. 239, 134 I.C. 328.

A mere deposit of title-deeds outside the towns mentioned in this section not only gives no right to the mortgagee to proceed against the properties they relate to, but does not operate as a further security or charge—*Darbari v. Khetra*, A.I.R. 1927 Pat. 41, 97 I.C. 391; *Basant v. Commissioner of Tax*, A.I.R. 1932 All. 451.

Where the mortgagor binds himself personally to pay the mortgage money, by the operation of secs. 96 and 58 (b) it is an equitable mortgage—*Nityananda v. Rajpur C. B. Cinema Ltd.*, A.I.R. 1953 Cal. 208, 90 C.L.J. 123.

346. Incidents of equitable mortgage:—A mortgage created by deposit of title-deeds and a mortgage created by an indenture stand on the same footing. A mortgage created by deposit of title-deeds does not create only an equitable estate liable to be defeated or postponed, as in England, by a subsequent purchaser for value without notice—*Ram*

Ratan v. Sew Kumari, A.I.R. 1938 Cal. 823 (829). An equitable mortgage is valid only if made within the towns specified in this clause. If executed outside those towns it is invalid and gives no right to the mortgagee to proceed against the properties comprised in the mortgage—*Darbari v. Khetra*, 8 P.L.T. 85, A.I.R. 1927 Pat. 41 (42); *Konchadi v. Siva Rao*, 28 Mad. 54. But the property mortgaged may be situate outside those towns. See below.

Three things are required for an equitable mortgage. (1) a debt; (2) deposit of title-deeds; and (3) an intention that the transfer should be security for the former—*Behram v. Sorabji*, 38 Bom. 372, 23 I.C. 140; *Jowala Das v. Thakar Das*, A.I.R. 1936 Lah. 251, 158 I.C. 562. There may be constructive deposit—*Nathan v. Maruthi Rao*, A.I.R. 1965 S.C. 430.

(1) **Debt**:—An equitable mortgage may cover an existing as well as a *future debt*; that is, it may be created not only to secure a contemporaneous advance, but it can be extended to cover future advances as well—*Himalayan Bank v. Quarry*, 17 All. 252. An equitable mortgage is created when title-deeds are deposited under an oral agreement to cover present and future advances. As each advance is made, it becomes a charge upon the land comprised in the title-deeds, from the force of the prior oral agreement that it shall be so—*Jaitha v. Haji Abdul*, 10 Bom. 634 (644).

(2) **Deposit of title-deeds**:—To create a mortgage by deposit of title-deeds it is not necessary that the *property* to which they relate should be situate within one of the towns mentioned in this clause—*Valliappa v. Ko Tha Hnyin*, 4 Bur. L.T. 189, 11 I.C. 721; *Imperial Bank of India v. U. Rai Gyaw*, 51 Cal. 86 (100) (P.C.). In interpreting cl. (f) the word "town" does not go with "person", but with "delivers". Under this clause it is not necessary that the person making the deposit of the title-deeds should be in one of the towns mentioned in the clause. It is enough if he makes the deposit to the creditor or his agent in that town with intent to create security thereon—*Indian Cotton Co. v. Hari Poonjoo*, A.I.R. 1937 Bom. 39 (41), I.L.R. (1937) Bom. 763, 38 Bom. L.R. 1222, 166 I.C. 974. Agreement must precede before actual transfer of interest in immoveable property—*Ibid* at p. 42. An equitable mortgage can be created in the Presidency towns by the deposit of title-deeds of *property lying outside* those towns. Had it been the intention of the Legislature that transactions of the above description should only affect immoveable property situate within the narrow circle of the Presidency Towns, such intention would have been clearly expressed—*Madho Das v. Ram Kishen*, 14 All. 238; *Manekji v. Rustomji*, 14 Bom. 269; *Srinath v. Godadhur*, 24 Cal. 348; *Behram v. Sorabji*, 38 Bom. 372, 23 I.C. 140 (141) (*per* Macleod, J.).

Even it is immaterial whether the property is situate inside or outside British India. An equitable mortgage may be created by deposit of title-deeds of property situate in a Native State (*e.g.*, Baroda)—*Central Bank of India v. Nusserwanji*, 34 Bom. L.R. 1384; A.I.R. 1932 Bom. 642.

But the *delivery of the title-deeds* must take place within the towns mentioned in this clause; so where the title-deeds were delivered out-

side Calcutta to an attorney's assistant who was acting for both parties for taking them to his employer to keep them in his Calcutta Office, the mere authorization to the solicitor outside Calcutta by the debtor to deliver the title-deeds to the creditor does not amount to delivery in Calcutta—*Surajmull v. Gopeeram*, A.I.R. 1932 Cal. 823, 36 C.W.N. 1028, 141 I.C. 257. Where the creditor in Bombay requested the debtor outside Bombay to send the title-deeds by post and the debtor sent them accordingly, it was held that although the Post Office became the agent of the creditor and the transaction though complete under sec. 7 of the Contract Act, did not create an equitable mortgage as the deposit of the title-deeds was made outside Bombay—*Indian Cotton Co. v. Hari Poonjoo*, A.I.R. 1937 Bom. 39 (43), I.L.R. (1937) Bom. 763, 38 Bom. L.R. 1222, 166 I.C. 974. A deposit of title-deeds can be both actual and constructive—*Kakoo Shah v. Kamalawati*, A.I.R. 1969 Delhi 120.

Where the defendants had already executed a mortgage in favour of the plaintiff and handed him the title-deeds of the property, and subsequently the plaintiff advanced a further sum to the defendants, who agreed that the title-deeds should be retained by the plaintiff as security for the re-payment of the further advances, it was held that the plaintiff was entitled to be declared an equitable mortgagee in respect of such further advances—*Dhirendra v. Kumud*, 25 Cal. 611; *Ex parte Kensington*, 2 V. & B. 83. In such cases it may be assumed that the parties agreed to treat the title-deeds as having been handed back to the mortgagor and rehandled to the mortgagee. Such an agreement was a constructive delivery of the title-deeds to the creditor as security for the further advances—*V. M. R. V. Chettyar Firm v. Asha Bibi*, A.I.R. 1929 Rang. 107 (108), 118 I.C. 407; *Cowasji v. Tyabji*, 23 S.L.R. 97, A.I.R. 1928 Sind 179 (186), 112 I.C. 722; *K. J. Nathan v. S. V. Maruthi Rao*, (1964) 2 S.C.J. 671.

In an equitable mortgage it is not necessary that *all* the title-deeds should be deposited. An equitable mortgage may be valid if only some or one of the material documents of title to the property have been deposited, although a complete title be not thereby shown as to the depositor's interest in the estate—*Roberts v. Croft*, 24 Beav. 223; *Ex parte Wetherell*, 11 Ves. 398; *Ramanathan v. Dowlat Singhji*, A.I.R. 1938 Mad. 865 (874), (1938) 2 M.L.J. 534; *Binapani v. Rabindranath*, A.I.R. 1959 Cal. 213. Thus, for the purpose of creating an equitable mortgage of a share in an indigo concern it is quite sufficient to deposit the title-deeds under which that share was acquired—*Twomey v. Bhupendra*, 7 Pat. 520, 111 I.C. 57, A.I.R. 1928 Pat. 304 (310); *Bhupendra v. Wajihunnessa*, 2 P.L.J. 293 (301), 39 I.C. 564. The documents must necessarily be documents showing the mortgagor's title, but that does not mean that they should never be held sufficient unless they actually connect the mortgagor with some predecessor of his whose title the documents show. On the other hand, if they purport to show the mortgagor's title in the property, it is not necessary that they should connect the mortgagor with some predecessor of his who had acquired the title originally. Thus where the deposited documents were (1) the original probate of the will whereby the predecessor bequeathed his property to the mortgagor and a certified copy of a redemption certificate issued to the predecessor in

respect of the said property, the original being lost, a valid mortgage was effected. But an attested copy would not be enough unless there is proof of the original not being available—*Surendra v. Mohendra*, 59 Cal. 781, 36 C.W.N. 420 A.I.R. 1932 Cal. 589 (593). Where a person himself puts a superstructure on the site of which he is a tenant, and subsequently purchases the site from the landlord, the title-deeds, though relating only to the land would clearly cover the house and his deposit would create an equitable mortgage of the entire property consisting of the ground and the superstructure—*Berumull v. Velu*, A.I.R. 1942 Mad. 369, (1942) 1 M.L.J. 372, 1942 M.W.N. 261. But if the document that is deposited shows no kind of title of the depositor in the property, and there are documents in existence showing his title to the property which are not deposited, an equitable mortgage cannot be said to have been validly created—*Venkataramayya v. Narasinga Rao*, 21 M.L.J. 454, 9 I.C. 309.

Maps of properties and other documents consisting of unimportant and useless letters cannot be recognized as title-deeds. But where the documents which were deposited included the "sold notes" by firms from whom machinery of a factory was purchased, the drafts for the purchase price, freight, etc., and the receipts by the firm for the amount paid and the certificates etc., they were documents of title of the factory as distinct from the building and the site underneath it. By their deposit an equitable mortgage was created—*People's Bank of N. India v. Forbes, Forbes Campbell & Co.*, A.I.R. 1939 Lah. 383 (403). Machinery which has been firmly fastened to the earth and has been continuously worked for several years is immovable property and the deposit of documents of title of such machinery creates an equitable mortgage—*Ibid.*

If part of the material documents of title be deposited with one person, and part with another, each deposit may have a good security, unless there be evidence of a contrary intention—*Roberts v. Croft*, 24 Beav. 223; Fisher on Mortgage, 5th Ed., p. 17. Thus, one S held two plots of land and a building thereon by virtue of a registered sale-deed. He also possessed the original lease-deeds under which the plots were held by his vendor. He deposited the sale-deed and also the lease-deed with respect to one of the plots with A, and thereafter deposited the other lease-deed with B. On each of the lease-deeds there was an endorsement that the property had been sold to S. Held that as A had title-deeds with regard to the whole property, an equitable mortgage was created on the whole property in his favour, although he did not possess the other lease-deed. Held also that an equitable mortgage was created in favour of B also, but A's mortgage had priority over that of B—*Chettyar Firm v. Chettyar Firm*, 7 Rang. 28, A.I.R. 1929 Rang. 65 (68), 116 I.C. 475.

A *patta* of land is a document of title by depositing which an equitable mortgage may be created—*Official Assignee v. Basudevadas*, 48 Mad. 454, A.I.R. 1925 Mad. 723, 48 M.L.J. 423. Even an expired lease may be sufficient to found a mortgage by deposit of title-deeds, if the lessee continues in possession, the lessor accepts rent from him and the lease is subsequently renewed—*Villa v. Petley*, A.I.R. 1934 Rang. 51, 148 I.C. 721. A *patta* issued in pursuance of an order passed by a Revenue Officer is not however a document of title but only evidence of title, the

main object of it being to give information of the amount of revenue payable. A valid order passed by a duly authorized agent of the Government granting lands at the disposal of the Government would confer title on the person in whose favour it is passed—*Dongannma v. Jamma-nna*, A.I.R. 1931 Mad. 613, 133 I.C. 782.

Where the mortgagor in consideration of his relinquishing all connection with his father and his property, obtains certain property and deposits a copy of the registered deed of relinquishment executed by him in favour of his father, the deposit of the document has been held to be sufficient to create an equitable mortgage of the property obtained by him—*Punjab and Sind Bank v. Amir Chand*, A.I.R. 1930 Lah. 731, 11 Lah. 694, 125 I.C. 631; while receipts and certified copies of mutations and jamabandi papers have been held to be insufficient to create such a mortgage—*Jowala Das v. Thakur Das*, A.I.R. 1936 Lah. 251, 158 I.C. 562. It has, however been laid down in a recent Full Bench decision of the Rangoon High Court in order to create a valid mortgage by deposit of title-deeds under cl. (f), it is not necessary that the whole, or even the most material, documents of title of the property should be deposited, nor that the documents deposited should show a complete or good title in the depositor. It is sufficient if the deeds deposited *bona fide* relate to the property or are material evidence of title or are shown to have been deposited with the intention of creating a security thereon—*Chidambaram v. Aziz Meah*, A.I.R. 1938 Rang. 149 (F.B.), overruling *Chettyar Firm v. Ma Joo*, A.I.R. 1933 Rang. 299, 11 Rang. 239, 147 I.C. 1105. It is not necessary that all the material documents should be deposited. It is sufficient if the principal documents are deposited—*Ralli Brothers v. Punjab National Bank*, A.I.R. 1930 Lah. 920, 11 Lah. 564, 129 I.C. 21.

A tax-receipt and a copy of a map are not documents of title—*Majoo Team v. Ma Thein*, 10 Rang. 403, A.I.R. 1932 Rang. 185, 140 I.C. 487; *Chettyar Firm v. Ma Joo*, A.I.R. 1933 Rang. 299, 11 Rang. 239; see also *Jiwan Das v. Peoples' Bank*, A.I.R. 1937 Lah. 926. But the copy of an award filed in Court being evidence of title, when deposited, creates a valid equitable mortgage—*Gurudas Mal v. Punjab Sind Bank*, A.I.R. 1933 Lah. 972.

Where the original title-deeds have been lost, copies of such deeds may be deposited—*Mrs. Stewart v. Bank of Upper India*, 31 P.R. 1916, 34 I.C. 937. But unless it is proved that the original has been lost or is not available, an attested copy would not be enough—*Surendra v. Mohendra*, supra. A mortgage-deed executed by the owner of the property in favour of a third person can never be deemed to be a title-deed of the mortgagor—*Nageswara v. Srinivasa*, A.I.R. 1926 Mad. 743, 94 I.C. 427.

(3) 'Intent to create a security thereon':—The title-deeds must be deposited *with intent to create a security thereon*. Otherwise there is no equitable mortgage. Unless the deposit of title-deeds effects the transfer of an interest in a specific immoveable property for the purpose of security the payment of money advanced or to be advanced, it is absolutely nothing at all—*Imperial Bank of India v. U Rai Gyaw Thu & Co. Ltd.*, 51 Cal. 86 (98) (P.C.), 1 Rang. 637, A.I.R. 1923 P.C. 211. Where one partner of an oil-mill had mortgaged the mill, and the other partner, who

was the managing partner, discharged the mortgage and took delivery of the title-deeds from the mortgagee, no equitable mortgage was created in favour of the managing partner merely because he took charge of the title-deeds, in the absence of an intent to create a security. He took charge of the title-deeds merely as manager and chief of the partnership business, and the transaction was to be treated as an advance from one partner to another to be paid off out of the profits—*Heng Moh v. Lim Saw*, 1 Rang. 545 (P.C.), 29 C.W.N. 12 (16, 17), 45 M.L.J. 776, A.I.R. 1923 P.C. 87, 75 I.C. 287. Both under the English and the Indian law, mere possession of title-deeds by the creditor coupled with the existence of a debt does not necessarily lead to a presumption of an equitable mortgage in the absence of an intention to create a security—*Jethabai v. Putlibai*, 14 Bom. L.R. 1020, 17 I.C. 722; *Darbari v. Khetra*, 8 P.L.T. 85, A.I.R. 1927 Pat. 41 (42); *Featherston v. Fenwick*, 1 Br. CC. 270n; *Behram v. Sorabji*, 38 Bom. 372, 23 I.C. 140; *Chapman v. Chapman*, 13 Beav. 308; *Fisher on Mortgage*, 5th Ed., p. 20. *A fortiori*, when there is no existing debt, the mere delivery of title-deeds is not sufficient to create an equitable mortgage unless it is accompanied with an agreement that the deeds should stand as security for future advances—*Jaitha v. Haji Abdul*, 10 Bom. 634 (645); *Dixon v. Muckleston*, L.R. 8 Ch. 155; *Ganpat v. Adarji*, 3 Bom. 329. No equitable mortgage is created by an agreement to execute a mortgage in future in case the amount due on a promissory note be not paid together with the delivery of the title deed of the property agreed to be mortgaged—*Subramania Iyer v. Nedungadi Bank Ltd.*, I.L.R. (1963) 2 Ker. 60.

Where there is a loan and document or documents relating to the property alleged to have been mortgaged are deposited, the only other fact that need be established for proving an equitable mortgage is that such document or documents have been deposited with the intention of creating a security on the property. It is not necessary that the document or documents should declare a title in the depositor—*Brij Mohan v. Abdul Majid*, A.I.R. 1939 Rang. 185, 182 I.C. 564. Where there is a debt in existence and title-deeds are deposited by the debtor with the creditor to secure the debt, an equitable mortgage is at once created, even though the deeds are deposited with the express purpose of having a legal mortgage prepared—*Dayal v. Jivraj*, 1 Bom. 237 (241). But if at the time when the title-deeds were deposited with the purpose of having a legal mortgage prepared there was no antecedent or existing debt nor was any oral agreement made that the title-deeds should stand as a security for future advances, it cannot be said that the deposit was made with the intention of creating a security thereon; and therefore there was no equitable mortgage; and if the legal mortgage subsequently executed became invalid through want of registration, the creditor could not fall back upon the deposit of title-deeds as creating an equitable mortgage—*Jaitha Bhima v. Haji Abdul*, 10 Bom. 634 (644, 645); *Madras Deposit Society v. Oonamalai*, 18 Mad. 29 (30). “Certainly, if, before the money was advanced, the deeds had been deposited with a view to prepare a future mortgage, such a transaction could not be considered as an equitable mortgage by deposit; but it is otherwise where there is a present advance, and the deeds are deposited under a promise to forbear from suing, although they may be deposited only for the purpose of

preparing a future mortgage. In such a case the deeds are given in as part of the security and become pledged from the very nature of the transaction"—*Keys v. Williams*, 3 Y. & C. 55 (61).

A mortgage by deposit of title-deeds cannot be looked upon as a mere oral transaction as the act of deposit is the essential part of it. In fact, the intention to create security is inferred in such cases from the mere deposit of title-deeds coupled with the loan without more, without writing, without word of mouth—*Ralli Brothers v. Punjab National Bank*, A.I.R. 1930 Lah. 920, 11 Lah. 564, 129 I.C. 21; *Chief Controlling Rev. Authority v. Pioneer Spinners Pvt. Ltd.*, A.I.R. 1968 Mad. 222 (F.B.). Oral proof cannot be substituted for the written evidence of any agreement put into writing—*Ibid.* All that is required is the intention of the lender to hold the title-deeds as security and of the borrower to leave them as security with the lender. If there be any writing to evidence the transaction that will require registration—*Nageswara v. Srinivasa*, A.I.R. 1926 Mad. 743, 94 I.C. 427.

An equitable mortgage stands on the same footing as a simple mortgage—*Chettyar Firm v. Vyaravan Chettyar*, A.I.R. 1936 Rang. 400, 164 I.C. 751; *Ally Ramzan v. Balthasar and Sons, Ltd.*, A.I.R. 1936 Rang. 290, 14 Rang. 292, 163 I.C. 850. So, unless an agreement to the contrary is made, neither the right to possession nor the right to rents and profits are part of the interest which is transferred to the mortgagee—*Ibid* at p. 291.

As to the appointment of a receiver in such mortgages see Note 408, *post*.

Where registration necessary :—When title-deeds are deposited with intent to create a security, the law implies the creation of a mortgage, and no registered instrument is necessary under sec. 59. But if the parties choose to reduce the contract to writing, the document will be the sole evidence of its terms and the deposit and the document together form integral part of the transaction. As the deposit alone cannot create the mortgage, the document which constitutes the bargain regarding the security requires registration under sec. 17, Registration Act, where the value of the property is Rs. 100 or upwards. The crucial question is : Did the parties intend to reduce their bargain to the form of a document? If so, it requires registration. If, on the other hand, proper construction and the surrounding circumstances lead to the conclusion that the parties did not intend to do so, then there being no express bargain, the mortgage arises by implication of the law from the deposit itself with the requisite intention, the document being merely evidential does not require registration—*Rachpal v. Bhagwandas*, A.I.R. 1950 S.C. 272, 1950 S.C.J. 361; *United Bank of India Ltd. v. Lekharam Sonaram*, A.I.R. 1965 S.C. 1591; *Indersain v. Md. Raza Gauthier*, (1961) 2 M.L.J. 328; *Rangbati v. United Bank of India Ltd.*, A.I.R. 1961 Pat. 158; *Sham Lal Thakar Dass Agarwal v. Punjab National Bank Ltd.*, A.I.R. 1961 Punj. 81; *Parkash Dev Chopra v. New Bank of India Ltd.*, A.I.R. 1968 Delhi 244; *Binapani v. Rabindra Nath*, A.I.R. 1959 Cal. 213. In this case the draft memorandum, signed and delivered, was as follows :—"We write to put on record that to secure the repayment of the

money already due to you from us on account of the business transactions between yourselves and ourselves and the money that may hereafter become due on account of such transactions, we have this day deposited with you the following title-deeds in Calcutta at your place of businessrelating to our properties at Samastipur with intent to create an equitable mortgage on the said properties to secure all moneys.....on account of the said transactions.....It was held that the memorandum did not require registration. In *Kevaldas v. Chhotabhai*, A.I.R. 1955 Bom. 454 it has been held that if the memorandum merely records a past transaction of an equitable mortgage then writing does not require to be registered, but that if the memorandum constitutes a contract the writing requires to be registered. See also *United Bank of India Ltd. v. Lekhrum Sonaram & Co.*, A.I.R. 1958 Pat. 472; *C. Balajiah v. Central Government and Union of India*, A.I.R. 1967 Andh. Pra. 51 where it has been held that a subsequent suit to set aside the mortgage decree on the ground of non-registration is incompetent.

Priority :—A mortgage by deposit of title-deeds under a verbal arrangement to secure payment of a debt is a complete act by itself and not a mere "oral agreement or declaration" within the meaning of sec. 48, Registration Act. The holder of a registered instrument does not by virtue of that section take priority over an equitable mortgagee by deposit of title-deeds—*Gokul Das v. Eastern Mortgage Co.*, 33 Cal. 410 (422); *Coggan v. Pogose*, 11 Cal. 158; *Mrs. Stewart v. Bank of Upper India*, 31 P.R. 1916, 34 I.C. 937. See the new *Proviso* to sec. 48, Registration Act, added by Act XXI of 1929. A mortgage created by deposit of title-deeds stands in the Province of the Punjab on the same footing as any other mortgage permitted by law. The transaction prior in time takes precedence over subsequent transaction—*Ralli Brothers v. Punjab National Bank*, A.I.R. 1939 Lah. 920, 11 Lah. 564, 129 I.C. 21.

Extent of security :—In the case of an equitable mortgage by deposit of title-deeds the scope of the security is the scope of the title—*Veerappa v. Ma Tin*, A.I.R. 1925 Rang. 250, 88 I.C. 1011; *Pranjivandas v. Chan Ma Phee*, 43 Cal. 895, 43 I.A. 122, 20 C.W.N. 925, 35 I.C. 190. An equitable mortgage will be a security only for the debt specified in the agreement, and will not include debts previously due from the mortgagor to the mortgagee—*Mountford v. Scott*, T. & R. 274; but it may include such debts, if an intention that it should do appears from the circumstances—*Ex parte Farley*, 1 M.D. & DeG. 688; *Fisher on Mortgage*, 5th Ed., p. 19.

An equitable mortgage will affect the beneficial interest of the mortgagor in all the property comprised in the deposited documents including accessions—*Manningford v. Toeman*, 1 Col. 670; *Bhupendra v. Wajihunnissa*, 2 P.L.J. 293 (299, 301). Compare sec. 70. It will operate not only on the interest of the debtor at the time of the deposit but also on any interest which he may subsequently acquire—*In re Susty*, 69 L.T. 160. But an equitable mortgage of a house will not comprise an entirely separate house, attached to that house, which is not included in the title-deed. The rule is that where titles of property are handed over with nothing said except that they are to be security, the law supposes that the *scope of the security is the scope of the title-deeds*. Where, however, title-deeds are handed

over accompanied by a bargain, that bargain must rule. Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and extent of the security—*Pranjivandas v. Chan Ma Phee*, 43 Cal. 895 (900) (P.C.). An equitable mortgage of a house and godown cannot include a machinery, unless it is attached to the house for the permanent beneficial enjoyment thereof, within the meaning of sec. 8—*Veerappa v. Ma Tin*, 4 Bur. L.J. 52, 88 I.C. 1011, A.I.R. 1925 Rang. 250.

Where title-deeds are deposited under an oral agreement to cover present and future advances, as each advance is made, it becomes a charge on the property comprised in the title-deeds. Fresh deposits of title-deeds for subsequent advances are not necessary—*Mohini v. Janaki*, A.I.R. 1936 Cal. 412, 40 C.W.N. 1277, 166 I.C. 382.

There is an essential distinction between an equitable mortgage as understood in English law and the mortgage by deposit of title-deeds recognised by the T. P. Act—*Nathan v. Maruthi Rao*, A.I.R. 1965 S.C. 430.

ANOMALOUS MORTGAGE :—

See the new clause (g). Under the old section 98, an anomalous mortgage was a mortgage "not being a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage or an English mortgage, or a combination of the first and third or the second and third of such forms." In other words, a simple mortgage usufructuary (*i.e.*, a combination of a simple and a usufructuary mortgage) and a mortgage usufructuary by conditional sale (*i.e.*, a combination of a usufructuary mortgage and a mortgage by conditional sale) did not fall under the old definition of an anomalous mortgage. See for instance *Lal Narsingh v. Mohammad Yakub*, 4 Luck. 363 (P.C.), 33 C.W.N. 693 (698), and *Kandula Venkiah v. Donga Pallaya*, 43 Mad. 589 (600), where a combination of a simple and usufructuary mortgage was held not to be an anomalous mortgage. Under the present clause (g) of section 58, those two classes of mixed mortgages will be included in anomalous mortgages.

"Section 98 only deals with certain classes or types of anomalous mortgages and is not exhaustive. We think it would be better to define anomalous mortgages as covering all mortgages other than those defined in clauses (b) to (f) of section 58 and that the definition should be inserted in this section as a separate clause. The rights and liabilities of the parties under anomalous mortgages should be dealt with in section 98"—*Report of the Special Committee*.

In construing mortgages of this kind the Courts should be guided by the following principles : In the first place, Courts should not be astute to take a transaction out of the category of recognised mortgages. In the second place, the essential elements of the transaction should be examined to find out whether the constituent parts of the recognised mortgages are found in it. The third principle is that in finding whether there has been a combination or not, the intention of the parties must be given paramount weight to. It is not merely the language in which the document is worded that should conclude Courts. It is really the substance of the transaction that should be looked into—*Kandula Venkiah v. Donga Pallaya*, 43 Mad. 589 (603) (F.B.).

Anomalous mortgages will now include the following classes :—

- (a) combination of simple and usufructuary mortgage ;
- (b) combination of mortgage by conditional sale and usufructuary mortgage ;
- (c) local mortgages, such as *otti*, *kanom*, *etc.* ;
- (d) other miscellaneous forms.

These are considered below in detail :—

Section 58 does not purport to enumerate a complete list of permissible mortgages. It does not enact that a mortgage by absolute transfer shall not be valid unless it complies with all terms of an English mortgage—*Shiva Prasad v. Smith*, 17 Pat. 499.

347. Combination of simple and usufructuary mortgage :—In a pure usufructuary mortgage, the principal or interest or both are contracted to be satisfied out of the usufruct of the property. The mortgagee, so long as he remains in possession, has no right to claim the mortgage-money, and the mortgagor undertakes no personal liability. But where there is a *personal covenant* to pay the mortgage-debt, such covenant is inconsistent with a pure usufructuary mortgage, and it becomes a combination of a *simple and usufructuary mortgage* and consequently an anomalous mortgage—*Jafar Husen v. Ranjit*, 21 All. 4 (8, 10) ; *Kangayya v. Kalimuthu*, 27 Mad. 526 (527) (F.B.) ; *Ramarayanimgar v. Maharaja of Venkatagiri*, 50 Mad. 180 (P.C.), A.I.R. 1927 P.C. 32 (36) ; *Fida Ali v. Ismailji*, 6 N.L.R. 20, 5 I.C. 701 ; *Dattambhat v. Krishnabhat*, 34 Bom. 462 (466) ; *Ramayya v. Guruva*, 14 Mad. 232 (234) ; *Sivakami v. Gopala*, 17 Mad. 131 (132) ; *Venkataratnam v. Tota Varahaliah*, A.I.R. 1932 Mad. 768, 139 I.C. 449 ; *Hundaldas v. Balukhan*, I.L.R. 1942 Kar. 452 ; A.I.R. 1943 Sind 59 ; *Rupeswari v. Giridhari*, A.I.R. 1952 Ass. 19 ; *Rahimuddin v. Nayan Chand*, A.I.R. 1950 Ass. 18 ; *Narendra v. Bhagaban*, A.I.R. 1951 Or. 147 ; *Amarji v. Jaravarsingh*, 1953 M.B. 9 ; *Ramakammal v. Subbarathnam*, A.I.R. 1953 Mad. 13 ; *Sbbaraya v. Subramanyans*, A.I.R. 1952 Mad. 856 ; *Md. Saeed v. Abdul Alim*, A.I.R. 1947 Lah. 40 (F.B.), I.L.R. 1946 Lah. 805 ; *Chhadamrai v. Ram Naresh*, A.I.R. 1943 All. 337 (F.B.), I.L.R. 1943 All. 802. In such a case it is a mixed or anomalous mortgage even if the personal remedy is not accompanied by a right of sale—*Akbar Ali v. Maftzuddin*, 45 C.W.N. 823, 74 C.L.J. 370, A.I.R. 1942 Cal. 55 (58). Thus, a mortgage-deed after acknowledging receipt of the consideration and mortgaging the land with possession (the usufruct apparently being in lieu of interest) contained the following provision as to redemption : "Thereafter on (date) on paying the aforesaid Rs. 200 we shall redeem or recover back our land. If on the date so fixed the amount be not paid, in whatever year we may pay Rs. 200 in full on the 30th Pangu in any year, then you shall deliver back our lands to us". Held that the first sentence contained a promise by the mortgagor to pay on the date named, and that the mortgage was a combination of a simple and usufructuary mortgage—*Kangayya v. Kalimuthu*, 27 Mad. 526 (527) (F.B.). A mortgage provided for payment of interest and compound interest ; it also provided that the mortgagee should take possession and enjoy the net profits in lieu of interest and during the time of such pos-

session the interest and the profits should be deemed equal; and it was further agreed that if the profits did not cover the amount of interest, the mortgagors would make good the deficiency from their pockets in accordance with the accounts prepared by the agent of the mortgagee. It was a combination of a simple and a usufructuary mortgage—*Jawahir v. Sameshar*, 28 All. 225 (231) (P.C.). Where by a mortgage landed property was hypothecated, the mortgagee to get and retain possession appropriating the profits after payment of a revenue towards interest, and any further surplus towards principal, but by a further clause it was stipulated that the mortgagors should remain entitled to enhance the rents, eject tenants, cultivate land and grant leases, and that the mortgagee like the mortgagors should possess all the remaining powers during his possession, *held* that the mortgage was a combination of simple and usufructuary mortgage—*Lal Narsingh v. Md. Yakub*, 4 Luck. 363, 33 C.W.N. 693 (698) (P.C.). The terms of a mortgage were as follows:—"Possessory mortgage-deed of immoveable property for Rs. 50..... This sum with interest thereon at Re. 1 per cent., per month I shall pay on 23-8-11. If I fail to pay on that date I shall give up the said land as sold to you and execute a proper sale-deed. The property has been delivered possession of to you on this very date.....you shall appropriate the profits towards interest." *Held* that the first portion of this deed with the covenant to repay with interest contained all the essentials of a simple mortgage, and the latter part (appropriation of profits towards interest) contained the elements of a usufructuary mortgage. It was therefore a combination of the two—*Kandula Venkiah v. Donga Pallaya*, 43 Mad. 589 (599) (F.B.). A mortgage-bond provided as follows:—"The whole debt, including principal and interest will be paid in 4 years.....If the amount due to you on account of principal and interest be not paid within the time fixed, then you are to take up the management of the land and house. We have this day put the said land and house into your possession." *Held* that it was a combination of simple and usufructuary mortgage—*Motiram v. Vitai*, 13 Bom. 90 (94). When a due date has been fixed for the payment of the mortgage-money, the mortgage is not a purely usufructuary mortgage—*Jag Sahu v. Ram Sakhi*, 1 Pat. 350 (355).

But in an Allahabad case it has been held that where the mortgage is in other respects a usufructuary mortgage (*e.g.*, where interest is stipulated to be taken out of the usufruct), the mere insertion of a personal covenant to pay the mortgage debt, unaccompanied by a *hypothecation* of the property (*i.e.*, without an indication of an intention on the part of the mortgagor to charge the mortgaged property with the payment of the entire mortgage-debt) cannot alter the character of the mortgage, and it is still a pure usufructuary mortgage—*Kashi Ram v. Sardar Singh*, 28 All. 157 (160) (dissenting from 14 Mad. 232 and 17 Mad. 131).

Where in a simple mortgage-bond it was provided that in case of default in paying the mortgage-money with interest the mortgagee would have the option (*akhtiar*) to get possession of the hypothecated property in lieu of the principal and interest, it was held to be a combination of a simple and usufructuary mortgage—*Ram Lochan v. Bachhu*, A.I.R. 1934 Oudh 255 (266), 148 I.C. 1197. Where the mortgage was partly usufructuary, but there was an express promise to pay the sum on a

particular date and to redeem the land on that date, it was an anomalous mortgage—*Qadir v. Mehr Nur*, A.I.R. 1935 Lah. 103, 16 Lah. 612, 158 I.C. 206. Where a mortgage-deed contained one clause which would make it a usufructuary mortgage, but another clause provided in the most explicit terms recovery of the amount due from the mortgaged property, it was an anomalous mortgage—*Mohan Devi v. Talib Mehdi*, A.I.R. 1938 Lah. 145. A deed of mortgage with possession provided for payment of principal and interest at a specified rate. By a separate document of the same date the mortgagee leased part of the mortgaged property to the mortgagor providing that upon default in payment of the rent reserved it should be a charge upon the property included in the mortgage-deed. It was held by the Privy Council that it was an anomalous mortgage—*Panaganti v. Venkatagiri*, 50 Mad. 180 (P.C.). A mortgage-deed provided that on receipt of a certain amount the possession of the property was made over to the mortgagee. It was then stipulated that after a period of 28 years the debt would be extinguished both as regards principal and interest. There was a stipulation by which the mortgagor agreed that in the event of the mortgagee being dispossessed of the property in any way the mortgagor would on account of the period of depression be liable to pay interest at a certain rate per month. There was in addition to this a personal covenant to pay, *held* that the mortgage was an anomalous mortgage—*Suresh v. Jadav*, A.I.R. 1940 Cal. 373.

Where a usufructuary mortgage (*dakhali rehan*) deed provided that so long as the principal was not paid the mortgagees were to remain in possession and if they were dispossessed they would realize the principal in any manner they liked and as security for the realization of the money in that event the land was mortgaged, it was held that it was a plain usufructuary mortgage of the kind described in clauses (a) and (d) of sec. 58 and not a combination of a simple and a usufructuary mortgage—*Udai Singh v. Bhunesharnath*, A.I.R. 1937 Pat. 94, 167 I.C. 755. The definition of a usufructuary mortgage in cl. (d) of sec. 58 refers to payment of the mortgage-money only in connection with the mortgagee's rights to retain possession and includes nothing inconsistent with its application to mortgages containing a condition for mere postponement of the right to repay. The mere fact that in a usufructuary mortgage there is a condition barring redemption within 5 years of the date of mortgage, would not take it out of the category of a usufructuary mortgage and make it an anomalous one—*Vaddiparthi v. Cadimsetti*, 41 M.L.J. 563, 68 I.C. 717.

For other instances of anomalous mortgage, see *Dharameshwari v. Labhyadhar*, A.I.R. 1950 Ass. 197 and *Amarji v. Joravarsingh*, A.I.R. 1953 M.B. 9.

348. Mortgage usufructuary by conditional sale :—This is a combination of a mortgage by conditional sale and a usufructuary mortgage.

As instances of this kind of mortgage, mention may be made of *Katkabala Muddata Kriyam* (*Ramasami v. Samiappa*, 4 Mad. 179) or *Bye-bil-wafa* with possession (*Girwar Singh v. Thakur Narain*, 14 Cal. 730). A mortgage with possession provided that the rents and profits should be set off against the interest, that the mortgage should not be redeemable for 5 years, and that if the mortgage was not redeemed within a

period of 20 years, the mortgagee should treat the lands as having been sold to him absolutely. *Held* that the mortgage was an anomalous mortgage, or a combination of a usufructuary mortgage and a mortgage by conditional sale—*Narayanamurthi v. Applanarasimhulu*, 41 M.L.J. 563, 68 I.C. 717. A mortgage-deed covenanted that the mortgagee should have possession of the mortgaged property in lieu of interest, that the mortgage-debt was payable at the end of the year 1307, and that if the mortgagors failed to pay the amount of the debt at the end of the specified period, the mortgagee should be at liberty to foreclose according to law. *Held* that the mortgage combined the incidents of a mortgage by conditional sale with an incident of a usufructuary mortgage—*Sita Nath v. Thakurdas*, 46 Cal. 448 (452).

Under a mortgage usufructuary by conditional sale, if the mortgagee fails to obtain possession, he is entitled to sue for possession of the mortgaged property or for the mortgage-money at once under sec. 68. But he is not bound to take the former course, nor is he obliged under sec. 68 to sue at once. It is open to him to bring a suit for the recovery of the mortgage-debt with interest, the money to be realised by foreclosure. This suit is in effect a suit under secs. 67 and 68 combined—*Sita Nath v. Thakurdas*, 46 Cal. 448 (454). Where a deed states that H has delivered possession of his property to K on receiving Rs. 700/- as loan and that K will be the absolute owner if the money is not repaid within 10 years, the transaction is a mortgage though described as a conditional sale in the deed—*Hamappa Sanyappa v. Ramangouda*, A.I.R. 1956 Bom. 575.

A mortgage-deed provided that the property was mortgaged without possession. It contained a covenant to pay the principal and the accumulated compound interest at the end of the period of 5 years, there was also a provision that the mortgagors were not to be entitled to redeem earlier than at the expiration of 5 years, and finally it provided that in case of non-payment of the entire amount of principal and compound interest, the mortgagees would, after expiry of the stipulated period, have power to obtain proprietary possession of the entire property mortgaged by bringing a suit for a decree for foreclosure: *held*, the mortgage was not a mortgage by conditional sale, but was an anomalous mortgage—*Ujagar Lal v. Lokendra Singh*, A.I.R. 1941 All. 169, 1941 A.L.J. 111. The test whether a particular document was a mortgage by conditional sale or is some other kind of mortgage is not what the parties have said it is, but is rather whether it fulfils those statutory requirements which the legislature has laid down—*Ibid*.

348A. Local forms of Anomalous mortgage :—(1) *Otti* mortgages of Malabar. An *otti* mortgage, according to Malabar law, is not redeemable before the expiration of 12 years from the date—*Edathil v. Kapa-sham*, 1 M.H.C.R. 122, *Keshava v. Keshava*, 2 Mad. 45.

(2) *Kanom* mortgages of Malabar. A *Kanom* is an anomalous mortgage—*Chandan v. Muhammad*, 1914 M.W.N. 618. A *Kanom* may be a lease or a mortgage; it is a mere lease, if a sum is advanced as security for the rent or proper cultivation, to be repaid on the expiry of the term; and is a mortgage, if it is made to secure a loan advanced to the *jenmi*—*Silapani v. Ashtamurthi*, 3 Mad. 382 (F.B.). But ordinarily, and in the

absence of special circumstances, it is to be treated as a mortgage—*Raman v. Krishna*, 6 Mad. 325 (326). And since it partakes of the nature of a usufructuary mortgage and a lease, it is an anomalous mortgage—*Kannakurup v. Sankarvarma*, 44 Mad. 344. A *kanom* mortgage also, like an *otti* mortgage, cannot be redeemed before the lapse of 12 years from the date of its execution, unless the parties have by express contract provided for its redemption at an earlier date—*Kelu Nedungadi v. Krishnan*, 26 Mad. 727 (728); *Kasara v. Govindan*, 5 Mad. 310. For all the incidents of a *kanom* see *Parvati v. Makkam*, A.I.R. 1951 Mad. 187 (F.B.), I.L.R. 1952 Mad. 92 and *Mariamamma v. Raman Pillai*, A.I.R. 1953 Tr.-Coch. 273. For the purpose of understanding whether a particular document is a *kanom* one may see whether it provided for liability to pay renewal fee—*Nambudiri v. Kartheya*, A.I.R. 1952 Mad. 176. Where all the terms generally found in a *kanom* are contained in a *kanomkuzhikanom* deed the fact that the parties agreed to one or more terms in addition does not make it the less a *kanom*—*Madhavi v. Sucheela*, A.I.R. 1950 Mad. 612, (1950) 1 M.L.J. 556. For the incidents of a *kanapaltam* tenure and the distinction between a *kanom* and a usufructuary mortgage, see *Sanku v. Hari*, A.I.R. 1952 Tr.-Coch. 333 (F.B.).

Chitham is an anomalous mortgage. For the nature of *chitham* and *vatantor* see *Bhagwanji v. Thacker*, A.I.R. 1952 Kutch 65.

(3) *Illudarwara of Malabar*.—Sec 1 M.H.C.R. 81 and 4 Mad. 113.

(4) *Paruvartham of Malabar*.—The characteristic feature of this kind of mortgage is that in redeeming the mortgage, the market-value of the land at the time, and not the amount for which it was mortgaged, is to be paid before restoration of the mortgaged land—*Shekari Varma v. Mangalam*, 1 Mad. 57.

(5) *San mortgage of Gujerat*. Its peculiarity is that the *san* mortgage without possession has priority over a subsequent *bona fide* purchaser with possession—*Paramaya v. Sonde Shrinivasapa*, 4 Bom. 459.

348B. Other instances of anomalous mortgage :—A contract of mortgage by which the mortgagor, in lieu of a sum due on account, made over to the mortgagee certain land for enjoyment for a certain number of years "in liquidation of the aforesaid rupees, and after the expiry of the said period the mortgagees will have no right whatever to the land," was held to be an anomalous mortgage—*Tukaram v. Ramchand*, 26 Bom. 252. Under a usufructuary mortgage, the mortgagee is entitled to remain in possession 'until payment of the mortgage-money' (sec. 58), so that no period of time can be fixed during which the mortgage is to subsist; however; the parties stipulate that the mortgage is for a definite period during which the mortgagee is to remain in possession, and after the end of the period the mortgagor shall be entitled to redeem, the mortgage does not strictly fall under the definition given in sec. 58 (d) but will be treated as an anomalous mortgage—*Hikmatulla v. Imam Ali*, 12 All. 203 (205). So also, where a mortgage-deed ran as follows.—"As we have received Rs. 500, you will, in lieu of the said amount and interest, enjoy the said property for three years by virtue of the *arakatta otti*. . . . on the condition that, on the expiry of the said three years, we should redeem the land without paying either principal and interest. You will, on the expiry of

the said period, deliver possession of the said immoveable property, without raising any objection." *Held* that the instrument created an anomalous mortgage—*Visvalinga v. Palaniappa*, 21 Mad. 1 (3).

A mortgage-deed provided that the mortgagee would be put in possession of the mortgaged properties and appropriate the usufruct towards payment of interest, after paying the landlord's rent; that the mortgagor would pay off the debt within 8 years and take back the properties; that in case of default the mortgagee would be entitled to recover his dues by suit, by sale of the mortgaged properties as well as other properties of the mortgagor; and that in case any hindrance or obstruction was offered to the possession of the mortgagee, he would be entitled to sue for and recover the amount of the bond. *Held* that the mortgage was neither simple nor usufructuary but an anomalous mortgage—*Gajadhar v. Sibananda*, 28 C.W.N. 532, 81 I.C. 768, A.I.R. 1924 Cal. 592; *Jagannath Prasad Tulsiram v. Kanti Prasad Batlilal*, A.I.R. 1964 Madh. Pra. 305; *A. V. Rama Chandra Naidu v. Hassina Bi*, (1968) I.M.L.J. 139. A mortgage with possession for a fixed term without any provision for accounting is in the nature of an anomalous mortgage, and it automatically redeems itself at the end of the fixed period—*Bhika v. Sheikh Amir*, 19 N.L.R. 1, A.I.R. 1923 Nag. 60 (61). In a mortgage-bond it was provided thus: "We shall pay off your said amount within three years from to-day. But if in the meantime a third party brings any suit against us or any one of us and attaches or brings into auction any property of us, then without waiting for the due date you shall forthwith bring a suit for foreclosure of this *Katkobala* and having got a decree shall be the owners of the properties mentioned in the schedule below." *Held* that this was an anomalous mortgage, and not a mortgage by conditional sale—*Solema v. Hafez*, 54 Cal. 687, A.I.R. 1927 Cal. 836, 104 I.C. 833. Where in a mortgage-deed there was a covenant by the mortgagor to pay interest, but no covenant to repay the principal, and subsequent to the execution of the mortgage, the mortgagor deposited certain title-deeds not mentioned in the mortgage-document, as further security, *held* that this was neither a simple nor an equitable mortgage, but an anomalous mortgage—*Gupta v. Administrator-General*, 5 Rang. 558, A.I.R. 1928 Rang. 16 (17).

In a mortgage-deed described to be a usufructuary mortgage, the mortgagor stated that he had put the mortgagee in possession. The deed, however, authorized the mortgagee to demand the mortgage-money at any time and conferred on him the power to realize it by sale of the property. It was further provided that the property would remain hypothecated until the mortgagor paid up the mortgage-money and redeemed the property: *held* that the mortgage was an anomalous mortgage—*Mir Singh v. Raghubir Singh*, A.I.R. 1939 All. 615, 184 I.C. 873. Where under a mortgage without possession a period was fixed for payment of the mortgage debt, and in default the mortgagee was entitled to enter into possession, the mortgage is an anomalous mortgage subject to foreclosure—*Govinda v. Narain*, A.I.R. 1956 Hyd. 107. Where a mortgage provides that the factory is mortgaged with possession, that the mortgage-money is repayable in annual instalments and that in default of payment of five instalments the factory shall be deemed to have been foreclosed with the right of redemption extinguished, the transaction is an anomalous mortgage with a right to foreclose—*Vijay Kumar v. Ramprasad*, A.I.R. 1960 Bom. 411.

348C. Sub-mortgage:—In ordinary parlance, the term "sub-mortgage" is often used as synonymous with a puisne mortgage, but the two are really different. Puisne mortgage means a second or subsequent mortgage executed by the mortgagor; but a sub-mortgage is a "mortgage of a mortgage," i.e., a mortgage executed by the mortgagee of his security under the original mortgage. A mortgage may be transferred by the mortgagee to some creditor of his own by way of mortgage; such a mortgage of a mortgage is known as "sub-mortgage."

The sub-mortgagee simply has a simple mortgage of a mortgage. The right given to him by the sub-mortgage is, in default of payment, to sell the interest mortgaged to him and to sell through the Court. He has no privity of contract or privity of estate with the original mortgagor such as would under the English law give him the right to join the original mortgagor and sell or foreclose in the suit which he files primarily against his sub-mortgagor and also secondarily against the original mortgagor—*Maung Po v. Ma Ngwe*, A.I.R. 1937 Rang. 56, 167 I.C. 449. But see *Vijayaraghavalu v. Arunachalam*, A.I.R. 1939 Mad. 165, 48 M.L.W. 766 where it has been held that a sub-mortgagee may maintain a suit against the original mortgagor; see also the cases cited there and *Vengannan v. Ramaswami*, A.I.R. 1943 Mad. 498, (1943) 1 M.L.J. 342. See in this connection *Manavala v. Md. Yoosaf*, A.I.R. 1943 Mad. 100, I.L.R. 1943 Mad. 195.

A sub-mortgagee stands in no higher position than the mortgagee. He is bound by the state of account between the mortgagor and the mortgagee. He must take the accounts as they stand after the creation of the security, unless he protects himself by giving notice to the mortgagor—*Bhagwati Prasad v. Dullan Singh*, I.L.R. 1939 All. 943, A.I.R. 1939 All. 719, 1939 A.L.J. 924. A mortgaged certain property to B who mortgaged it with some other properties to C. A had no notice of the sub-mortgage. B obtained a decree against A, but did not execute it. C thereafter obtained a decree against B and purchased the property in execution. A's heirs then sued for the property. C contended that he was not bound by the decree in B's suit and that the security still subsisted; held that though the security subsisted for certain purposes after the passing of the final decree, it subsisted only in respect of the decretal amount and so the sub-mortgagee was not entitled to claim the total amount on his sub-mortgage—*Ibid*.

Where a mortgagee became insolvent and thereupon the Official Receiver purported to sell by auction the property of the insolvent including his claim under the mortgage and the purchaser sued on the mortgage, before a formal registered sale-deed was executed, without impleading the Official Receiver, it was held that the purchaser was not entitled to sue as an assignee of the mortgage-right in the absence of a registered deed of transfer—*Vijayaraghavalu v. Arunachalam*, supra, relying on *Skinner v. Bank of Upper India*, A.I.R. 1935 P.C. 108, 57 All. 314, 62 I.A. 115, 155 I.C. 743.

A sub-mortgage may be made either by an assignment by the mortgagee of his interest, or by deposit of title-deeds where this is permissible.

An equitable sub-mortgage by mere deposit of title-deeds without a registered document can be validly made even of an equitable mortgage—

Maung Thaung v. Chettyar Firm, A.I.R. 1936 Rang. 366, 164 I.C. 724; *Gurnam Kaur v. R. K. Banerji*, A.I.R. 1937 Rang 69, 14 Rang. 522, 168 I.C. 830; *Ramanathan v. Dowlat Singhji*, A.I.R. 1938 Mad. 865 (874), (1938) 2 M.L.J. 534. A sub-mortgage of an equitable mortgage is deemed to be concluded on the day on which the deeds are deposited—*Gokul v. Eastern Mortgage & Agency Co.*, 33 Cal. 410.

A sub-mortgagee of mortgage-rights in immoveable property is entitled to a decree for sale of the mortgage-rights of his mortgagor—*Ram Shankar v. Ganesh*, 29 All. 385 (F.B.). In a properly constituted suit, the sub-mortgagee may have a sale of the interest mortgaged to him, subject to the right of redemption of the original mortgagor—*Ibid* (at p. 406).

A sub-mortgage is only good to the extent of the amount due on the original security, on payment of which the security is released and the deeds must be handed back to the mortgagor—*Mathews v. Wallwyn*, 4 Ves. 118; *Maung Shan v. U. Po*, 5 Rang. 749, A.I.R. 1928 Rang. 30 (31). The sub-mortgagee cannot recover anything more than the amount due to the original mortgagee from the original mortgagor, whatever may be the state of the account between himself and the original mortgagee—*Nga Kye v. Nga Po Min*, U.B.R. (1906) Sub-mortgage 1. And the original mortgagee cannot recover from the original mortgagor anything more than the amount stipulated in the mortgage, whatever may be the contract between the mortgagee and his sub-mortgagee—*Imdad Hasan v. Badri*, 20 All. 401 (408). The sub-mortgagee becomes an assignee of the debt. Under all legal principles he is entitled therefore to recover the debt and to realize it from the security though he is bound, no doubt, to render an account of the sum recovered, and, if it exceeds the sum due to him, to pay over the surplus to his own mortgagor—*Chela Ram v. Walidad*, 31 P.R. 1900 (F.B.). The original mortgagor is entitled to sue the sub-mortgagee for redemption; conversely, the latter may sue the former for recovery of his money out of the mortgaged property—*Nga Kye v. Nga Po*, supra.

The position of the original mortgagee in relation to the sub-mortgagee is that of a surety, and he is thus entitled to recover the debt from the original debtor, but is bound to pay it over to the sub-mortgagee in discharge of the sub-mortgage—*Gurney v. Seppings*, 2 Phil. 40; *Dost Mohammad v. Dheru Mal*, A.I.R. 1940 Pesh. 25, 189 I.C. 665. The sub-mortgagee can enforce his claim against the mortgaged property as well as against the mortgagee. The only reservation is that if notice of the sub-mortgage is not given to the mortgagor and the latter pays the mortgage-money to the mortgagee, the sub-mortgagee loses his right to proceed against the property—*Ibid*. A sub-mortgagee is not privy to the original contract of mortgage and until and unless he gives notice to the mortgagor, the latter has got every right to redeem the mortgage and get rid of the liabilities thereunder. The sub-mortgagee has a remedy in such circumstances against his transferor only, that is to say, the mortgagee—*Bhag Chand v. Sujan Singh*, A.I.R. 1938 Pesh. 73 (76); *Viswanath v. Chimmitt Kutti*, A.I.R. 1932 Mad. 115, 55 Mad. 320, 135 I.C. 535. If payment of the original mortgage-debt is made by the original mortgagor to the original mortgagee without notice of the sub-mortgage, the sub-mortgage is extinguished, and the sub-mortgagee cannot hold the property against the original mortgagor—*Maung Shan v. U Po*, supra. See also *Sahadev v.*

Sheikh Papa Miya, 29 Bom. 199 (202). If the original mortgagor had notice of the sub-mortgage, he is bound to pay his debt to the sub-mortgagee, and the sub-mortgagee can hold the property against the original mortgagor, till the sub-mortgage is redeemed—*Nga Kye v. Nga Po*, supra; *Ma Myat v. Ma Nyan*, 2 Rang. 561 (565), A.I.R. 1925 Rang. 140.

The sub-mortgagee, by virtue of his assignment, is not only entitled to the usual remedies against his mortgagor (i.e., the original mortgagee) but is also entitled to a remedy against the original mortgagor; the position of the original mortgagee after the sub-mortgage becomes that of a surety, the sub-mortgagee becomes the creditor and the original mortgagor continues to remain the debtor. The original mortgagee is not entitled to exercise a power of sale as against the mortgagor. The sub-mortgagee is not bound by the result of any suit brought by the original mortgagee, for the operation of the sub-mortgage is to transfer to the sub-mortgagee all the rights and remedies the original mortgagee had against the original mortgagor. Where the debt has not been discharged, and the original mortgagee has already obtained a decree on his mortgage, which he has failed to execute within limitation, there is no bar to the exercise of the sub-mortgagee's right to the sale of the mortgaged property—*Kanhaiya Lal v. Mahadeo*, 18 I.C. 389 (Oudh).

Where a sub-mortgage is created for a lesser amount than that of the original mortgage and the claim of the sub-mortgagee is less, a decree obtained by the latter for his claim making both the mortgagor and original mortgagee parties to his suit does not preclude the original mortgagee from asserting his right in a subsequent suit, the causes of action being separate—*Mohideen v. Nagore*, A.I.R. 1937 Mad. 799, (1937) M.L.J. 536. Where the original mortgagee creates a sub-mortgage over some of the mortgaged property and brings a suit on his mortgage against the mortgagor to which the sub-mortgagee refuses for some reason or other to be joined as plaintiff, the original mortgagee can maintain the suit to assert the right which still vested in him—*Mohan Devi v. Talib Mehdi*, A.I.R. 1938 Lah. 145 (148).

Where in ignorance of the existence of a sub-mortgage, the original mortgagor substituted the original mortgage by another mortgage covering a distinct property, and the sub-mortgagee brought a suit for sale of the original property sub-mortgaged to him, *held* that the substitution of the original mortgage by a new one in favour of the mortgagee did not extinguish the sub-mortgage, and therefore the sub-mortgagee was entitled to bring the mortgagee's interest under the earlier mortgage to sale. *Held* also that the mortgagor's remedy against the sub-mortgagee was just what he would have had against the original mortgagee, if the latter sought to enforce his debt against that particular property, viz., to redeem by paying the amount sued for—*Chakrapani Chetty v. Lakshmi Achi*, 35 M.L.J. 309, 45 I.C. 769. There is no necessity for the original mortgagee to give notice of the sub-mortgage to the mortgagor, and such want of notice will not render the sub-mortgage invalid—*Ibid*.

It is, however, a well-settled principle of law that if the sub-mortgagee gives no notice to the original mortgagor of the assignment of the mortgagee's rights in his favour the original mortgagor would be justified in paying the debt wholly or in part to the assignor thereby extinguishing the

original mortgage altogether. It follows that on such an extinction the sub-mortgagee has no remedy left against the property—*Mohan Singh v. Sewa Ram*, A.I.R. 1924 Oudh 209, 75 I.C. 579; *Fateh Bahadur v. Mt. Subhago*, A.I.R. 1938 Pat. 265, 175 I.C. 563. The question of notice will, however, arise if payment has in fact been made. The mere fact that the consideration or a part of it was not paid by the transferee is not sufficient to show that the right did not pass to the transferee, when it is otherwise clear that it was the intention of the parties that the transaction was to be effective—*Ibid* at p. 266.

348D. Mortgage of moveables :—In India, mortgage of moveables in the premises, existing at the time as also those which might be subsequently acquired and brought there, is valid—*H. V. Low & Co. v. Pulin-behari*, 59 Cal. 1372, A.I.R. 1933 Cal. 154. A mortgage of moveable property can be created orally without delivery of possession, and the mortgagee is entitled to a decree for sale as much as a mortgagee of immoveable property—*People's Bank of India v. Forbes, Forbes Campbell & Co.*, A.I.R. 1939 Lah. 398 and the authorities cited there. See also *Co-operative Hindusthan Bank v. Surendra*, A.I.R. 1932 Cal. 524 (526), 36 C.W.N. 263, 138 I.C. 852; and *Dwarampudi v. Kamajulu*, A.I.R. 1933 Mad. 241, 56 Mad. 500, 142 I.C. 96; *Kesrimal v. Bansilal*, A.I.R. 1952 M.B. 196; *Pran-shankar v. Raghunath*, A.I.R. 1952 Sau. 107. A holder of a charge on moveable property who has obtained a personal decree for his debt cannot, however, without leave of the Court, sue to enforce his mortgage-security. Order 34, r. 14 does not apply as it relates to immoveable property only. But his charge is not extinguished and he is entitled to all rights thereunder as defendant in a prior mortgagee's suit—*Official Assignee v. Chinnivram*, A.I.R. 1938 Bom. 51, 57 Bom. 346. A mortgagee in possession of moveable property has on the insolvency of the mortgagor a right to sell the property without intervention of the Court. His right is in no way inferior to that of a pledgee—*In re Ahmed*, A.I.R. 1932 Bom. 613, 34 Bom. L.R. 1398.

Where there is a mortgage of moveable property and it is allowed by the mortgagee to remain in possession of the mortgagor as ostensible owner, and the property is again mortgaged to a third party and sold, the first mortgagee cannot recover from the second mortgagee unless he can show that the second mortgagee had notice of the prior mortgage. Section 179 of the Contract Act has no application to such a case—*Dāyalji v. Karachi Electric Supply Co.*, A.I.R. 1940 Sind 177, 190 I.C. 790; *K. M. S. Mallayan Chettiar v. Sivarama Pillai Krishna*, A.I.R. 1955 Trav.-Co. 162.

Hypothecation of moveable property is not a mortgage within the meaning of cl. (a) of sec 58 *ante* and hence sec. 59 *post* does not apply and the mortgage need not be registered—*Avana Mana v. Mangat Valapil*, (1941) 2 M.L.J. 293, A.I.R. 1941 Mad. 805, 1941 M.W.N. 751.

A mortgagee of moveable property is not entitled to claim possession. His right is only to enforce the mortgage by suing for a sale of the property or by the appointment of a receiver to secure possession of it in order that his security may be realized—*Venkatachalam v. Venkatrami*, (1940) 2 M.L.J. 456, 1940 M.W.N. 978, A.I.R. 1940 Mad. 929.

The right of a mortgagor of movable property, may be to sue for

redemption and that of a mortgagee to sue for foreclosure where that is the term of the contract—*Jagannath v. Fatechand*, A.I.R. 1949 Nag. 368, I.L.R. 1949 Nag. 243.

Such a mortgage should be distinguished from a *pledge* under sec. 172, Contract Act. In a mortgage of movables the intention is to pass the ownership to the mortgagee, though this may be without possession, while in a pledge there must be delivery of possession and it does not pass ownership—*Ibid.* See also *Kesrimal v. Bansilal*, supra and *Padam Singh v. Ram Krishan* A.I.R. 1954 M. B. 6.

Mortgage of growing crops:—As immovable property does not include growing crops under sec. 3, *ante*, a deed of mortgage of immovable property and also of the produce realized therefrom every year operates in respect of the produce on the land as mortgage of movable property. The moment the crop comes into existence the mortgagee gets title to the crop—*Venkatachalam v. Venkatarami*, supra. So long as the mortgagee allows the mortgagor to remove the crops and does not secure them during the year the crops were raised, he loses his right to them. His rights cannot prevail against a *bona fide* assignee from the mortgagor without notice of the mortgage of the produce—*Ibid.*

59. Where the principal money secured is one hundred rupees or upwards, a mortgage, *other than* a mortgage by deposit of title-deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

(Omitted.)

Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein, Akyab and in any other town which the Governor-General in Council may, by notification in the *Gazette of India*, specify in this behalf, by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon.

Amendment : —By sec. 20 of the T. P. Amendment Act (XX of 1929), the italicised words have been added in the first para, and the last para has been omitted. The addition of the words in the first para is consequential to the omission of the last para; and this last para has been transferred to clause (g) of sec. 58 with slight verbal alterations. See Note 356.

Scope :—Where a mortgage transaction is entered into and completed within an area in which this Act is in force but the property is situate outside such area, the form and validity of the mortgage deed are determined by the *lex situs* of the property and not by the *lex loci contractus*—*Iqbal Begam v. Uttam Chand*, A.I.R. 1947 Lah. 324 (F.B.), I.L.R. 1947 Lah. 828.

348E. Principal money secured :—The term “principal money secured” is intended to show that *interest* or any other addition is not to be taken into account in calculating the value of the instrument for the purpose of registration—*Habibulla v. Nackched*, 5 All. 447 (F.B.); *Ram-doolary v. Thacoor*, 4 Cal. 61; *Kattamuri v. Padalu*, 5 Mad. 119; *Nago v. Babaji*, 8 Bom. 610; *Laxman Rao v. Kesho*, 4 N.L.R. 90; *Gama v. Lahanoo*, 4 N.L.R. 86. A bond showed that Rs. 90 was due and the mortgagor agreed to pay that sum in 18 years by six-monthly instalments of Rs. 5 each carrying a certain interest. He was, in case of default, liable for the payment of the whole sum of Rs. 180 *plus* interest. *Held* that the principal sum secured by the mortgage was Rs. 90, and that the deed did not require registration—*Jodh Ram v. Lajja Ram*, 11 A.L.J. 729, 21 I.C. 78.

349. Registration :—Prior to the amendment of clause (c) of sec. 58, a mortgage by conditional sale was usually effected by means of two deeds, one purporting to be a deed of sale and the other containing an agreement to reconvey within a certain period; and both documents had to be registered. If, in such a case, the deed of sale was alone registered, and the agreement to reconvey was unregistered, the latter document was inadmissible in evidence for the purpose of showing that the agreement along with the absolute conveyance constituted a mortgage by conditional sale—*Puttisesha v. Kuppachar*, 1919 M.W.N. 87; *Namdev v. Dhondur*, 22 Bom. L.R. 979; *Muthu Venkatachalapati v. Pyunda Venkatachalapati*, 27 Mad. 348. See in this connection *Rajjula v. Jalaluddin*, A.I.R. 1950 Hyd. 51. Under the present law, however, a mortgage by conditional sale must be effected by only *one* document. See Note 338 under sec. 58.

The requirements of this section cannot be got over by applying the doctrine of part performance. Consequently an admission by the mortgagor that the mortgagee was in possession of the property as *mortgagee* under an oral mortgage for a consideration of more than Rs. 100 cannot create a mortgage; nor is an entry in the record of rights to that effect sufficient. The principle that once a mortgage always a mortgage will not be applied as there is no mortgage at all—*Bishan v. Sheodhari*, A.I.R. 1947 Pat. 110, 12 B.R. 599. Where the property is worth Rs. 100 or upwards and the purported mortgage-deed is neither attested nor registered, it is not liable to stamp duty—*Crompton Engineering Co. v. Chief Controlling Revenue Authority*, A.I.R. 1953 Mad. 764 (F.B.), I.L.R. 1953 Mad. 566. Where a prior mortgage is recorded in Book IV instead of Book I by mistake, it is a mere defect of procedure covered by sec. 87, Registration Act, and the mortgage is not invalid—*Varadaraja v. Kailasam*, A.I.R. 1947 Mad. 175, (1946) 2 M.L.J. 355.

Under the first para of this section, a simple mortgage for Rs. 100 or upwards, must be effected by a registered instrument. The second para lays down that a mortgage under Rs. 100 may be effected by a registered instrument or by delivery; but delivery of possession does not take place

in a simple mortgage. So, a simple mortgage can be effected only by a registered instrument, irrespective of the amount of the loan—*Mg. Shwe Bya v. Chawari*, 4 Bur. L.T. 219, 12 I.C. 25.

(It should be noted that the words "registered instrument" in the second para have been substituted by the Amendment Act of 1904 for the words "an instrument" ; and therefore prior to 1904, a simple mortgage of value less than Rs. 100 could be created by an unregistered instrument.)

In case of the other kinds of mortgage, if the money secured is less than Rs. 100, delivery of possession would be sufficient. The validity of such a possessory mortgage is not liable to be affected by the fact that an unregistered document is also executed—*Habibur v. Rasul*, 19 A.L.J. 376, 62 I.C. 859. But if the mortgage is made in writing, and no delivery of possession takes place, the writing must be registered, for sec. 4 has abolished optional registration in respect of all instruments executed after 11th March 1904. Compare the cases cited in Note 290 under sec. 54. As to competition between possession and registration, see the analogous cases of sale in Note 291 under sec. 54. The holder of a prior unregistered mortgage (which is not compulsorily registrable) *with possession* cannot be defeated by a subsequent mortgagee under a registered deed, because the possession of the prior mortgagee would amount to *notice* to the subsequent mortgagee—*Bhikhi v. Udit Narain*, 25 All. 366 (370) ; *Krishnamma v. Suramma*, 16 Mad. 148 (170).

An unregistered simple mortgage cannot stand in competition with any other valid mortgage.

Where the mortgage-deed purported to mortgage fruit-bearing trees, such as mango and jaman trees as immoveable property, it was held that the mortgage could not be effected without the formalities prescribed by this section—*Shiv Dayal v. Putto Lal*, A.I.R. 1933 All. 50, 54 All. 437, 140 I.C. 491.

A husband and wife borrowed Rs. 500 and subsequently put the lender in possession of their land by an oral transaction. The lender utilized the usufruct of the land in payment of interest on the loan. There was no mortgage but the lender alleged that he was put into possession as usufructuary mortgagee: *held*, that as this was an entirely oral transaction, it was ineffective to create any interest in the land—*U Talok v. Maung Tha*, A.I.R. 1937 Rang. 148, 169 I.C. 945.

A document effecting a change in the rate of interest payable on a mortgage is not, however, a change in the mortgagee's interest in the land and therefore does not require registration—*Mt. Parbati v. Gopal Das*, A.I.R. 1938 Lah. 481, 40 P.L.R. 291.

It is not ordinarily obligatory for a person who takes a registered mortgage to secure the title-deeds of the property mortgaged, and ordinarily his registered mortgage is sufficient protection to him—*Wan Taik v. Chettyar Firm*, A.I.R. 1935 Rang. 26, 155 I.C. 954.

Invalid registration:—If a property has been introduced in a mortgage-bond, which has either no existence or does not belong to the mortgagor,

with a view to effect the registration of the bond in a particular office, the registration must be deemed to be invalid, with the result that there is no enforceable security under sec. 59 of this Act—*Kedarnath v. Jayanta*, 38 C.L.J. 355, 70 I.C. 583, A.I.R. 1924 Cal. 348; *Kesari v. Musafir*, A.I.R. 1937 All. 711, (1937) A.L.J. 815, 171 I.C. 825; *Akshoyalingam v. Ramayya*, A.I.R. 1929 Mad. 426, 120 I.C. 876; *Harendra v. Haridasi*, 41 Cal. 972, 41 I.A. 110; *Biswanath v. Chandra Narayan*, 48 Cal. 509, 48 I.A. 127. Where a plot of land in another district was purchased and included in a mortgage-deed, but it was found that the purchase was a paper transaction only, the registration of the mortgage was invalid—*Parsotam v. Ali Haidar*, A.I.R. 1937 Oudh 493, 171 I.C. 233; *Biswanath v. Chandra Narayan*, supra.

Where a mortgage-deed, dated 4th October, 1910, was presented by a person for registration under a power-of-attorney, dated 9th February, 1910, which stated that the executants authorized him to present the deed which they had already executed on 8th February, 1910, but the date was subsequently altered to 4th October, 1910, the Privy Council held that the deed was not properly registered not being presented for registration by an authorized agent. The registering officer had no jurisdiction to register it. It was pleaded that the executants represented that the person presenting the document had such authority but their Lordships overruled this plea on the ground that the express provisions of the Registration Act not having been complied with, there could be no estoppel—*Dottie Karan v. Lachmi Prasad*, A.I.R. 1931 P.C. 52 (57), 10 Pat. 481, 35 C.W.N. 354, 131 I.C. 321. But see *Hunter v. Damodar*, A.I.R. 1924 All. 772, 46 All. 759, 81 I.C. 508.

Where the subject-matter of a mortgage has not been identified at all for the purposes of registration within the meaning of sec. 21 of the Registration Act, the document, even if registered, would not be valid—*Nahar Lal v. Baij Nath*, A.I.R. 1928 Cal. 385, 32 C.W.N. 241, 47, C.L.J. 124.

Effect of non-registration :—If a transaction intended to be a mortgage, and requiring registration, is not registered, the mortgage is not converted into a charge under sec. 100—*Somasundaram v. Nachiappa*, 2 Rang. 429 (436); *Maung Tun v. Mg. Aung Dun*, 2 Rang. 313 (318). See Note 533 under sec. 100.

If a mortgage-security be invalid by reason of want of registration, it is invalid for all purposes and against all. It cannot be invalid only as between the mortgagee and a subsequent mortgagee—*Krishnaswami v. Chevulu Kamalamma*, 46 C.W.N. 29 (P.C.).

An unregistered deed of simple mortgage is not receivable in evidence for the purpose of affecting immoveable property, but it will be received as evidence of a *personal obligation* and will be admissible to prove the debt for the purpose of granting a simple money-decree—*Kattamuri v. Padalu*, 5 Mad. 119; *Ulfatunnissa v. Hossain Khan*, 9 Cal. 520 (F.B.); *Vani v. Bani*, 20 Bom. 553; *Comaji v. Subbarayappa*, 15 Mad. 253; *Jadu v. Bhagwat*, 7 A.L.J. 71; *Ram Autar v. Ram Asre*, 66 I.C. 680 (Oudh); *Myat Thin v. Kasi-viswanathan*, 4 L.B.R. 52; *Nemdhari v. Bissessuri*, 2 C.W.N. 591; *Sadik v. Basaviah*, 17 M.L.J. 167; *Quan Cheng v. Maung Po*, 66 I.C. 589; *Hari Chand v. Kartar Singh*, A.I.R. 1952 Pepsu. 56; *Mon Koch v. Dhaniram Bora*, A.I.R. 1968 Assam 10. It may also be admissible in evidence to prove an

acknowledgment of liability on the part of the executant sufficient to save limitation—*Mugniram v. Gurmukh*, 26 Cal. 334; *Sheo Dial v. Prag Dat*, 3 All. 229; *Lachman Singh v. Kesri*, 4 All. 3. See the new proviso to sec. 49, Registration Act, added by Act XXI of 1929. (Appendix V). But see *Mst. Sanjya v. Chauthmal*, A.I.R. 1963 Raj. 129 and *Mohanlal Ganeshram v. Gajraisingh*, A.I.R. 1959 Madh. Pra. 178. In the latter case it has been held that if an unregistered mortgage bond says that the mortgagor will repay the amount borrowed, namely, Rs. 600 after two years and the mortgagee will enjoy the usufruct in the meantime in lieu of interest, the bond is inadmissible in evidence in a suit to recover Rs. 600.

Until the mortgage-deed has been registered, the mortgagee is not under any obligation to advance any mortgage-money to the mortgagor. Consequently, it is not open to the creditor of the mortgagor to attach the mortgage-money in the hand of the mortgagee until registration of the mortgage—*Tulsiram v. Harakh Narain*, A.I.R. 1922 All. 384 (385).

But non-registration may be cured if the mortgage has been acted upon by the parties for a long period. Thus, money-decree for Rs. 300 was compromised by the parties, and they came to an agreement (which was embodied in an application to the Court) under which the plaintiffs were put in possession of certain plots belonging to the defendants, and it was further agreed that the plaintiffs would take the usufruct in lieu of interest and the defendants would be entitled to redeem on payment of Rs. 300. The agreement embodying the compromise was not registered but the plaintiffs remained in possession for more than fifty years, when it was challenged on the ground of want of registration and attestation. Held that although the formalities had not been complied with, still it is now far too late to challenge a mortgage which has in fact been given effect to for 50 years—*Ram Sewak v. Sheo Naik*, 45 All. 388 (389). Even where the mortgage is not a valid transaction because of non-compliance with sec. 59, the person inducted on the property as mortgagee may acquire the status of mortgagee by prescription, and the mortgagee or his vendee is entitled to redeem—*Sukra Oraon v. Jagat Mohon*, A.I.R. 1957 Pat. 245; *Rupa Nonia v. Ram Brich*, A.I.R. 1959 Pat. 164. It is for the mortgagee to have a proper and valid mortgage-deed executed in his favour. Therefore, where a mortgagee takes possession of the mortgaged property under a deed which requires registration but is not registered, the principle "once a mortgage always a mortgage" applies, and he cannot be permitted to resist the redemption by the mortgagor—*Rajpati v. Sukwaro*, 63 I.C. 400 (Pat.).

An unregistered deed of usufructuary mortgage (for more than Rs. 100) cannot be recognized by the Court in proof of the mortgage, and consequently a suit by the mortgagor for redemption, on the basis of the unregistered mortgage, is not maintainable—*Ma Thaing v. Maung Chit*, 7 Rang. 140, A.I.R. 1929 Rang. 179 (180). In this case the mortgagee did not obtain possession. But if the mortgagee obtains possession under an unregistered usufructuary mortgage, he will be entitled to retain possession until the debt is paid off. The mortgagor cannot bring a suit for redemption, the mortgage being invalid, but he will be entitled to bring a suit for possession on his offering to repay the loan, and the Court will decree the suit conditional on his repaying the amount of the loan—*Maung Tun v. Maung Aung Dun*, 2 Rang. 313 (317, 318); *Maung Po Sin v.*

Mg. Po Sin, 5 Bur. L.J. 106, A.I.R. 1926 Rang. 201 (202). These cases will now be decided under sec. 53A.

Where a person has been put into possession as usufructuary mortgagee and the mortgage is invalid for want of registration, a suit for possession by the owner by redemption is not competent. The defendants are not also entitled to prove the alleged oral mortgage for an additional sum. The proper course for the plaintiff would be to have sued for possession of the lands relying on his title—*Ma Kyi v. Maung Thon*, A.I.R. 1935 Rang. 230 (F.B.), 157 I.C. 565; *Sheikh Bhukhan v. Radhika Kumari*, A.I.R. 1938 Pat. 479, 176 I.C. 35; *Ma Mo v. Ma Kun*, A.I.R. 1941 Rang. 234, 1941 R.L.R. 309; *Maung Lu v. Maung San*, A.I.R. 1940 Rang. 11 (F.B.), 1939 R.L.R. 645, 186 I.C. 69. Where under a usufructuary mortgage bond for Rs. 2000, which is unregistered, the only remedy open to the mortgagee is foreclosure, the mortgagee can sue the mortgagor, who has not parted with possession, for the recovery of Rs. 2000 by way of damages for breach of contract—*Harikishan v. Baijnath*, 24 Cut. L.T. 447.

Although a person cannot sue for redemption on the strength of a usufructuary mortgage which is invalid for want of registration, yet if he sues for possession and proves his title and then the defendant sets up adverse possession, the plaintiff may prove that the character of the possession was not adverse to him by giving evidence of the factum of the unregistered mortgage, though not of its terms—*Maung Daw v. Maung Wa*, A.I.R. 1941 Rang. 261 (F.B.). See also *Maha Mangal v. Kishun*, A.I.R. 1927 All. 311 (314), 100 I.C. 346, relying on *Varada v. Jeevarathammal*, 43 Mad. 244 (P.C.), 46 I.C. 284. If in a redemption suit, the defendant admit his possession as mortgagee and has no objection to restore possession on receiving the mortgage money, the question of non-registration of the mortgage deed does not arise—*Munshi Ram v. Baisakhi Ram*, A.I.R. 1947 Lah. 335, 49 P.L.R. 79. Where the plaintiff's evidence as to ownership is vague, an unregistered mortgage cannot be used for proving the plaintiff's title to the land—*Maung Daw v. Maung Wa*, supra. A personal covenant to pay may be proved by a mortgage found to be invalid—*Jagannadhan v. Official Assignee*, A.I.R. 1931 Mad. 124, 60 M.L.J. 309, 229 I.C. 814. In a possessory mortgage where there is no personal undertaking to repay the money the case is otherwise—*Kesari v. Musafir*, A.I.R. 1937 All. 711, (1937) A.L.J. 815, 171 I.C. 825.

Where a mortgagor executes a new mortgage-deed for consideration comprising the principal and interest due on an earlier mortgage-deed and the later mortgage-deed is found to be invalid through no fault of the mortgagee, he is entitled to sue on the earlier mortgage-deed—*Kanhaiya v. Mt. Hamidan*, A.I.R. 1938 All. 418 (F.B.), 176 I.C. 492.

Transactions which do not purport to comply with statutory requirements, e.g., the formality of the Registration law, although in every other way the object achieved by the transfer has been executed, can be recognized in law or rather at equity, so as to bind the parties by their conduct so irrevocably as to make it impossible for them to re-open the transactions or retrace their steps—*Hunter v. Damodar*, A.I.R. 1924 All. 772, 46 All. 759, 81 I.C. 508.

350. "Signed":—The term 'signature' is not defined in the Transfer

of Property Act but its definition is to be found in the General Clauses Act of which sec. 3 (52) runs as follows:—"Sign" with its grammatical variations and cognate expressions, shall, with reference to a person who is unable to write his name, include 'mark' with its grammatical variations and cognate expressions." It is clear therefore that an illiterate mortgagor may sign a mortgage by affixing his mark—*Gobind v. Bhau*, 41 Bom. 384 (388). A signature may be put down in various ways. The executant may sign by pen and ink, or put his name down by means of types, or if he uses a facsimile for signing his name he may use it for his signature—*Nirmal Chandra v. Saratmani*, 25 Cal. 911.

The words "signed by the mortgagor" do not mean that the mortgagor must *personally* sign the document; the mortgage-deed may be signed by another for him and under his authority on the principle *quo facit per alium facit per se* (he who acts through another acts through himself). Before the T. P. Act was passed, a mortgage was a good instrument, whether it was signed by the mortgagor personally or by some other person signing for him, and it is not the intention of the present Act to curtail that freedom—*Deo Narain v. Kukur Bind*, 24 All. 319 (F.B.) (overruling *Moti Begum v. Zorawar*, 1889 A.W.N. 196); *Sasi Bhusan v. Chandra Peshkar*, 33 Cal. 861; *Sristidhar v. Rakshakaly*, 49 Cal. 438. The insertion of the words "on behalf of" in sec. 123 and the omission of those words in section 59 cannot be taken to show that the Legislature intended to lay down in sec. 59 a different rule from that provided in sec. 123. Further, to hold that the Legislature requires that the personal signature of the executant is indispensable in the case of a mortgage which is only the transfer of an interest in the immoveable property, while it does not require the same in the case of a gift or a sale whereby the transferor's immoveable property is absolutely transferred, is an anomaly, and a construction, which leads to such anomaly, should not be adopted—*Deo Narain v. Kukur Bind*, 24 All. 319 (F.B.) (*per* Banerji, J.). Where the executant of a document is illiterate, some other person can sign his name on the document on his behalf in his presence and at his request—*Ibid*; *Sashi Bhusan v. Chandra Peshkar*, 33 Cal. 861; *Ram Charan v. Bhikari*, 12 O.C. 257.

350A. Proof of execution :—Sec. 68, Evidence Act, provides: "If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution.... Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied." (This proviso has been added by the Indian Evidence Amendment Act, XXI of 1926).

Section 70, Evidence Act lays down: "The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested."

These sections relate to the manner in which a deed should be legally proved. But they have nothing to do with the question about the legality or validity of the instrument itself as a document of title if there has been

no attestation as required by law. In other words, if the document is void for want of proper attestation, any proof of execution of the document under these sections is out of the question—*Balbhaddar v. Lakshmi*, 1930 A.L.J. 623, A.I.R. 1930 All. 669 (673), 125 I.C. 507.

The *validity* of a mortgage-bond and the *proof of its execution* are two different questions. And so even though the execution of the bond is admitted by the executant and consequently need not be proved by calling in an attesting witness under sec. 68, by virtue of the provisions of sec. 70, still if any question is raised as to the validity of the deed owing to improper attestation (e.g., by a scribe), *held* that evidence must be given that the document was properly attested—*Paban v. Badal*, 26 C.W.N. 951 (953), 34 C.L.J. 498, A.I.R. 1921 Cal. 276, 66 I.C. 906.

The proviso to sec. 68 lays down that no proof under that section is necessary unless the executant *specifically* denies the execution of the document. Where the executant says that "he has no knowledge of the mortgage, and that if it is genuine, it must be hollow," *held* that these words mean that the executant neither admits nor denies the genuineness of the mortgage, but that he asserts absence of consideration if it is held to be genuine; these words do not amount to specific denial, and consequently it is not necessary to call an attesting witness in proof of the execution—*Yakub Khan v. Gujar Khan*, 52 Bom. 219, A.I.R. 1928 Bom. 267 (268), 111 I.C. 287. The mere fact that the executant of a mortgage does not admit the genuineness of the bond, or says that the attesting witnesses did not sign as witnesses or did not sign at the proper place in the bond, does not amount to specific denial of the execution of the bond; and therefore does not necessitate any proof of attestation—*Biswanath v. Kayastha Corporation*, 8 Pat. 450, 10 P.L.T. 379, 119 I.C. 405, A.I.R. 1929 Pat. 422 (423).

Where some of the executants of a mortgage deed are minors and *pardanashin* ladies who had not executed the document according to law, the execution by the rest is not invalid, as the liability being joint and several the mortgagee is entitled to realize the whole debt from any of them—*Keka v. Sirajuddin*, A.I.R. 1951 All. 618, 1951 A.L.J. 258.

The word "execution" in sec. 70 means *due* execution or execution in a way in which the document is required to be executed. If the mortgagor admits his having signed the document but denies his having done so in the presence of attestors, *held* that such admission does not amount to admission of *due* execution, and cannot dispense with proof of execution—*Arjun v. Kailash*, 27 C.W.N. 263, 36 C.L.J. 373, 70 I.C. 532, A.I.R. 1923 Cal. 149. See also 5 Pat. 50 (P.C.) cited in Note 354.

351. Attestation :— The provision as regards attestation has been newly introduced by the Transfer of Property Act. A mortgage-deed executed prior to the passing of this Act did not require attestation by witnesses—*Jati Kar v. Makunda*, 39 Cal. 227; *Mt. Rangili v. Pearey Lal*, A.I.R. 1940 All. 101, 1939 A.L.J. 1056, 186 I.C. 519.

See the new definition of 'attested' in sec. 3, and Note 18A, *ante*.

The requirements of this section as to attestation apply to an anomalous mortgage. Such a mortgage is invalid if it is not attested—*Kannakarup v. Sankaravarma*, 44 Mad. 344, 62 I.C. 386.

Attestation means simply witnessing the execution of a document, in order that the person attesting may subsequently testify that the deed was actually executed by the person whose name appears as executant. It does not import anything more, and therefore it must be distinguished from cases where a person signs a document not merely as a witness to the execution but also with a view to giving consent to the transaction. Such cases frequently arise where a Hindu widow sells or mortgages her husband's property, and the reversioner signs her deed with the object of giving consent to the alienation. Such an act on the part of the reversioner ought not to be treated as 'attestation'. Similarly, where a Hindu lady executed a deed of mortgage which was signed by two witnesses, one of whom was her husband, and it appeared that the husband had signed the document in order to evidence his approval of the transaction, *held* that the husband was not an attesting witness since he had signed in a capacity other than that of a witness, in spite of the fact that he signed in the place where the other witness had signed. The deed was therefore not validly attested by two witnesses—*Barkuarin v. Sircar Barnard & Co.*, 6 P.L.J. 473, 2 P.L.T. 761, 62 I.C. 668; *Sarkar Barnard & Co. v. Alak Manjari*, 83 I.C. 170 (P.C.), A.I.R. 1925 P.C. 89. The mere fact that a man was present and witnessed the execution of the deed and his name appeared on the deed does not lead to the conclusion that he was a good attesting witness. In all cases, the Court must have regard to the *purpose* for which a man's signature is on the document—*Abinash v. Dasarath*, 56 Cal. 598, 32 C.W.N. 1228 (1230), A.I.R. 1929 Cal. 123 (disapproving *Raj Narain v. Abdur Rahim*, 5 C.W.N. 454). Attestation means a certain act with reference to the execution of the document. The act must be done with the *intention* of attesting the executant's signature. So, a person who signs a document, which is executed by pardanashin lady before the Sub-Registrar under the registration endorsement, in proof of the fact that he has identified the lady, does not sign as an attesting witness—*Chandrani v. Lala Sheo Nath*, 8 O.W.N. 104, A.I.R. 1932 Oudh 146 (150), 132 I.C. 337.

Again, to attest means to bear witness; *i.e.*, attestation means the act of witnessing *another man's* signature; therefore a man who signs for and on *behalf* of the executant (who is illiterate) is not competent to sign also as a witness. The same person cannot simultaneously perform a double function; a person who executes the mortgage-deed on behalf of the mortgagor is not competent to become an attesting witness to attest the signature he himself has written out. An attester is a person who 'sees the document executed'; a person who executes a document on behalf of the executant is not a person who sees it executed when he himself does the very thing to which by subsequently signing as a witness he professes to bear witness—*Sristidhar v. Rakshakaly*, 49 Cal. 438 (441, 443); *Rajani Kanta v. Panchananda*, 23 C.W.N. 290, 48 I.C. 720; *Upendra v. Hukum Chand*, 46 Cal. 522; *Ram Samuji v. Mainath*, 2 O.W.N. 853, A.I.R. 1925 Oudh 737; *Dharmadas v. Ramoomal*, 19 S.L.R. 322, A.I.R. 1927 Sind 118 (120). But where a lady executed a mortgage-deed by putting her finger-mark to the same, and thereafter a person who saw her put the finger-mark wrote her name at her request and added the words "by the pen of" before his name written by himself; it was held that the document was executed by the *lady* herself and not by him

on her behalf, and that consequently he was a valid attesting witness—*Dinamoyee v. Banbehari*, 7 C.W.N. 160 (161); *Ram Samujh v. Mainath*, 2 O.W.N. 853 (so assumed). See also *Raja Ram v. Jagannath*, A.I.R. 1926 Oudh 209, 91 I.C. 507. An illiterate person signed a mortgage-deed by putting his mark to it, which mark was described by the scribe of the deed who put his own signature below the description. *Held* that the scribe was a valid attesting witness. The execution was complete when the mortgagor unable to write his name placed his mark thereon; the mark was his signature and was independent of any description by which the mark was explained. The function of the scribe ended when he signed his name at the conclusion of the body of the document; he thereafter signed his own name under the description of the mark made by the executant, with a view to authenticate the mark, that is, to vouch the execution of the deed by the marksman, in other words, to act as an attesting witness—*Govind v. Bhau Gopal*, 41 Bom. 384 (389), 19 Bom. L.R. 147, 39 I.C. 61.

As stated above, 'to attest' means only to witness the execution of a deed, and it is not necessary that the person attesting a document should sign his name personally. Just as in the case of an illiterate mortgagor some other person can sign the mortgagor's name on his behalf and under his authority, so in the case of witnesses who are illiterate and cannot write, it will be sufficient if their signatures are affixed for them by another person with their consent. There is no distinction in this respect between the signature of the mortgagor and the attestation by the witnesses—*Sashi Bhusan v. Chandra Peshkar*, 33 Cal. 861; *Lal Bahadur v. Rameshwar*, 4 O.W.N. 965, A.I.R. 1927 Oudh 510 (521), 3 Luck 113. But in such a case, where one person signs for another, it must be shown that the former was *authorised* by the latter to sign for him; otherwise there is no valid attestation. Thus, where a document contained the signature of one attesting witness, and the name of another person was written on the margin by the scribe, but there was no signature or mark made by this second person and there was nothing to show that he had authorised the scribe to sign for him, *held* that the document was not duly attested by two witnesses, within the meaning of this section—*Paramhans v. Randhir*, 38 All. 461, 35 I.C. 748. In the case of illiterate witnesses, attestation by a mark is a sufficient attestation—*Shri Kishen v. Sonba*, 1 N.L.R. 14; *Chiranjil Lal v. Purna*, 12 A.L.J. 1114; *Harrison v. Harrison*, 8 Ves. 185. Where a will was attested by one person in his own handwriting and he also held and guided the hand of a second witness who could not read or write, *held* that the attestation was sufficient—*Harrison v. Elwin*, 61 RR. 183.

Where a document is executed by two persons at different times, each time the signature must be attested by witnesses. Thus, where in a mortgage-deed executed by A and B, it appeared that after the bond was signed by A in the presence of two persons who then and there attested the document, it was taken to B who lived at a different place, and that B signed the document in the presence of the witnesses who however did not sign their names again as attesting witnesses, *held* that the bond was not properly attested so far as B was concerned—*Muniappa v. Vellaichami*, 1918 M.W.N. 853, 49 I.C. 278.

But where a document consists of several sheets of paper and the executant signs each sheet, it is not necessary that every signature of the executant must be attested by the witnesses; it is sufficient if one signature is attested. A mortgage-deed consisted of three sheets of paper; the mortgagor signed the second sheet in the presence of the attesting witnesses who also signed at the foot as having witnessed the signature of the mortgagor. The third sheet (which enumerated certain additional properties included in the mortgage) was signed by the mortgagor in the presence of the same witness but without again affixing their signatures. *Held* that the whole document was properly attested. To validate the third page of the mortgage-deed, it was not necessary for the two witnesses again to sign it—*Janki v. Aswini Kumar*, 60 I.C. 736 (Cal.).

One of the essentials of attestation of a mortgage-deed is that each of the attesting witnesses must have signed the instrument in the presence of the executant—*Surendra Bahadur v. Behari Singh*, 43 C.W.N. 669, A.I.R. 1939 P.C. 117, I.L.R. 1939 Kar. 222, 1939 A.L.J. 492. See the definition of 'attested' in sec. 3. Where it was proved that the executant signed the deed in the presence of the attesting witnesses, but there was no evidence that the latter signed the document in the presence of the executant, *held* that the deed was not validly attested—*Jadumandan v. Surajdeo*, 52 All. 434, 1930 A.L.J. 289, A.I.R. 1930 All. 223 (224). Where the witnesses did not see the executant sign the instrument and the executant did not acknowledge to them that she had signed it, and the attestors did not even sign the instrument in the presence of the executant, *held* that the deed was not validly attested—*Venkata Jagannatha v. Venkata Kumara*, 54 Mad. 163, A.I.R. 1931 Mad. 140 (141), 135 I.C. 17.

Proof of attestation :—The proviso to sec. 68, Evidence Act only removes the necessity of calling an attesting witness to prove the execution of documents therein referred to and does not purport to relieve the party of the necessity of proving a mortgage in the form prescribed in this section—*Chettyar Firm v. U tau*, A.I.R. 1933 Rang. 6, 11 Rang. 26, 141 I.C. 700. Where the mortgagor puts the mortgagee to proof then there being no specific denial of attestation, the attestation of one witness is sufficient. Where there is specific denial, in that case only the mortgagee is called upon to prove attestation of two witnesses—*Amir Hussain v. Abdul Samad*, A.I.R. 1937 All. 646, I.L.R. (1937) All. 723, 171 I.C. 743 (following *Lachman v. Surendra*, A.I.R. 1932 All. 527 (F.B.), 54 All. 1051, 139 I.C. 1. Where one attesting witness has been called at the trial for the purpose of proving execution of a mortgage-deed and his evidence has not been accepted as reliable, further evidence of the due execution and attestation is necessary—*Surendra Bahadur v. Behari Singh*, *supra*. An attesting witness must either see the executant sign or he must receive from the executant an acknowledgement that the executant has signed the deed. Further the attesting witness must sign the deed in the presence of the executant. Unless these requisites have been established by evidence, due execution and attestation cannot be said to have been proved—*Bhikari v. Sudhir*, A.I.R. 1938 Cal. 702, 42 C.W.N. 1055. Where the handwriting of the attestors who are dead has been proved, the presumption is that they actually witnessed the execution—*Vankataramayya v. Kamiseti*, A.I.R. 1927 Mad. 662, 53 M.L.J. 216, 101 I.C. 498.

Admission by the executant of execution is not sufficient to validate a mortgage-deed which has not been duly attested—*Maung Po Gyi v. Maung Min Din*, A.I.R. 1927 Rang. 233, 5 Rang. 561, 104 I.C. 386. Where a mortgage was executed and attested, but the Sub-Registrar finding a technical defect had the document re-executed by the mortgagors in his office, which was duly registered, though not re-attested; and in a suit upon the mortgage the mortgagor admitted execution: held that in spite of the admission the document did not amount to a mortgage—*Sheikh Kachu v. Mammad Ali*, A.I.R. 1927 Cal. 926, 45 C.L.J. 577, 105 I.C. 28.

Where an attesting witness merely states that the executant has signed the document in his presence and he witnessed its execution, it is not a sufficient proof of attestation. There must be some evidence to show that the other witness was also present at the time of execution or at least he attested the deed after he had received a personal acknowledgment from the executant of his signature or mark—*Zaharui Hussain v. Mahadeo Ramji*, A.I.R. 1949 Nag. 149, I.L.R. 1948 Nag. 621.

352. Who can attest :—A party to an instrument cannot under any circumstances be allowed to sign the instrument as an attesting witness; therefore a person who has once signed as an executant of a mortgage-deed and as one of the persons who were borrowing money on the bond, cannot be allowed to have his position altered from an executant of the bond to that of a witness, for the purpose of rendering the document valid as a mortgage against the other executants—*Debendra v. Behari*, 15 I.C. 666, 16 C.W.N. 1075; *Peary Mohan v. Sreenath*, 14 C.W.N. 1046; *Freshfield v. Reed*, (1842) 9 M. & M. 404, 60 R.R. 769; *Wickham v. Marquis of Bath*, (1865) L.R. 1 Eq. 17 (24). A person who is a party to the deed cannot be regarded as an attesting witness, on the ground that if the person for whose benefit the instrument is executed is allowed to be an attesting witness, the very object of attestation, viz., the prevention of fraudulent mal-practice, may be completely defeated—*Seal v. Claridge*, L.R. 7 Q.B.D. 516; *Amick v. Woodworth*, (1901) 58 Ohio 86; *Donovan v. St. Anthoney Co.*, (1899) 73 Am. St. Rep. 779. Where A executes a mortgage-deed on behalf of B under a power of attorney from him, A, though a different person, cannot be a valid attesting witness of that document—*Gomathi v. Krishna*, A.I.R. 1954 Mad. 126. But a person who is merely interested in the money advanced under the deed of mortgage, and is not himself a party to the deed, can validly attest it—*Balu v. Gopal*, 13 Bom. L.R. 944.

When a mortgage is executed benami the person who actually advanced the money is of course interested in the transaction, but he is actually not a party to the mortgage-deed as it stands. If he attests the mortgage-deed, his attestation should be held to be a sufficient attestation by a witness under this section—*Durgadin v. Suraj Bakhsh*, A.I.R. 1931 Oudh 285 (F.B.), 134 I.C. 402.

Attestation by scribe :—The question whether a scribe who has signed his name below the executant's can be regarded as an attestor is a question of fact depending upon the circumstances of each case. The mere statement of a writer of a document that he wrote it cannot be

regarded as an attestation of that document by him—*Veerappudayan v. Muthu Karuppa*, 24 M.L.J. 534, 19 I.C. 589 (590). A scribe who had seen the deed executed was held to be a valid attesting witness, though he called himself a scribe in the document—*Paramasiva v. Krishna*, 41 Mad. 535, 43 I.C. 983; *Jagannath v. Bajrang*, 48 Cal. 61, 62 I.C. 97; *V. R. Firm v. Md. Kassim*, 5 Bur. L.J. 68, A.I.R. 1926 Rang. 145; *Dharmadas v. Ramoomal*, 19 S.L.R. 322, A.I.R. 1927 Sind 118 (120); *Alagappa v. Ko Kala*, A.I.R. 1940 Rang. 134, 1940 R.L.R. 199, 188 I.C. 759. When a man places his signature upon a document and at the same time describes himself as the writer thereof, the inference is that he signs as the writer only; but as a matter of fact it can be shown that he signed not only as the writer but also as a witness—*Alagappa v. Ko Kala*, supra. The writer of a document who signs just below or above the signature of an admitted attester or among a lot of signatures of attesting witnesses is deemed to sign as an attester, though he merely describes himself as the writer—*Ayyasami v. Kylasam*, 26 I.C. 409 (Mad.); *Jogendra v. Ntal*, 7 C.W.N. 384 (386); *Abinash v. Dasarath*, 56 Cal. 598, 32 C.W.N. 1228 (1231). But in all such cases, it must be shown that he put down his name with the *intention* of attesting it. If such intention is established, he will be deemed as an attesting witness, inspite of the fact that he merely signed as a scribe—*Badri Prosad v. Abdul Karim*, 35 All. 251; *Veerappudayan v. Muthukaruppa*, 24 M.L.J. 534, 19 I.C. 589 (590). Such intention may be presumed when the scribe signs his name at the time of execution of the deed; and it is not necessary that the writer should expressly describe himself as a witness or that there should be a testimonial clause—*Veerappudayan v. Muthukaruppa*, 24 M.L.J. 534, 19 I.C. 589 (590); *Bryan v. White*, 2 Rob. Eccl. 315; *Burdett v. Spilsbury*, 10 Cl. & F. 340. But several other cases have laid down a more stringent rule, namely, that the writer of a document, in order to be an attesting witness, must sign *as a witness* (i.e., must describe himself as a witness). If his signature appears on the document merely as a scribe, it will not be sufficient to make him an attesting witness, even though he was present at the time of the execution and had seen the execution—*Ram Bahadur v. Afodhya*, 1 P.L.J. 129, 20 C.W.N. 699, 34 I.C. 370; *Dalichand v. Lotu Sakham*, 44 Bom. 405, 55 I.C. 616; *Jadumandan v. Surajdeo*, 52 All. 434, 28 A.L.J. 289, A.I.R. 1930 All. 223; *Ram Samujh v. Mainath*, 2 O.W.N. 853, A.I.R. 1925 Oudh 737 (738) (following 1 P.L.J. 129); *Dharmadas v. Ramoomal*, 19 S.L.R. 322, A.I.R. 1927 Sind 118 (120). Where the name of the scribe appeared under a separate heading "scribe," apart from the signature of the only other person who signed as witness, *held* that the signature of the scribe was not, as a matter of construction, capable of being read as attestation—*Abinash v. Dasarath*, 56 Cal. 598, 32 C.W.N. 1228 (1231), 114 I.C. 84, A.I.R. 1929 Cal. 123. If a person who has signed as a scribe subsequently asserts that he signed as a witness, the onus of proving such assertion lies very heavily upon him—*Nageshwar Prosad v. Bachu Singh*, 4 P.L.J. 511.

The scribe of a mortgage-deed who executes the document for and on behalf of the mortgagor is not competent to sign the document as an attester; for that will amount to attestation of one's own signature, which is invalid—*Rajani v. Panchananda*, 23 C.W.N. 290, 48 I.C. 720;

Upendra v. Hukum Chand, 46 Cal. 522; *Shristidhar v. Rakshakaly*, 49 Cal. 438.

353. Attestation of signature is not necessary:—See the new definition of "attested" in sec. 3. *ante*, particularly the words "or has received from the executant a personal acknowledgment of his signature". Prior to this definition it was held by the High Courts as well as by the Privy Council that it was necessary, to validate a mortgage under this section, that the mortgagor must sign the document in the presence of the attesting witnesses. There was no attestation unless the act signing by the person who executed the document was done in the presence of the witnesses. The thing should be done in the presence of the man who in future would be able to testify that it was done. A mere acknowledgment of his signature by the executant in the presence of the witnesses was not sufficient—*Shamu Pattar v. Abdul Kadir*, 31 Mad. 215, affirmed by the Privy Council in 35 Mad. 607; *Sarkar Barnard & Co. v. Alak Manjari*, 83 I.C. 170 (P.C.), A.I.R. 1925 P.C. 89; *Hira Bibi v. Ram Hari*, 5 Pat. 58 (P.C.), A.I.R. 1925 P.C. 203; *Arjunchandra v. Kailash Chandra*, 27 C.W.N. 263; *Radhe Shyam v. Chummi*, 14 A.L.J. 361, 35 I.C. 192; *Sama Rao v. Vannajee*, 46 Mad. 64 (71); *Abdul Karim v. Saliman*, 27 Cal. 190; *Girindra v. Bijoy Gopal*, 26 Cal. 246; *Khemchand v. Malloo*, 10 N.L.R. 81; *Pribhudas v. Sahib Khan*, 18 S.L.R. 282; *Paramasiva v. Krishna*, 41 Mad. 535; *Ranu Shivaji v. Laxmanrao*, 33 Bom. 44; *Badri Prosad v. Abdul Karim*, 35 All. 254; *Sahedha v. Raja Ram*, 11 A.L.J. 757. These decisions are no longer of any authority in the face of the new definition of 'attestation' in sec. 3.

Prior to the decision of the Privy Council in 35 Mad. 607, it was held in several cases that it was not necessary for the mortgagor to affix his signature to the mortgage-deed in the actual presence of the attesting witnesses, but it was sufficient if he acknowledges his signature on the deed in their presence—*Sheikh Ghazi v. Bhawani Prasad*, 1896 A.W.N. 89; *Bunkatesh v. Rama Das*, 6 A.L.J. 737; *Ramji v. Bai Parbati*, 27 Bom. 91; *Ganga Devi v. Shyam Sunder*, 26 All. 69. These decisions will now stand as good law.

The new definition of attestation (which has been added by the T. P. Amendment Act XXVII of 1926) is *retrospective* in its operation, in view of the word "*must be deemed always to have meant*" occurring in the definition, which words have been added by the Amending and Repealing Act X of 1927. In other words, all documents executed even prior to the passing of the Act XXVII of 1926, in which the attesting witnesses did not actually see the executant sign the mortgage-deed but received from the executant a personal acknowledgment of his signature on the deed, and then attested the deed, must nevertheless be deemed to have been validly attested—*Balaji v. Gangamma*, 51 M.L.J. 641, A.I.R. 1927 Mad. 85, 99 I.C. 143; *Mohammedi v. Kashi*, A.I.R. 1926 All. 725, 96 I.C. 775; *Veerappa v. Subramanya*, 52 Mad. 123, 55 M.L.J. 594 (F.B.), 116 I.C. 367, A.I.R. 1929 Mad. 1; *Radha Mohan v. Nripendra*, 47 C.L.J. 118, A.I.R. 1928 Cal. 154, 31 C.W.N. clx; *Motilal v. Kasambhai*, 29 Bom. L.R. 1334, A.I.R. 1928 Bom. 16, 105 I.C. 864; *Gangaram v. Umaji*, 105 I.C. 891, A.I.R. 1928 Nag. 70. See page 18, *ante*. The contrary view taken in the Allahabad Full Bench case of *Girijananda v. Hanumandas*, 49 All. 25, 24 A.L.J. 921, A.I.R.

1927 All. 1, 99 I.C. 161, must be deemed as overruled by the Amending and Repealing Act of 1927.

Where the mortgagee states in the presence of the mortgagor that the mortgage-deed has been executed by the latter and asks the attesting witness to attest it which he does without any dissent having been expressed by the executant, the mortgage-deed is duly attested on acknowledgment received from the mortgagor—*Amir Husain, v. Abdul Samad*, A.I.R. 1937 All. 646, I.L.R. (1937) All. 723, 171 I.C. 743.

Where the attesting witness to a mortgage-deed signed the document before its execution by the mortgagor, held that the bond was not attested as required by this section—*Pran Nath v. Jadu Nath*, 32 Cal. 729.

Attestation by Registration officer :—A large number of cases hold to the view that the Registration endorsement made by the Sub-Registrar at the time of registration of the mortgage-deed amounts to an attestation, so that if there is only one witness to the deed, instead of two, the defect is made up by the Sub-Registrar's signature—*Veerrappa v. Subramanya*, 52 Mad. 123 (F.B.) ; *Radha Mohan v. Nripendra*, 47 C.L.J. 118 ; *Ram Chandra v. Bhairon*, 53 All. 1 ; *Saroda v. Triguna*, 1 Pat. 300. But the Oudh Chief Court has dissented from this view on the ground that the word 'attestation' is used to mean a certain act with reference to the execution of the document, and with the intention of witnessing the executant's signatures, whereas the signature of the Sub-Registrar is put to the registration endorsement after the execution of the document has been complete, and he puts his signature not with the intention of witnessing the executant's signature, but with a different object and for a different purpose altogether—*Chandrani v. Lala Sheo Nath*, 8 O.W.N. 194, A.I.R. 1931 Oudh 146 (150), 132 I.C. 337. A similar view has been taken by the Allahabad High Court in *Lachman v. Surendra*, 1932 A.L.J. 653 (F.B.), 139 I.C. 1, A.I.R. 1932 All. 527.

In a recent case the Judicial Committee has held that where the Sub-Registrar and identifying witnesses have affixed their signatures to the registration endorsement under secs. 58 and 59 of the Registration Act admitting execution of a mortgage-deed, but there is no evidence that the signatures were made in the presence of the executant, the signatures, assuming that it would be legitimate to look at the proceedings relating to the registration for the purpose of proving due execution and attestation, cannot be said to have proved due attestation as required by this section. In such a case secs. 58, 59 and 60 of the Registration Act are of no avail. The endorsements made at the time of registration are relevant to the matter of registration only—*Surendra Bahadur v. Behari Singh*, 43 C.W.N. 669 (P.C.), I.L.R. 1939 Kar. 222, A.I.R. 1939 P.C. 117 (121), 1939 A.L.J. 492. See also *Zaharul Hussain v. Mahadeo Ramji*, A.I.R. 1949 Nag. 149, I.L.R. 1948 Nag. 621 ; *Shanmughavelu Mudaliar v. Niranand Naraindas*, (1967) 2 Mad. L.J. 388. In the absence of evidence that the Sub-Registrar put his signature or seal on the mortgage-bond in the presence of the lady executant, it cannot be said that the mortgage-bond was properly attested—*Hem Chandra v. Guiram*, 58 C.L.J. 545, 150 I.C. 762 ; see also *Atul v. Krishna*, 67 C.L.J. 31. Where in the registration endorsement there is no statement to the effect that the identifying witnesses signed the

document in the presence of the admitting executants, and there is no other evidence to prove this fact, the Court is not justified in drawing an inference that the document was properly attested—*Ramanathan v. Delhi Badaha*, A.I.R. 1931 Mad. 335 (338, 339), 60 M.L.J. 302, 131 I.C. 840. Where there was no witness to the mortgagor's signature at the foot of the mortgage-bond, but at the back there were three identifying witnesses to his signature before the Registrar and the mortgagor in his written statement admitted that he had executed the document though he made no admission as to attestation, it has been held that as the document does not show that the signature of the identifying witnesses were affixed in the presence of the executant, the document cannot be said to be properly attested—*Dhanapala v. Goverchand*, A.I.R. 1938 Mad. 959 (962), (1938) M.W.N. 938.

See Note 18A, *ante*, under the heading "Attestation by Registering Officer".

354. Attestation of mortgage executed by pardanashin lady:—Where *pardanashin* ladies are unable to appear before male witnesses, a document, which by independent testimony is proved to have been executed by a *pardanashin* lady, may reasonably be deemed to have been attested by witnesses, if they were present outside the *pardah* and had before attestation satisfied themselves that there was no fraud and that the deed had been actually executed by the lady. The fact that a screen had completely separated the witnesses from the executant would not invalidate the attestation—*Sarur Jigar v. Barada Kanta*, 37 Cal. 526; *Hamangal v. Ganaur*, 13 C.W.N. 40 (In both these cases, one of the attesting witnesses managed to see the lady sign, from outside the *pardah*). Though this is not a strict compliance with the letter of the law, still it is the only possible mode of attestation under the circumstances, having regard to the custom of this country. These two cases may be compared with an English case in which Sir H. Jenner Fust expressed the opinion that he would be prepared to hold that if the attesor and the executant signed in the presence of each other, it would be a valid attestation though one of them being blind could not see, provided his position was such that he could have seen if he had his eye-sight unimpaired—*Re Piercy*, 1 Robertson 228, cited in *Sarur Jigar v. Barada Kanta*, 37 Cal. 526. A mortgage executed by a *pardanashin* lady was attested by her husband and another witness. The husband actually saw the signature being made and the other witness was outside the screen in the same room with the lady and he knew her voice and heard her say "yes" when the document was explained to her. Held that the document was duly attested—*Rukmini v. Nilmani*, 19 C.W.N. 1309; *Syed Yakir v. Madhusudan*, 45 I.C. 691 (Pat.). It is not essential that the attesting witness should have actually seen the lady sign the document—*Kasidanbi v. Ganga*, 16 N.L.R. 196, 56 I.C. 247. It is not necessary in the case of a document executed by a *pardanashin* lady that the witnesses should be actually inside the *pardah*. Where one of the witnesses to a mortgage-deed was inside the *pardah* where the lady affixed her signature to the deed, the other witnesses being outside the *pardah*, and after the lady's signature he took the document to the other witnesses, and there he signed it himself and the other witnesses also signed, held that there was valid attestation—*Syed Yakir v. Madhusudan*, 45 I.C. 691 (Pat.). Where the witnesses who attested the execution of a mortgage-deed by a *pardanashin*

lady had not seen her face, but had identified her by her voice, *held* that the execution of the mortgage-deed was sufficiently attested—*Padarath Halwai v. Ram Narain*, 37 All. 474 (P.C.) ; *Rai Radha Kishen v. Jag Sahu*, 60 I.C. 173 (Pat.). But where the witnesses did neither see the face of the executant *pardanashin* lady nor hear her voice, the deed was not validly attested. Thus, a mortgage-deed, purporting to have been granted by a *pardanashin* lady on behalf of her minor son, was executed as follows: the lady was behind the *pardah*, when the document was taken to her for signature ; none of the witnesses saw her sign it ; her son came from behind the *pardah*, and said that it had been signed by her, and then the witnesses attested it. Their Lordships of the Judicial Committee observed that the requirement as to attestation contained in sec. 59 was not complied with, since the attesting witnesses were neither able to answer as to the act of execution nor as to the identity of the person performing the act—*Ganga Pershad v. Ishri Pershad*, 45 Cal. 748 (754) (P.C.), 22 C.W.N. 697, 45 I.C. 1. The same view is taken in *Hira Bibi v. Ram Hari*, 5 Pat. 58 (P.C.), 89 I.C. 659, A.I.R. 1925 P.C. 203, where the facts are exactly the same. Even the fact that the *pardanashin* lady subsequently admitted that she had executed the mortgage-deed would not validate the deed by operation of sec. 70 of the Evidence Act, for that section applies only to a document *validly attested*, which is not the case here—*Hira Bibi v. Ram Hari*, (supra). Where the attestors did not see the lady sign the instrument, and the lady did not acknowledge to them that she had signed it, and the attestors did not sign the instrument in the presence of the lady (as for instance, where the witnesses were waiting in the parlour of the lady's house and the document was taken inside the house for her signature, and after its return with her signature it was brought to the place where the witnesses were waiting and there they signed), the instrument could not be said to have been validly attested—*Venkata Jagannadha v. Venkata Kumara*, 54 Mad. 163, 60 M.L.J. 56, A.I.R. 1931 Mad. 140 (141), 135 I.C. 17.

Where a document executed by a *pardanashin* lady is attested by the witnesses while the lady is sitting behind a thin curtain and it is clear that she could have seen the witnesses, if so minded, even if she did not actually see them through the curtain, it amounts to sufficient compliance with the requirement of attestation as defined in sec 3—*Kundan Lal v. Musharafi Begam*, A.I.R. 1936 P.C. 207, 63 I.A. 326, 40 C.W.N. 1093, 11 Luck. 346, 63 C.L.J. 511, 163 I.C. 156, reversing *Mt. Mushrafi v. Kundan Lal*, A.I.R. 1933 Oudh 365, 144 I.C. 860 ; followed in *Murari v. Samiuddin*, A.I.R. 1937 All. 273, 168 I.C. 988.

355. Effect of invalid attestation :—If a document is not validly attested as required by this section the mortgage is ineffectual, but it does not follow that, failing to operate as a mortgage, it will still operate as a charge. The Legislature could not have intended that a transaction bad as a mortgage (because the document was not registered or attested) was still good as a charge under sec. 100, for then the owner of that charge could afford to disregard sec. 59 altogether, being amply protected by sec. 100—*Pran Nath v. Jadu Nath*, 32 Cal. 729 ; *Samoo Patter v. Abdul Sammad*, 31 Mad. 337 ; *Shania Pattar v. Abdul Kader*, 35 Mad. 607 (P.C.) ; *Narayan v. Lakshmandas*, 7 Bom. L.R. 934 ; *Deben-dra v. Behari Lal*, 16 C.W.N. 1075, 15 I.C. 666 ; *Collector of Mirzapur*

v. *Bhagwan Prasad*, 35 All. 164, 18 I.C. 311; *Ram Narain v. Adhindra Nath*, 44 Cal. 388 (P.C.); *Khem Chand v. Malloo*, 10 N.L.R. 81, 26 I.C. 601.

But though the deed may be ineffectual as a mortgage for want of attestation, still it will be admissible as an evidence of a *personal covenant* to repay the debt, whether the deed has been registered or not—*Muthalakulangara v. Thiruthipalli*, 32 Mad. 410 (F.B.); *Sada Kavaur v. Tidepally*, 30 Mad. 284; *Venkata Jagannadha v. Venkata Kumara*, 54 Mad. 163 A.I.R. 1931 Mad. 140; and a single money-decree can be passed on the personal covenant to pay—*Mahadeo Prosad v. Gajraj Sing*, 3 O.L.J. 164, 34 I.C. 397; *Mathura Prosad v. Chedi Lal*, 13 A.L.J. 553; *Sama Rao v. Vannajee*, 46 Mad. 64 (67); *Dhana Mohammad v. Nastulla*, A.I.R. 1926 Cal. 637; *Tofaluddi v. Mehar Ali*, 26 Cal. 78. So, in a suit on a simple mortgage for sale of the mortgaged property, if it is found that the document fails for want of proper attestation to take effect as a mortgage-deed, the Court can allow the plaintiff, even at a late stage of the case, to amend the plaint by adding an alternative prayer for a simple money-decree—*Mahadeo Prosad v. Gajraj*, 3 O.L.J. 164. But this rule will not hold good in the case of a usufructuary mortgage in which the mortgagor does not bind himself personally to repay the money. If such mortgage is not validly attested, neither a personal decree will be allowed against the mortgagor nor will the document create a charge—*Ram Narain v. Adhindra Nath*, 44 Cal. 388 (P.C.). In a case where a mortgage-bond failed to take effect for want of due attestation, the Privy Council gave effect to it as a validly executed transfer of the earlier mortgages by the mortgagees—*Lucas v. Bank of Bengal*, A.I.R. 1926 P.C. 129 (130), 31 C.W.N. 178, 98 I.C. 925. If any person enters into possession on the basis of a deed of usufructuary mortgage not properly attested he cannot resist the claim for recovery of possession by the owner especially when he does not deny the execution of the mortgage—*Azab Ali v. Farid Ali*, A.I.R. 1961 Assam 48. Attestation is not required in the case of a mortgage deed executed by the court in pursuance of a decree for specific performance—*Sait Genamal v. Pachigalla*, A.I.R. 1960 Andh. Pra. 465.

355A. Usufructuary mortgage :—Where a person borrowed an amount less than Rs. 100 and executed a document stating "I have mortgaged to you with possession from the ensuing year.....," it was held that the actual mortgage was intended to take place the following year and before the date on which the mortgage was to operate, the document would presumably amount to an agreement to mortgage, and delivery of the property was not necessary at the time document was drawn up—*Majji v. Gottennkkala*, A.I.R. 1938 Mad. 85, 46 M.L.W. 742. An oral usufructuary mortgage or charge in extension of a previous such mortgage is invalid without registration—*Viswanatha v. Fatima Bi*, A.I.R. 1952 Hyd. 5.

The mortgagor of an oral unregistered usufructuary mortgage cannot institute a suit for redemption but can treat the mortgagee as a trespasser and can evict him without repaying the loan—*Ningappa v. Danappa*, A.I.R. 1947 Bom. 206, 48 Bom. L.R. 800. In such a case limitation under

Art. 137, Limitation Act does not start from the date on which the mortgagee took possession of the property—*ibid*.

356. Equitable mortgage :—The last para of the old section which provided for an equitable mortgage was not happily worded : it was in the nature of a negative provision. It gave rise to the contention (in a case before the Privy Council) that this para did not validate or expressly recognize an equitable mortgage but threw on those who relied on it to establish the validity of such mortgage, and that if the mortgagee did not discharge that burden, the mortgage was invalid. But their Lordships overruled this contention, saying that although this Act did not itself validate such mortgages, the validity of such mortgages must be deemed as recognized by this Act, and that no onus lay on the mortgagee to prove the validity of the mortgage—*Papiah Naidu v. Naganatha Sethupathi*, 61 M.L.J. 408 (P.C.), 35 C.W.N. 1061 (1065), A.I.R. 1931 P.C. 239, 134 I.C. 328.

No such contention is now possible under clause (f) of sec. 58, to which this para has been transferred.

An equitable mortgage may be made without any writing, because it is the deposit of title-deeds which creates the mortgage; the mortgage is effected as soon as the deposit takes place, and any letter or memorandum which accompanies or follows the deposit is merely a recital that the mortgage has been effected and is not itself a contract of mortgage—*Kedarnath v. Shamlal*, 11 B.L.R. 405; *Jivandas v. Framji*, 7 B.H.C.R. 62; *Behram v. Sorabji*, 38 Bom. 372. 23 I. C. 140 (141); *Oo Nong v. Moug*, 13 Cal. 322 (325).

As regards registration, the newly-added words "*other than a mortgage by deposit of title-deeds*" show that such a mortgage, whatever be the amount of the loan, does not require registration.

An equitable mortgage is created and is complete by the act of deposit of title-deeds; nothing else is necessary. It is essentially an oral transaction; consequently no writing is required, and registration is out of the question. But if there is a writing, the matter is different—*Punjab & Sind Bank v. Rustomji*, A.I.R. 1935 Lah. 821 (823), 160 I.C. 773. In such a case a distinction should be made between cases in which the writing itself constitutes the bargain between the parties, and cases in which the writing is a mere memorandum of the fact of mortgage. In the former case, registration is essential; in the latter, registration is unnecessary. Therefore, in determining whether the writing requires registration or not, it is necessary to consider, whether the writing is the embodiment of the equitable mortgage or whether the mortgage is complete independently of it. Thus, a letter or memorandum which is written after the deposit has been made and which records the deposit and the purpose for which it has been made, does not require registration, because such a document does not constitute the bargain between the parties; the mortgage has been effected by deposit before the writing of the letter; and the letter is merely the record of a transaction which has already been completed—*Bhuban Mohan v. Co-operative Hindustan Bank*, 29 C.W.N. 784, A.I.R. 1925 Cal. 973 (975), 89 I.C. 866; *Kshetrath v. Harasukhdas*, 31 C.W.N. 703, A.I.R. 1927 Cal. 538; *Sundara-*

chariar v. Narayana, 54 Mad. 257 (P.C.), 35 C.W.N. 494 (501), A.I.R. 1931 P.C. 36, 131 I.C. 328; *Surendra v. Mohendra*, 59 Cal. 781, 36 C.W.N. 420, A.I.R. 1932 Cal. 589; *Kedarnath v. Shamlal*, 11 B.L.R. 405 (412), 20 W.R. 150; *Esther v. Martu*, 37 I.C. 117, 25 C.L.J. 160; *Oo N'oung v. Moung*, 13 Cal. 322 (325); *Ma Sein v. Chetty Firm*, 3 Rang. 443; *Gokul Das v. Eastern Mortgage Agency Co.*, 33 Cal. 410 (420); *Haripado v. Anath Nath*, 22 C.W.N. 758 (760), 44 I.C. 211; *Vadamalai v. Subramania*, 1923 M.W.N. 57, A.I.R. 1923 Mad. 262; *Rammohan v. Bharat National Bank*, 3 Lah. L.J. 373; *Umrao Singh v. Punjab National Bank*, 3 Lah. L.J. 44, 59 I.C. 578; *Shailendra v. Hade Kaza*, 59 Cal. 586; *Ralli Brothers v. Punjab National Bank*, A.I.R. 1930 Lah. 920, 11 Lah. 564, 129 I.C. 21; *Chettyar Firm v. Administrator General*, A.I.R. 1933 Rang. 307, 11 Rang. 481; *Nageswara v. Srinivasa*, A.I.R. 1926 Mad. 743, 94 I.C. 427; *Jagannadham v. Official Assignee*, A.I.R. 1931 Mad. 124, 60 M.L.J. 309, 129 I.C. 814; *Rama Krishna v. Kesavalu*, A.I.R. 1927 Mad. 1145, 53 M.L.J. 179, 192 I.C. 34; *Villa v. Pethy*, A.I.R. 1934 Rang. 51, 148 I.C. 721; *Ramanathan v. Dowlat Singhji*, A.I.R. 1938 Mad. 865 (871, 872), (1938) 2 M.L.J. 534; *Ram Sarup v. Shiv Dayal*, A.I.R. 1940 Lah. 285, 42 P.L.R. 307, 190 I.C. 463. In *Sundarachariar v. Narayana*, supra, a person in Madras gave a promissory note which contained a list of the title-deeds with the introductory words: "As agreed upon in person, I have delivered to you the undermentioned documents as security," it was held by the Privy Council that the memorandum was not other than a written record of the particulars of the deeds, the subject-matter of an agreement. "Even if it was a condition of the advance", observed their Lordships, "that the memorandum was to be given, the fact that the memorandum was prepared, signed and handed over to the mortgagee before the advance of the balance of the money to be secured by the deposit, could not alter the nature and meaning of the document. It was and remained a list of the documents deposited and nothing more. It did not embody the terms of the agreement between the parties"—at p. 38. "Where there is no written agreement there seems no reason why the intent to create a security.....should not be evidenced by written as well as oral evidence"—at p. 58. Again, "No such memorandum can", observed their Lordships in the same case, "be within the section unless on its face it embodies the terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that so far as the deposit is concerned it constitutes the agreement between the parties"—at p. 39. So also *Punjab & Sindh Bank v. Jaswant Singh*, A.I.R. 1937 Lah. 135, 164 I.C. 63; *Central Bank v. Jawahir Singh*, A.I.R. 1936 Lah. 65, 162 I.C. 406. It is the deposit of title-deeds that creates an equitable mortgage; that is, the essence of an equitable mortgage is the deposit of title-deeds, and a letter which accompanies or precedes or is contemporaneous with the deposit does not *per se* have the effect of creating the mortgage merely because it contains the terms of the contract—*Muthiya Chetty v. Kothandaramswami*, 31 M.L.J. 347, 35 I.C. 864 (865, 866). But where after reciting the details of the properties the mortgagor's letter ran: "Now I am creating an equitable mortgage.....and am depositing the title-deed", and the letter together with the title-deeds was handed over to the mortgagee: held, not only were the writing of the letter and the

deposit of the title-deeds contemporaneous transactions, but the letter was the sole repository of the terms of the bargain, and since it was not registered, it was inadmissible to prove the mortgage transaction and its terms could not be proved *aliunde* under sec. 91 of the Evidence Act—*Ram Sarup v. Shiv Dayal*, A.I.R. 1940 Lah. 285 (287-288), 42 P.L.R. 307, 190 I.C. 463. When a document is drawn up constituting the bargain between the parties,—a document which purports or operates to create the mortgage, which is tacitly considered by the parties themselves as the only repository and appropriate evidence of the agreement, a document without production of which in evidence the plaintiff cannot establish his claim—then the document is not admissible in evidence to prove the mortgage unless it is registered—*Subramonian v. Lutchman*, 50 Cal. 338 (346) (P.C.); *Bengal Banking Corporation v. Mackertich*, 10 Cal. 315 (322); *Chunilal v. Vithal Das*, 24 Bom. L.R. 502, A.I.R. 1922 Bom. 440; *National Bank of India v. R. C. Nazir & Co.*, 34 Bom. L.R. 748, 139 I.C. 745, A.I.R. 1932 Bom. 401 (404); *Krishnaiya v. Pannuswami*, 47 Mad. 398 (400), 46 M.L.J. 295, A.I.R. 1924 Mad. 547; *Dwarka v. Sarat Kumari*, 7 B.L.R. O.C. 55; *Bhairab Chandra v. Anath Nath*, 24 C.W.N. 599, 31 C.L.J. 375; *Behram v. Sorabji*, 38 Bom. 372, 23 I.C. 140 (141); *Swami Chetty v. Ethirajulu*, 40 Mad. 547, (1916) 2 M.W.N. 84, 34 I.C. 853; *Alwar Chetty v. Jagannath*, 54 M.L.J. 109; *Jagannadham v. Official Assignee*, 60 M.L.J. 309, A.I.R. 1931 Mad. 124 (127, 128), 129 I.C. 814; *Kedarnath v. Hari Sankar*, A.I.R. 1938 Cal. 308, I.L.R. (1937) 2 Cal. 586, 175 I.C. 578; *Krishnaswami v. Jonnagadla*, A.I.R. 1936 Mad. 256, 163 I.C. 195.

The criterion which should enable a Court to come to a proper conclusion as to whether or not any particular document is of such and such a character that it requires to be registered is this : If the document is merely a written record of the particulars of the deeds deposited, the document does not require registration. But if, on the other hand, the document is one which in itself purported or operated to create or declare some right, title or interest in the property included in the deeds, or in other words, if the document is of such a nature that it was treated by the parties as the contract for the mortgage and to be the only repository and appropriate evidence of the agreement, the document would come within sec. 17 of the Registration Act and would require registration—*Kedar Nath v. Hari Sankar*, supra, at pp. 311, 312. See also *Ebrahim v. Official Trustee*, A.I.R. 1937 Cal. 741; *Ram Ratan v. Sew Kumari*, A.I.R. 1938 Cal. 823.

An endorsee of a negotiable instrument, the payment of which is secured by a mortgage by deposit of title-deeds, can claim to enforce the mortgage, even though there is no registered instrument conveying the mortgagee-rights to him—*Villa v. Petley*, A.I.R. 1934 Rang. 51, 148 I.C. 721; *Hirendra v. Noyes*, A.I.R. 1937 Rang. 154, 171 I.C. 356. [Contra—*Elumalai v. Bala Krishna*, 44 Mad. 965; *Mrs. Niemeyer v. Mamooji*, A.I.R. 1938 Rang. 461.] In such a case the execution of fresh promissory notes is not a discharge of the loan of equitable mortgage, but merely a matter of providing evidence of the loan and keeping alive the right to a personal remedy against the mortgagor—*Hirendra v. Noyes*, supra, at p. 156.

If in a suit on a mortgage by deposit of title-deeds the mortgage is held to be invalid, but the mortgagee is found entitled to a money-decree by virtue of a promissory note executed for the loan, only a simple money-decree can and should be passed against the mortgagor and the suit must be dismissed as against a third party impleaded as a subsequent mortgagee—*Krishnaswami v. Kamalamma*, 46 C.W.N. 29 (P.C.), A.I.R. 1941 P.C. 90. The validity or otherwise of the mortgage of such third party cannot be investigated, nor a money-decree passed in his favour on the finding that his mortgage is invalid as against the prior mortgagee, nor a sale ordered of the mortgaged property with directions as to the distribution of the sale-proceeds as between only these creditors—*Ibid.*

Title-deeds may be deposited under an oral agreement to cover present and future advances; as each advance is made it becomes a charge upon the property comprised in the title-deeds from the force of the previous oral agreement. When in such a case there is a written memorandum relating to the first advance creating a collateral security, oral evidence of the agreement, whereby the same deposit of title-deeds was to cover future advances, is not excluded by sec. 91 of the Evidence Act—*Mohini Mohan v. Deb Narayan*, 40 C.W.N. 1277.

A mere agreement to make an equitable mortgage does not require registration and is admissible in evidence though unregistered—*Bengal Banking Corporation v. Mackertich*, 10 Cal. 315 (322).

Punjab:—The Transfer of Property Act is not in force in the Punjab. The result is that sec. 59 does not prohibit the creation of a mortgage by deposit of title-deeds in that Province; hence such mortgages are valid there—*Gurudas Mal v. Punjab-Sind Bank*, A.I.R. 1933 Lah. 972, and the mortgage need not be executed, attested and registered according to the formalities of this section—*Brij Raj v. Alliance Bank*, A.I.R. 1936 Lah. 946, 17 Lah. 686. But a mortgage by deposit of title-deeds cannot be effected within the limits of a cantonment to which sec. 59 has been extended—*Punjab & Sindh Bank v. Ishar Sing*, A.I.R. 1933 Lah. 1001; *Gurudas Mal v. Punjab-Sind Bank*, *supra*. As a matter of fact this section along with other sections enjoining registration of documents has been extended to all cantonments by sec. 287 of the Cantonment Act (II of 1924). See Note 8, *ante*.

59A. *Unless otherwise expressly provided, references in this Chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively.*

References to mortgagors and mortgagees to include persons deriving title from them.

This section has been added by sec. 21 of the Transfer of Property Amendment Act (XX of 1929). The *Special Committee* observes:—

“Whether the words ‘mortgagor’ and ‘mortgagee’, as used in the different sections in this Chapter, include all persons deriving title from them has given rise to some difficulties. [See 39 I.A. 7, 34 All. 63 (P.C.): and 21 All. 223]. In order to make this clear, we propose the addition of section 59A.”

357. A distinction is drawn by this section between the two categories of mortgagors and mortgagees and the intention is that the persons who derive title from them are to derive title as a mortgagor or mortgagee. That is, under the term "mortgagor" would be included persons succeeding by inheritance or by will or by sale or by auction-sale to the right of the equity of redemption held by a mortgagor and these words would not include persons who subsequently take a mortgage from the mortgagors—*Piarey Lal v. Dina Nath*, I.L.R. 1939 All. 185, A.I.R. 1939 All. 190, 1939 A.L.J. 228.

The term "mortgagee" in sections 60 and 62 is intended to mean not only the mortgagee but persons deriving title from him. These sections do not limit the right of the mortgagor to proceed only against the mortgagee in a redemption-suit. In order to avoid multiplicity of proceedings the Court is not debarred from giving a decree in a redemption-suit against the persons who have derived title from the mortgagee (e.g., a sub-mortgagee)—*Venkataramana v. Rangaswami*, 1927 M.W.N. 418, A.I.R. 1927 Mad. 703 (704). The expression "mortgagor" also includes his heirs and survivors—*Harihar v. Lachman*, A.I.R. 1939 Oudh 246, 149 I.C. 543. The representatives of the mortgagor and mortgagee are also included whether they are mere heirs or subsequent transferees—*Chettyar Firm v. Sein Htaung*, A.I.R. 1935 Rang. 420, 159 I.C. 1038. In view of the provisions of this section the word mortgagor in sec. 6 (1) (c) must include the subsequent purchaser of the mortgaged property—*Haridas v. Jagannath*, I.L.R. 1938 Nag. 63, A.I.R. 1939 Nag. 256 (258), 1939 N.L.J. 338; *Janki Saran v. Md. Ismail*, A.I.R. 1932 Pat. 273, 13 P.L.T. 373, 139 I.C. 525; *Mt. Mathura Devi v. Mohan Lal*, A.I.R. 1938 Oudh 210, 1938 O.W.N. 806, 177 I.C. 100 followed and *Tretanath v. Ajodhya Prasad*, A.I.R. 1930 Nag. 139, 124 I.C. 690 held to have been overruled by sec. 59-A; *Madangopal v. Srinarayan*, A.I.R. 1946 Nag. 226, I.L.R. 1946 Nag. 297; *Kishan Lal v. Gouri Shankar*, A.I.R. 1949 Aj. 52. If the holder of a simple money-decree purchases the equity of redemption in execution of his decree against the mortgagor, he cannot question the validity of the mortgage—*Hindusthan Ideal Insurance Co. Ltd. v. Perla Sathaya Chetty*, A.I.R. 1961 Andh. Pra. 183.

Rights and Liabilities of Mortgagor.

60. At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to retransfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished :

Right of mortgagor
to redeem.

Provided that the right conferred by this section has not been extinguished by act of the parties or by *decree* of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except *only* where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

Amendment :—By section 22 of the T. P. Amendment Act (XX of 1929), the word "payable" has been replaced by the word "due" (see Note 359), and the italicised words have been added in para 1 (see Note 370); the word "decree" has been substituted for "order" in para 2 (see Note 373); and the word "only" has been added in the last para (see Note 376).

The intention of the Legislature in making the above amendments in 1929 was not to alter but to declare the law—*Md. Yunus v. Champamani*. A.I.R. 1939 Pat. 49, 19 P.L.T. 875, 18 Pat. 141.

As to mortgages executed between 1858 and the coming into force of this Act in 1882 the equity of redemption which had been originally imported from the English Courts must be recognized—*Ramalinga v. Arunachala*, A.I.R. 1936 Mad. 386.

Scope :—This section gives the right to redeem to the mortgagors generally, and sec. 62 deals specifically with usufructuary mortgages—*Parasram v. Bindeshari*, A.I.R. 1953 All. 33. See also *Ram Prasad v. Bishambhar*, *infra*. This section does not override other statutory provisions limiting or barring the exercise of the right of redemption in certain circumstances, as for instance O. 23, r. 1 C. P. Code. Therefore when a suit for redemption has once been withdrawn or abandoned without permission and consequently dismissed, a fresh suit for redemption is not maintainable—*Raju v. Raghavayya*, A.I.R. 1945 Mad. 225, I.L.R. 1945 Mad. 803. In a suit by the mortgagee against the mortgagor's lessees to recover possession, neither lessees nor the mortgagors can claim to redeem the mortgage—*ibid*.

This section applies to a subsisting mortgage only—*Ram Prasad v. Bishambhar*, A.I.R. 1946 All. 400, 1946 A.L.J. 175.

358. Right to redeem :—The right to redeem is a right conferred upon the mortgagor by enactment, of which he can only be deprived by means and in the manner enacted for that purpose and strictly complied

with—*Raghunath v. Mt. Hansraj*, A.I.R. 1934 P.C. 205, 56 All. 561, 39 C.W.N. 9, 61 I.A. 362, 157 I.C. 37. This relief the Court is not entitled to give on such terms as it thinks equitable. This right is only available upon the terms stated in this section—*Shah Ram Chand v. Prabhu Dayal*, 47 C.W.N. 1 (P.C.), A.I.R. 1942 P.C. 50 overruling cases taking a contrary view. It is not the law in India, any more than in England, that one of several mortgagors cannot redeem more than his share, unless the owner of the other shares consent or make no objection, subject to the pre-safeguarding of the rights which those owners might possess—*Yadalli v. Tukaram*, 48 Cal. 22 (P.C.). A second mortgagee desiring to redeem is bound to pay the whole amount due under the first mortgage and not merely the price realized at the sale held in execution of the first mortgagee's decree—*Hare Krishna v. Gojendra*, A.I.R. 1939 Cal. 15, relying on *Jnanendra v. Sorashi*, A.I.R. 1922 Cal. 23, 49 Cal. 626, 69 I.C. 759 and *Umesh v. Mt. Zahoor Fatima*, 18 Cal. 164 (P.C.). See this case for calculation of interest on a paddy loan. Where the first mortgagee without impleading the second mortgagee brought a suit on his mortgage and purchased the mortgaged property in execution of the decree, in a suit brought by the second mortgagee for redemption, the first mortgagee contended that he was not liable to account as he was in possession not as a mortgagee but as a purchaser: Held that inspite of the sale in execution of the first mortgagee's decree, the second mortgagee held the equity of redemption and as such the first mortgagee was bound to account—*Hare Krishna v. Gojendra*, supra. But the principle that the right of a second mortgagee to redeem the first mortgage is not extinguished by proceedings in suit on the first mortgage to which the second mortgagee is not a party is inapplicable to a case where the second mortgage did not exist either at the time of the suit or at the date of the decree or even at the time of the sale in execution of the decree—*Venkatarama v. Rangiyar*, A.I.R. 1924 Mad. 449, 77 I.C. 504. Thus, where the charge created by a widow's maintenance decree came into existence only on the date of the decree and not earlier, the mere fact that the widow was not impleaded in the sale proceedings in execution of the mortgage-decree did not give her or the purchaser in execution of her decree any right to redeem the mortgage—*Ibid*, at p. 505.

Where a mortgagor, having a power under the mortgage-deed to sell the mortgaged property enters into a contract for sale of the property, the mortgagor has still the right to redeem the mortgage—*Mansoor v. Usman*, A.I.R. 1944 Bom. 156, 46 Bom. L.R. 159. A puisne mortgagee or even a purchaser of a portion of the mortgaged property can redeem the mortgage by paying the whole sum. After suit and after decree this position is not altered—*Suryanarayana v. Daulatrao*, A.I.R. 1949 Nag. 296 I.L.R. 1949 Nag. 60. In the absence of a final decree passed under O. 34, r. 8 C. P. Code the right to redeem remains intact under the present section—*Loknath v. Daulta Kuer*, A.I.R. 1953 All. 503, 1953 A.L.J. 258. See in this connection *Sheo Narain v. Mt. Deolochan*, A.I.R. 1948 Pat. 208, 26 Pat. 97.

The remedy under this section depends upon existence of the relationship of mortgagor and mortgagee—*Batuk Prasad v. Rudra Das*, A.I.R. 1950 Pat. 206.

Where the mortgage was by conditional sale and no proceedings were taken to foreclose it, the mortgage could be redeemed—*Pal Singh v. Bhola*

Singh, A.I.R. 1934 Lah. 242, 149 I.C. 964. A mortgagee by conditional sale who is in possession of the property cannot, by obtaining a decree in an illegal foreclosure proceeding or by asserting himself to be the proprietor and obtaining mutation, alter the character of his original title, nor can he rely on a possession adverse to the mortgagor to deprive him of his right to redeem the property—*Mt. Dhapan v. Sri Ram*, A.I.R. 1937 Lah. 837, 172 I.C. 449. A right to the equity of redemption may, however, be acquired by adverse possession against the mortgagor—*Parshottam v. Sagaji*, 28 Bom. 87.

If during the continuance of the mortgage and prior to its redemption the mortgagee allowed a stranger to receive an additional advance from him on the same security and attorned to him, while still entitled to retain possession, it would be ineffective to deprive the true mortgagor of his right to redeem—*Gurunath v. Suryakant*, I.L.R. 1940 Bom. 453, A.I.R. 1940 Bom. 225, 42 Bom. L.R. 399.

Where the mortgagee undertook to redeem a prior mortgage and pay the rent of the mortgaged holding, but omitting to do so, purchased it in execution of the rent-decree in the name of another person: held the sale was no bar to the mortgagor's right of redemption—*Ram Kishore v. Jagannath*, A.I.R. 1934 Pat. 307, 151 I.C. 255.

There is a material difference between a case where cash is paid in satisfaction of the mortgage-debt and where property is transferred in satisfaction thereof. In the former case, the moment the money is appropriated redemption takes place in fact, but in the latter case the redemption depends upon whether the title in the property sold, in law passed to the mortgagee or not, and the mortgage-debt in this case is extinguished to the extent to which the transfer is valid—*Kishen Gopal v. Abdul Latif*, 15 Luck. 175, A.I.R. 1940 Oudh 97 (100), 1939 O.W.N. 1045.

A *benamdar* of the mortgagor is a trustee for him. A suit for redemption by the transferee of the benamdar's heirs is maintainable even though the real owner's heir gave evidence that he was not willing to maintain the suit. The remedy of the real owner, however, on establishing his right, stood unaffected—*Md. Sheriff v. Sayyed Kasim*, A.I.R. 1933 Mad. 635, 145 I.C. 230.

358A. Suit for redemption :— Where in a suit on a simple mortgage a decree for possession was wrongly given, but the decree became final and was executed, it was held that the decree for possession did not amount to a decree for foreclosure or preclude redemption, the possession of the decree-holder having been as mortgagee and having involved liability to account to the mortgagor—*Papamma v. Pratapa*, 19 Mad. 249 (P.C.), 23 I.A. 32. A decree obtained by the mortgagee, before the Act came into force, to receive the mortgage-debt by sale of the mortgaged property which remains unexecuted; does not bar a suit for redemption if instituted within the period of limitation, on the ground of *res judicata*—*Badrudin v. Sitaram*, A.I.R. 1930 Bom. 401, 32 Bom. L.R. 933, 126 I.C. 882.

Where the suit was in effect one for redemption of an oral mortgage it was necessary for the plaintiff to prove that he was the mortgagor entitled

to redeem—*Bishnu v. Sheodhari*, A.I.R. 1947 Pat. 110, 12 B.R. 599. Where the mortgagee acquired by auction purchase one fourth share of the mortgaged property belonging to one of the joint mortgagors with the result that the integrity of the mortgage was broken up, a suit for redemption of the entire property was not the proper remedy, and the plaintiff was allowed to sue for partition and redemption of his share only—*Narayan-swami v. Perumal*, A.I.R. 1953 Mad. 720, (1953) 2 M.L.J. 150. See also *Ayoob v. Anantha*, A.I.R. 1953 Tr.-Coch. 335. In a suit for redemption of a usufructuary mortgage the Civil Court is entitled to consider question whether the mortgagee has set up a fictitious person as tenant to prevent the mortgagor from obtaining possession. Sec. 12 of the U. P. Agriculturists' Act, 1934 has not changed the substantive law in secs. 60, 76 and 83, T. P. Act—*Ram Piary v. Ram Adhin*, A.I.R. 1953 All. 472, 1953 A.L.J. 154. Where the renewal clause in a mortgage deed could not come into force without something more being done by the parties, the suit for redemption was not premature—*Kurien v. Lakshmi*, A.I.R. 1951 Tr.-Coch. 71 (F.B.). In a suit for redemption the plaintiff must show that the mortgage is a subsisting one—*Bhailal v. Keshavji*, A.I.R. 1952 Kutch 1. As to *Otti or Kuzhikanom* mortgages see *Savarmuthu v. Marthandan*, A.I.R. 1951 Tr.-Coch. 170; and *Bhageerathi v. Kochan*, A.I.R. 1952 Tr.-Coch. 286. A suit may be a suit for redemption if only one of the three rights enumerated in sec. 60 is claimed in the suit—*K. Manickchand v. Saleh Mohamed Sait*, A.I.R. 1969 S.C. 751.

Where the alleged mortgage is not proved the plaintiff cannot take advantage of a different mortgage not set up by him—*Kanhiya v. Jamha*, A.I.R. 1950 Raj. 47.

In a redemption suit instituted by the transferee from the mortgagor the plaintiff can obtain redemption with respect to the right of his transferor and no more—*Abdul Wahab v. Raghunandan*, A.I.R. 1945 All. 388, I.L.R. 1945 All. 637.

Successive suits :—Until a final decree is passed in a mortgage suit the right of redemption is not extinguished, and a mortgagor can bring successive suits for redemption of the same mortgage—*Suraj Bali v. Rang Bahadur*, A.I.R. 1950 All. 88, 1950 A.L.J. 86. See also *Ramjatan v. Net Lal*, A.I.R. 1950 Pat. 281; *Kunhotti v. Koya*, A.I.R. 1949 Mad. 443, I.L.R. 1949 Mad. 276; *Somnath Pradhan v. Sanno Govinda Misra*, A.I.R. 1959 Orissa 122. The cause of action in a redemption suit being a recurring one, provisions like O. 9, r. 9, O. 23, r. 1, etc. are no bar to the filing of a second suit for redemption—*Subba Rao v. Raju*, A.I.R. 1950 F.C. 1, 1949 F.L.J. 398, (1950) 1 M.L.J. 752; *Rajaram v. Ramchandra*, A.I.R. 1948 Bom. 226 (F.B.), 50 Bom.L.R. 45; *Narayan Shenoi v. Yasodabai*, A.I.R. 1955 Trav.-Co. 9 (F.B.); *Edumban Chettiar v. Ramalakshmi Pichamma*, A.I.R. 1965 Ker. 153. A subsequent suit for redemption would be barred by limitation on the application of the principle of *res judicata*, if in a prior suit for redemption the suit was dismissed on the ground of limitation—*Neelakanta Pillai v. Mathavan Pillai*, A.I.R. 1963 Mad. 226.

Costs :—The ordinary rule that costs follow the event applies with greater force in mortgage suits including redemption suits—*Varaha Devaswom v. Ummer Sait*, A.I.R. 1951 Tr.-Coch. 17. See also *Kaliya Pillai v.*

Kamalammal, A.I.R. 1953 Tr.-Coch. 423 ; and *Bhanwarlal v. Bhagwatidevi*, A.I.R. 1954 Aj. 9 (1).

Limitation:—In a suit for redemption the mortgagor must prove that his claim for redemption is within time—*Mangilal v. Ram Dayal*, A.I.R. 1951 Aj. 21. Where the suit for redemption is instituted more than 60 years after date of expiration of the term, it was barred limitation—*Shib Narain v. Chitru*, A.I.R. 1949 E.P. 389 ; *Mohammad Khan v. Md. Salim*, A.I.R. 1951 All. 392, 1951 A.L.J. 174. See in this connection *Gangadhar v. Dattatraya*, A.I.R. 1953 Bom. 424 ; *Dhanammal v. Raju*, A.I.R. 1954 Mad. 193. In a suit by a co-mortgagor for redemption of his share of mortgage and for possession from another co-mortgagor who is in possession on redemption of the possessory mortgage, limitation starts not from the time when the re-deeming co-mortgagor redeemed it but from the time when the original mortgage become redeemable—*Kaliyamma Pillai v. Narayana Pillai*, I.L.R. (1966) 2 Ker. 388.

Decree:—There is nothing wrong in law if the mortgage-decree is scaled down, in accordance with local law, in favour of one of the judgment debtors while in respect of others the decree is kept intact—*Ramaswami v. Kailasa*, A.I.R. 1951 S.C. 189, 1951 S.C.J. 278, 1951 M.W.N. 343.

359. "Due"—When mortgagor may redeem:—There is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property—*Ashrafi v. Zamir*, A.I.R. 1940 All. 29. Under a possessory mortgage executed in November, 1947 it was agreed that the debt would be paid within a period of ten years. Suit for redemption was filed in 1951. *Held* that the word 'within' indicate that the suit is not pre-mature—*Yendru v. Satyavatamma*, A.I.R. 1957 Andhra 30. One deed cannot be interpreted in the light of the language used in another deed. In such case the Court must look to the nature of the particular mortgage and the surrounding circumstances to ascertain what the intention of the parties was—*Ashrafi v. Zamir*, A.I.R. 1940 All. 29.

A mortgage-debt means that portion of the amount secured by the mortgage which is still due—*Ganga v. Tejpal*, A.I.R. 1944 All. 232, I.L.R. 1944 All. 349. The word "due" in this section means due by the mortgagor on expiry of the time during which the mortgagee was authorized to retain possession of the property—*Dosabhai v. Vasan*, A.I.R. 1953 Kutch 4.

Having regard to sec. 60 of the Transfer of Property Act, the Legislature appears to have adopted the principle that in the absence of a stipulation to the contrary, the presumption is that the right to redeem and the right to foreclose arise at the same time, and that when a date is fixed for the payment of the principal-debt and the mortgagee cannot foreclose earlier, the mortgagor also cannot redeem before the appointed time—*Tirugnana v. Nallatombi*, 16 Mad. 486 (489). Thus, if the mortgage-deed fixes a term of years (e.g., where the deed stipulates that the mortgagor will pay the debt within 10 years or 15 years and redeem the property), the mortgagor is not entitled to redeem before the expiry of the term. The mere use of the word "within" ("within 10 years") is not a sufficient indication of an intention that the mortgagor may redeem in a less period than 10 years—*Vadju v. Vadju*, 5 Bom. 22 ;

Shiam Lal v. Jagadamba, 25 A.L.J. 1051, A.I.R. 1928 All 131 (132, 132); *Raghubar v. Budhu Lal*, 8 All. 95 (98). This principle has been recognised in *Husaini v. Husain*, 29 All. 471 (473), and has been ultimately approved of by the Privy Council. "Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period"—*Bakhtawar v. Husaini*, 36 All. 195 (199) (P.C.); see also *Ram Datta v. Md. Husain*, A.I.R. 1940 Oudh 428, 1940 O.W.N. 897, 190 I.C. 828. The rule is not affected by the fact that the term fixed is such a long period as 60 years or that it is provided in the deed that even after expiry of the term, there should be no redemption—*Narain v. Jagan*, A.I.R. 1925 All. 42, 80 I.C. 728; see also *Md. Sher Khan v. Swami Dayal*, A.I.R. 1922 P.C. 17, 44 All. 185, 49 IA. 60; *Bakhtwar v. Hussain*, 36 All. 195, 41 I.A. 84; *Mela Ram v. Prithvi Chand*, A.I.R. 1929 Lah. 523, 116 I.C. 609; *Akbar v. Shah Ahsanul Haq*, A.I.R. 1932 All. 155, 134 I.C. 459.

In an earlier Madras case *Turner, C.J.* expressed the opinion that where a date was fixed in the mortgage-deed, the presumption was that the date was fixed for the convenience of the mortgagor, and that he might repay the debt at an earlier period—*Sri Raja Satrucherla v. Sri Raja Vairicherla*, 2 Mad. 314 (316); and relying on this view, *Mahmood, J.* laid down that "no general rule exists in India as would preclude a mortgagor from redeeming a mortgage before the expiry of the term for which the mortgage was intended to be made, unless the mortgagee succeeds in showing that by reason of the terms of the mortgage itself the mortgagor is then precluded from paying off the debt due by him to the mortgagee"—*Bhagwat v. Parshad*, 10 All. 602 (609). In a Madras case, where the mortgagor covenanted to repay the mortgage-money within a specified date (e.g., within 20th April 1904), held that the mortgagor could redeem before that date, that the rule of mutuality (*viz.*, that the right of redemption and the right of foreclosure are co-extensive) was not an inflexible or universal one, and that when the mortgagor covenanted to repay the money within certain date, it must be presumed that he intended to reserve the liberty of redeeming at his pleasure—*Rose Ammal v. Rajarathammal*, 23 Mad. 33 (35, 36), dissenting from *Tirugnana v. Nallatombi*, 16 Mad. 486.

But the Legislature has adopted the rule of mutuality, and the word "due" has been substituted for the word "payable" in order to make it clear that the redemption should not be allowed within the term of the mortgage.

The diversity of opinion as to the meaning of the word "payable" (referred to in the above Report) is to be found in *Rose Ammal's* case (23 Mad. 33) and *Husaini's case* (29 All. 471). In the Madras case (at p. 36) it has been remarked that money is said to be "payable" when it is payable by the mortgagor, *i.e.*, when the mortgagor is entitled to pay it, even though it is not "due" to the mortgagee, *i.e.*, even though the mortgagee is not entitled to call for the money. The Allahabad High Court holds (at p. 474) that money becomes "payable" when the payment becomes obligatory upon the mortgagor, *i.e.*, when the mortgagee can enforce payment of it, and not earlier. To remove this divergence of opinion, the

Legislature has substituted the word "payable" by the word "due," so that the mortgagor can redeem only when the money has become "due" to the mortgagee, *i.e.*, when the mortgagee can call for the money, and not earlier.

But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property. Such a provision is usually to the advantage of the mortgagor—*Bakhtawar v. Husaini*, 36 All. 195 (199) (P.C.); *Kuddi Lal v. Aisha*, 2 Luck. 564, A.I.R. 1927 Oudh 199 (201). Where in a usufructuary mortgage for 37 years, it was stipulated that if the mortgagor made payment of the amount due at the end of 10 years, he would be entitled to redeem, but if such payment was not made, the mortgagee's possession was to continue on the same terms as before, and the mortgagor made no payment at the end of 10 years but brought a suit for redemption at the end of 14 years, *held* that the option to redeem at the end of 10 years not having been exercised on the proper date, the suit brought before the expiry of the original term was premature—*Aga Mahammad v. Venkatappaya*, 35 M.L.J. 287, 48 I.C. 379 (382).

Where no time was fixed for the payment of the mortgage-money, but after the execution of the deed a clause was added to the effect that "the amount will be paid, principal and interest, within one year," and this clause was separately signed by the mortgagor, *held* under circumstances of the case, that the mortgagor was entitled to redeem *before* the expiry of the year—*Purna Chandra v. Peary Mohan*, 39 Cal. 828 (833). Where no period is mentioned in the mortgage deed the mortgage money becomes due immediately on the date of the mortgage—*Des Raj v. Hargurdial Singh*, A.I.R. 1959 Punj. 249.

Where a provision was inserted in the mortgage-deed "exclusively for the benefit of the mortgagee" purporting to give him an option either to enforce the security at once or if the security was ample to stand by his investment for the full term of the mortgage, the mortgagor could not take advantage of his own default and upon such default he could not have the right to redeem. The mere fact that in the plaint in a suit on the mortgage the compound interest was calculated from date of the first default in payment of interest did not necessarily indicate that the option given to him had been waived—*Lasa Din v. Mt. Gulab*, A.I.R. 1932 P.C. 207, 7 Luck. 442, 36 C.W.N. 1017, 59 I.A. 376, 138 I.C. 779. See also *Nenumal v. Chadumal*, A.I.R. 1936 Sind 14, 161 I.C. 518. If a default clause making the entire money payable on failure to pay interest in any year is incorporated in the bond, the entire money does not become due automatically on the mortgagor's default in payment of interest; it becomes due on default only when the mortgagee calls for the entire money—*Subbanna v. Krishna Iyenger*, A.I.R. 1962 Mys. 5.

A mortgagor may sometimes be allowed to redeem before the fixed date on equitable grounds, *e.g.*, where the mortgagee failed to perform his part of the contract. In such a case, it is not equitable that the mortgagee should be in a position to resist redemption when he himself did not comply with the other terms of the deed—*Narasimha v. Seshayya*, 48 M.L.J. 363, A.I.R. 1925 Mad. 825, 90 I.C. 138; *Chhotku v. Baldeo*, 34 All. 659

(662). Where the period of redemption was fixed as 50 years, but the mortgagor sought to redeem after 26 years only and the mortgagee sought to set up adverse title, redemption was allowed on the ground that the mortgagee did not act in accordance with the terms of the contract and was not willing to do—*Durga v. Paresh*, A.I.R. 1925 Cal. 105 (106), 76 I.C. 336. Where the mortgagee failed to perform his part of the contract, e.g., paying the mortgagor by instalments, the mortgagor was entitled to redeem before the due date—*Sanwaley v. Sheo Sarup*, A.I.R. 1927 Oudh 589, 122 I.C. 411. Where part of the principal money was made payable by the mortgagee to another forthwith and the mortgagor was entitled to redeem within 20 years, but owing to unexpected events payment by the mortgagee was made only subsequently, the right to redeem accrued only 20 years from the date of actual payment and not from the date of mortgage—*Hira Lal v. Khizar*, A.I.R. 1936 Lah. 168 (174), 161 I.C. 251. Where under the terms of a mortgage the mortgagee is to enjoy the property in lieu of interest for five years and the mortgagor is to repay the amount when demanded in any year at the close of the agricultural season after the expiry of five years, money becomes due on expiry of five year's period without any demand from the mortgagee—*Narayana Chettiar v. Ranga-swami Naidu*, (1968) 2 M.L.J. 445.

A mortgagee may sometimes be allowed to sue before the expiry of the term on reasonable grounds (e.g., in the event of the property being found to have been mortgaged or transferred to any one or if there should arise any cause which may effect the total or partial loss of the properties), but that does not give a corresponding right to the mortgagor to redeem before the stipulated period—*Bhawani v. Sheodihal*, 26 All. 476 (482). In a later Allahabad case, where the term of the mortgage was a long period, viz., 40 years, the interest was payable annually, and it was stipulated that in case of default of payment of interest the mortgagee was entitled to sue at once for the entire mortgage-money, held that it was only equitable that the mortgagor also should be allowed to redeem before the expiry of the said period—*Hira Kuar v. Gambhir*, 19 A.L.J. 460, 62 I.C. 985 (986). But a mortgagor is not entitled to redeem before the expiry of the stipulated period merely on the ground that the mortgagee in possession has done something which he was not authorized to do, although he has not destroyed or permanently injured the property in any way—*Har Baksh v. Mahabir*, A.I.R. 1936 Oudh 130, 159 I.C. 1052.

Where a mortgagee brings a suit for possession in pursuance of a condition in the mortgage-deed that if the principal and interest are not paid off in a certain period the mortgagee can take possession, the mortgagor or person claiming through him cannot claim to redeem in such a suit—*Bed Nath v. Rajeshwari*, A.I.R. 1937 Oudh 406, 168 I.C. 725. The tenant of the mortgagee is liable to be evicted in execution of a decree for redemption—*Dalip Singh Hazara Singh v. Financial Commissioner to Govt. of Punjab*, A.I.R. 1964 Punj. 369.

In India, before the date of payment, the mortgagor has an interest in the land which is legal and not equitable. After the date he has the legal right of redemption given him by this section. In each case he retains a legal interest in the property—*Ram Kinkar v. Satya Chadan*,

A.I.R. 1939 P.C. 14 (19), 43 C.W.N. 281, 66 I.A. 50, I.L.R. (1939) 1 Cal. 283.

360. Usufructuary mortgage:—In a usufructuary mortgage, the essence of the transaction is the realization of the principal and interest from the rents and profits of the mortgaged property, and as soon as the principal and interest have been satisfied, the mortgagor is entitled to redeem, irrespective of the fact that a time has been fixed in the mortgage-deed for the satisfaction of the mortgage. In such cases the time is not of the essence of the contract. Thus, if the usufructuary mortgage provides that the usufruct is to be applied first towards interest, then towards principal, and that the debt is to be repaid after a *certain number of years* (e.g., 3 years) the mortgagor will be entitled to redeem *before* the date fixed, on his showing that the principal and interest had been wholly discharged by the usufruct before the stipulated period—*Kundan v. Thakurlal*, 6 C.P.L.R. 43. Where the deed provides that the mortgagee will be entitled to remain in possession for 12 years, even though the mortgage-debt is satisfied out of the property before the expiry of the term, *held* that the mortgagor will be entitled to redeem before 12 years, as soon as the mortgage-debt is satisfied—*Ankinedu v. Subbiah*, 35 Mad. 744 (748). See Notes 382 and 383 under sec 62, where this subject is fully discussed. But where there were no clear words in a usufructuary mortgage which permitted the mortgagor to pay the whole of the principal on or before the expiry of the mortgage-term and to obtain possession of the land, the mortgagee was entitled to insist on the term which provided for 15 years' enjoyment—*Rangayya v. Basana*, A.I.R. 1926 Mad. 594, 94 I.C. 639. Where, however, the mortgagee gave the go-by to other terms of a mortgage-deed, the mortgagor was not bound to confine himself to his right under the deed to claim a proportionate relinquishment of the land, but was entitled to redeem the mortgage even before the expiration of the period fixed as the term thereof—*Narasimha v. Sheshayya*, A.I.R. 1925 Mad. 825, 48 M.L.J. 363, 90 I.C. 138.

In a usufructuary mortgage of agricultural land it is usually stipulated that if the mortgagor wants to redeem, he must redeem in a particular month (e.g., *Jeth*) of the year. In such case, it has been held that having regard to the agricultural conditions of the country, the time of payment is of the essence of the contract, and that the mortgagor will not be entitled to redeem in any other month. The reason is thus stated: "In the case of a usufructuary mortgage like this one, it is necessary for the mortgagee who is liable to be redeemed to know *before* he commences to sow his crops whether he will have to give up possession in that year or not, and that no doubt is the reason for the stipulation that the redemption should take place in *Jeth*"—*Bansi v. Girdhar*, 1894 A.W.N. 143; *Chinnasamy v. Krishna*, 16 M.L.J. 146; *Muhammad Ali v. Baldeo Pande*, 38 All. 148; *Narsingh v. Achhaibar*, 36 All. 36; *Kripal v. Sheoambar*, 1930 A.L.J. 610, A.I.R. 1930 All. 283 (285), 126 I.C. 366; *Sarbdawan v. Bijai*, 36 All. 551 (554). In such cases, the redemption decree, even though it directs the mortgagor to pay the mortgage-money in any other month, at the same time allows the mortgagee to retain possession till the next *Jeth*—*Narsingh v. Achhaibar*, 36 All. 36 (39); *Het*

Singh v. Bihari, 43 All. 95 (101); *Kirpal v. Sheoambar*, supra. Where a subsequent usufructuary mortgagee sues for redemption against a prior usufructuary mortgagee, the former can be made liable for reasonable interest also along with principal amount only if the latter can claim interest in a suit under sec. 68 coupled with sec. 67—*Kumarappa v. Suppan*, A.I.R. 1933 Mad. 672, 145 I.C. 744. Possession of the mortgagee after full satisfaction of the debt by the mortgagor of a part of the property after the mortgagor has taken possession of the rest is adverse to the mortgagor—*Ananthan Patti v. Krishna Pillai*, A.I.R. 1957 Trav.-Co. 145. Where A is put in possession of the mortgaged property by the mortgagee after purported redemption of the usufructuary mortgage, B, a purchaser at a court sale of the equity of redemption is entitled to get a decree for possession on the basis of title without redeeming the mortgage in favour of the mortgagee—*Jadunandan Mondal v. Hitlal Mondal*, A.I.R. 1969 Pat. 171.

Limitation :—Where one of several mortgagors becomes a subrogee by redeeming the entire mortgage, his co-mortgagor can redeem him within the period prescribed by Art. 148, Limitation Act—*Rahimansa v. Mad. Istamia E. Instn.*, A.I.R. 1953 Mad. 366, (1952) 2 M.L.J. 179. See in this connection *Ram Lal v. Chetu*, A.I.R. 1953 Pepsu. 101.

361. Clog on redemption :—The right of redemption of the mortgagor has been the subject of anxious protection in law; so much so that an impediment to the fair exercise of that right (i.e., a clog on the equity of redemption) even by a contract of the parties at the time of the transaction is not recognized. The Indian Legislature, in this section has omitted the words "in the absence of a contract to the contrary" with a view to prevent the mortgagor from contracting himself out of his right of redemption at the time of the mortgage—*Seeti Kutti v. Kunhi Pathumma*, 40 Mad. 1040 (1062). This section is unqualified in its terms and contains no saving provision as other sections do, in favour of "contracts to the contrary". Therefore, there is no sufficient reason for withholding from the words of this section their full force and effect—*Muhammad Sher Khan v. Raja Seth Swami Dayal*, 44 All. 185 (189) (P.C.). But see *Kadir Bibi v. Mailappa*, A.I.R. 1946 Mad. 542 (F.B.), I.L.R. 1946 Mad. 739 where it has been held that although this section is unqualified in its terms and there is no saving clause in it as in other sections, in favour of contracts to the contrary, it does not mean that the parties cannot decide for themselves what is reasonable notice to which the mortgagee is entitled under this section.

A mortgagor cannot by any contract, entered into with the mortgagee at the time, give up his right of redemption or fetter it in any manner by confining it to a particular time or a particular manner or a particular description of persons—*Sayad Abdul Hak v. Gulam*, 20 Bom. 677 (696); *Kanaran v. Kuttoly*, 21 Mad. 110; *Rajmal v. Shivaji*, 27 Bom. 154; *Abdul Hakim v. Sajjad Hosain*, 26 O.C. 209, A.I.R. 1923 Oudh 209, 74 I.C. 304.

The doctrine of the Court of Equity on this subject is expressed in the well-known maxim "*Once a mortgage, always a mortgage*," which has been supplemented by the words "*and nothing but a mortgage*" by Lord Davey in the leading case of *Noakes v. Rice*, [1902] A.C. 24. "This doc-

trine means that no contract between a mortgagor and a mortgagee made at the time of the mortgage and as part of the mortgage transaction or in other words, as one of the terms of the loan, can be valid if it prevents the mortgagor from getting back his property on paying off what is due on his security. Any bargain which has that effect is invalid and is inconsistent with the transaction being a mortgage"—per Lord Lindley *Samuel v. Jarra Timber and Wood-paving Corporation*, [1904] A.C. 323. "The principle is this : a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage; and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which security was given is what is meant by 'clog' or fetter on the equity of redemption and is void"—per Lord Lindley in *Stanley v. White*, [1899] 2 Ch. 274, "Redemption is of the very nature and essence of a mortgage. It is inherent in the thing itself. Equity will not permit any device or contrivance designed or calculated to prevent or impede redemption. It follows as a necessary consequence that when the money secured by a mortgage of land is paid off, the land itself and the owner of the land in the use and enjoyment of it must be as free and unfettered to all intents and purposes as if the land had never been made the subject of the security"—per Lord Macnaghten in *Noakes v. Rice*, [1902] A.C. 24 (30).

The doctrine of clog on redemption relates only to the dealings which take place between the parties to the mortgage *at the time* when the contract of mortgage is entered into, and therefore they are at liberty to deal *subsequently* with each other so as to vary the terms upon which the redemption of the mortgage can be had—*Harihar v. Bhawani*, 20 O.C. 97; *Parmanand v. Matadin*, 47 All. 582, 23 A.L.J. 307, A.I.R. 1925 All. 427; *Shankar Din v. Gokal Prosad*, 34 All. 620 (P.C.); *Shankar Dhonde v. Yeshwant*, 22 Bom. L.R. 965. The mortgagee cannot, at the moment when he is lending the money and taking the security, enter into an agreement, the effect of which would be that the mortgagor should have no right of redemption; but there is nothing to prevent that being done by an agreement which in substance and in fact is *subsequent* to and independent of the original bargain—*Lisle v. Reeve*, [1902] 1 Ch. 53. But the subsequent contract restricting the right of redemption must be an *independent* contract, *distinct* from the contract of mortgage. Otherwise it will be treated as a clog on redemption. The mere fact that the subsequent agreement was entered into 5 or 6 days after the contract of mortgage was executed, is not sufficient to show that it was an independent contract, if in fact the contract of mortgage and the subsequent agreement were parts of the *same transaction*. "The question is, in my opinion, not whether the two contracts were made at the same time and evidenced by the same instrument, but whether they were in substance single and undivided contracts, or two distinct contracts. The question is one not of form but of substance, and it can be answered in each case by looking at all the circumstances, and not by mere reliance on some abstract principle"—per Viscount Haldane in *Kreglinger v. New Patagonia Meat Co.*, [1914] A.C. 25 (30), 83 L.J. Ch. 79; *Browne v. Ryn*,

[1901] 2 Ir. R. 653; *Tirumala v. Srinivasa*, 52 Mad. 300, A.I.R. 1929 Mad. 243 (248), 56 M.L.J. 318, 121 I.C. 753. There were three mortgages in favour of the same person in respect of the same property and possession had been given under the first mortgage. The third mortgage deed provided that in case of failure to repay the mortgage money on the third mortgage within two years, the deed should be deemed to be a sale deed and the total amount due on all the three mortgages should be treated as the consideration for the sale: Held, (1) all the three mortgages should be read together and the mortgagee should be treated as a mortgagee in possession under a mortgage by conditional sale; (2) the provision was a clog on the equity of redemption; (3) the possession of the mortgagee did not become adverse to the mortgagor; and (4) obtaining a patta of the mortgaged property in his name by the mortgagee without notice to the mortgagor did not affect the latter's right of redemption—*Mathai v. Daniel*, A.I.R. 1954 Tr.-Coch. 165. A landlord mortgagee in possession cannot by getting himself recorded in revenue papers as owner defeat the mortgagor's right of redemption—*Sucha Singh v. Nighaya Ram*, A.I.R. 1954 Punj. 86.

A covenant amounting to a clog on redemption has no binding force either on the mortgagor or his assigns—*Mehrban v. Manka*, 11 Lah. 251 (P.C.), 34 C.W.N. 529 (534), 32 Bom. L.R. 882, 28 A.L.J. 544, 58 M.L.J. 714, A.I.R. 1930 P.C. 142, 123 I.C. 554; *Sundar v. Lachhman*, A.I.R. 1948 Lah. 17, 50 P.L.R. 88.

An agreement which amounts to a clog on the equity of redemption cannot be enforced, even though it is contained in a consent-decree. In passing a consent-decree, the Court simply embodies in the decree the terms of the compromise, without any adjudication or an enquiry. In these circumstances, the fact that an illegal term in an agreement is by consent of parties embodied in consent-decree cannot make that term enforceable, nor can it be a defence in a subsequent suit for redemption—*Ambu v. Kelu*, 53 Mad. 805, 31 L.W. 44, A.I.R. 1930 Mad. 305 (314), 123 I.C. 584. In the case of a clog there is no question of limitation. The mere acquiescence of the mortgagor for a long time will not estop his vendee in a suit for redemption from contending that a certain provision in the mortgage-deed, e.g., a permanent lease, is a clog on the equity of redemption—*Rattan Singh v. Kishen Das*, A.I.R. 1937 Lah. 49 (52), 158 I.C. 452.

Relief against a clog on the equity of redemption being an equitable relief can be obtained if it is challenged within a reasonable time—*Shankar Lal v. Ganga Dhar*, A.I.R. 1951 Aj. 28.

Application of the rule :—The rules as to clog on redemption apply not only to the classes of mortgages defined in sec. 58, but also to a mortgage which is a combination of a simple and a usufructuary mortgage—*Pandiyan v. Velayapa*, 33 M.L.J. 316, 42 I.C. 438; *Srinivasa v. Radha Krishna*, 38 Mad. 667; *Kandula Venkiah v. Donga Pillai*, 42 Mad. 589 (598, 604), 57 I.C. 274. The doctrine applies to an anomalous mortgage. See *Muhammad Sher Khan v. Rajah Seth Swami Dayal*, 44 All. 185 (189) (P.C.) cited in Notes under sec. 98, *infra*. and *Chellakutti v. Ven-gappa*, A.I.R. 1925 Mad. 366, 82 I.C. 809—*Raman v. Gowri*, A.I.R. 1954 Tr.-Coch. 7.

Even in those parts of India to which the Transfer of Property Act has not been extended, the rule enunciated in sec. 60 would be applicable as a rule of justice, equity and good conscience, and clauses which take away the right of the mortgagor to redeem after the stipulated period would be deemed as clog on the equity of redemption and as such not enforceable—*Ma Min Byu v. Maung Chit Po*, 1 Rang. 419; *Jagjewan v. Rana Jelubha*, A.I.R. 1951 Sau. 53.

362. Instances of "clog on redemption" :—

It is impossible to lay down a hard and fast rule as to what should and what should not be regarded as an improper restraint or fetter on the equity of redemption. The Court has to take into account all the circumstances as they existed at the time of execution of the mortgage, and all the terms of the mortgage-deed, and then consider whether the covenant is so unduly hard and unconscionable as to nullify for all practical purposes the right of redemption, or the exercise of the right of redemption is restricted in such an unreasonable manner as practically to deny it—*Bhullan v. Bachcha*, 53 All. 580, A.I.R. 1931 All. 380 (384), 131 I.C. 520; *Sarbdawan v. Bijai*, 36 All. 551 (554); *Rajai v. Randhir*, A.I.R. 1925 All. 643, 87 I.C. 30.

(1) *An agreement restricting the equity of redemption to a specific period or date* is a clog on redemption. Equity does not recognise agreements to confine the right of redemption to any given period, as the life of the mortgagor; or to any specific class of persons, as to the mortgagor alone or the heirs of his body.. *Fisher on Mortgage*, § 1395; *Sayad Abdul Hak v. Gulam*, 20 Bom. 677 (696). Thus, where a suit on a usufructuary mortgage was compromised and a consent-decree was passed to the effect that if the amount due under the mortgage was paid within 3 years from the date of the decree, the mortgagor was to redeem the properties, that in default of such payment the mortgagee was to recover possession of the properties in execution of the decree, held that the provision in the consent-decree which allowed the mortgagor to take possession only by execution of the decree reduced the period of 60 years provided by the law of redemption (Art. 148, Limitation Act) to a period of 3 years and was invalid as being a clog on the equity of redemption—*Ambu v. Kelu*, 53 Mad. 805, A.I.R. 1930 Mad. 305 (312), 123 I.C. 584. Where it was provided in a mortgage-deed that the right of redemption will accrue after 10 years from the date of mortgage, and that if the mortgagor did not redeem the property on that date, thereafter he would be entitled to redeem in any succeeding year only on a particular day, it was held that the latter stipulation was a clog on the equity of redemption—*Suppan v. Rangan*, A.I.R. 1938 Mad. 405 (509), (1938) M.W.N. 356; *Murarilal v. Devkaran*, A.I.R. 1965 S.C. 225.

(2) *A condition restraining alienation during mortgage* is a clog on the equity of redemption. Thus, a stipulation that the mortgagor shall not alienate the property pending the mortgage and that he shall be allowed to redeem only by paying the money out of his own pocket and not by money raised by a sale or mortgage of the property, is inequitable and incapable of enforcement—*Ram Saran v. Amrita Kuar*, 3 All. 369 (F.B.); *Ram Ganesh v. Rup Narain*, 80 I.C. 944, A.I.R. 1925 All. 34 (35); *Kripal v. Sheoambur*, 1930 A.L.J. 610, 126 I.C. 366, A.I.R. 1930

All. 283 (285); *Kuddi Lal v. Aisha*, 2 Luck. 564, 102 I.C. 263, A.I.R. 1927 Oudh 199 (200). But see *Shiam Lal v. Jagadambu*, 25 A.L.J. 1051, A.I.R. 1928 All. 131 (134), 108 I.C. 561. So also, where a mortgagor undertook that he would not alienate the equity of redemption and that the mortgagee should not be obliged to receive the money from any one but the original mortgagor, it was held that as the undertaking absolutely forbade alienation, and thus deprived mortgagor of a right which was an essential incident of the estate he had in the property by virtue of his equity of redemption, it could not be given effect to—*Trimbak v. Sakharam*, 16 Bom. 599. In mortgage-bonds in this country, a clause is generally inserted restraining alienation of the mortgaged property; such a clause does not prevent an alienation being made subject to the right of the mortgagee—*Syam Peary v. Eastern Mortgage and Agency Co.*, 22 C.W.N. 226, 40 I.C. 865.

Similarly, a covenant that the mortgagor shall not be entitled to redeem the mortgage with borrowed money, cannot be enforced, as its effect is to throw an obstacle in the way of redemption—*Sarbdawan v. Bijai*, 36 All. 551 (555).

(3) *Onerous covenant extending beyond redemption*:—In a mortgage of a lease-hold public house by a licensed victualler to brewers, the mortgagor covenanted with the mortgagees that he and all the persons deriving title under him should not, during the continuance of the term and whether any money should or should not be owing on the security of the mortgage, use or sell in the house any malt liquors except such as should be purchased from the mortgagees. *Held* that the words “whether any money should or should not be owing for the security of the mortgage” showed that the onerous covenant was to continue even after the mortgage had been paid off; such an agreement was void, because it prevented the mortgagor from getting back the property unfettered and unclogged even after he had paid off the principal and interest. Therefore, the mortgagor, on payment of all that was due upon the mortgage, was entitled to have a reconveyance of the property, free from the tie—*Noakes v. Rice*, [1902] A.C. 24.

(4) *Agreement to convert mortgage into sale on default of payment*:—A contract entered into at the time of the mortgage for the purchase of the mortgaged property is a clog on the equity of redemption—*Dharba Veera v. National Insurance Co.*, A.I.R. 1947 Mad. 51, I.L.R. 1947 Mad. 312; *Viranna v. Pallaya*, A.I.R. 1948 Mad. 7, (1947) 1 M.L.J. 244; *Pinfo v. Sheenappa*, *infra*; *Gangadhar v. Shankar Lal*, A.I.R. 1958 S.C. 770; *Ratanlal v. Prabhudayal*, I.L.R. (1960) 10 Raj. 517; *Sirinivas Fogla v. Satyanand Gupta*, A.I.R. 1969 Pat. 64. An agreement in a mortgage that in default of payment of the mortgage-money on the due date, the mortgagor will sell the property to the mortgagee at a price to be fixed by umpires, constitutes a fetter on the equity of redemption, and is therefore unenforceable—*Kanaram v. Kuttooly*, 21 Mad. 110; *Narayanan v. Kochupenna*, A.I.R. 1954 Tr.-Coch. 142. Similarly, a condition in the deed that the mortgage will work itself out into a sale (*i.e.*, the mortgagee shall be absolute owner of the property) should the amount be not paid within a fixed period, is a clog on redemption and therefore void—*Mehrban v. Makhna*, 11 Lah. 251 (P.C.), 34 C.W.N. 529 (534),

A.I.R. 1930 P.C. 142, 123 I.C. 554; *Srinivasa v. Radha Krishna*, 38 Mad. 667; *Gulab v. Pancham*, 59 I.C. 338 (Pat.); *Pandian v. Vellayappa*, 33 M.L.J. 316, 42 I.C. 438; *Athan Kutti v. Sutarjanom*, 32 M.L.J. 317, 37 I.C. 756; *Ram Ganesh v. Rup Narain*, A.I.R. 1925 All. 34, 80 I.C. 944; *Nga Po Nyun v. Mi Yin*, 11 Bur. L.T. 36, 39 I.C. 377; *Narayanamurthi v. Appalanarasimhulu*, 41 M.L.J. 563, A.I.R. 1921 Mad. 517, 68 I.C. 717; *Ram Bali v. Ram Asre*, 12 O.L.J. 105, 86 I.C. 686, A.I.R. 1925 Oudh 386; *Ramalinga v. Arunachala*, A.I.R. 1926 Mad. 386, 93 I.C. 338; *Rocky Flora Gomez v. Parvathy Ammal*, A.I.R. 1957 Ker. 175; *Ananchaperumal Yogeeswarar v. Sivagurunatha Pillai*, (1964) 1 M.L.J. 86. No title by adverse possession can be claimed by a usufructuary mortgage even when the mortgage deed provides that in default of payment on due date the mortgagee shall become the absolute owner—*Srinivasa Fogla v. Satyanand Gupta*, A.I.R. 1969 Pat. 64. An agreement that the mortgagee will acquire title to the mortgaged property on default by a branch of the *Tarward* to pay the value of the improvements due to him is a clog on the equity of redemption—*Raman v. Gowri*, A.I.R. 1954 Tr.-Coch. 7.

A stipulation in a mortgage-deed of raiyati lands providing that upon redemption of the mortgage those raiyati lands would not come back to the mortgagor is clearly a clog on the equity of redemption—*Sapneswar v. Brundaban*, A.I.R. 1934 Pat. 397, 148 I.C. 429; *Ramlochan Singh v. Pradip Singh*, A.I.R. 1959 Pat. 230. But if this agreement is entered into not in the mortgage-deed itself but in a contract *subsequent* to the mortgage, it will not be invalid—*Kanhayalal v. Narhar*, 27 Bom. 297; *Shankar v. Yeshwant*, 22 Bom. L.R. 965. The rule is that the mortgagee cannot, *at the moment* when he is lending his money and taking his security, enter into an agreement the effect of which would be that the mortgagor should have no equity of redemption, but there is nothing to prevent that being done by an agreement which in substance and in fact is *subsequent* to and independent of the original bargain—*per* Vaughan Williams, L.J. in *Lisle v. Reeve*, [1902] 1 Ch. 53, affirmed by the House of Lords in *Reeve v. Lisle*, [1902] A.C. 461. The rule is thus stated in Halsbury's Laws of England, Vol. 21, p. 143: "No agreement between a mortgagor and mortgagee contained in the mortgage can make a mortgage irredeemable; and no contract between a mortgagor and mortgagee made *at the time* of the mortgage and as part of the mortgage transaction, or in other words, as one of the terms of the loan, can be valid, if it provides that the mortgaged property shall become the absolute property of the mortgagee upon any event whatsoever." And at p. 140: "But the rule against clogging the equity of redemption does not invalidate *subsequent* and *independent* transactions between the mortgagor and mortgagee relating to the mortgaged property." See also *Venugopala Rao v. Hanumantha Rao*, A.I.R. 1958 Andh. Pra. 541.

(5) *Covenant to grant permanent lease to mortgagee*:—A permanent lease by mortgagor in favour of the mortgagee, though by a separate deed and for consideration not included in the mortgage-debt is part of the same mortgage transaction and is therefore a clog on the equity of redemption—*Rattan Singh v. Kishen Das*, A.I.R. 1937 Lah. 49, 168 I.C. 452. A condition in a mortgage that if the mortgagor redeems the property, the mortgage should be extinguished, but that the property should for ever remain

in the possession of the mortgagee on his paying a fixed rent, is a condition which cannot be enforced. Such a condition, although it does not exclude the right of redemption, fetters it with the onerous obligation of accepting the mortgagee as a perpetual tenant, and prevents the mortgagor from getting back the property unfettered; it is therefore a clog on redemption—*Mahomed Muse v. Jijibhai*, 9 Bom. 524; *Bhimrao v. Sakhararam*, 46 Bom. 409, 23 Bom. L.R. 1268; *Parmanand v. Mata Din*, 47 All. 582, 87 I.C. 474, A.I.R. 1925 All. 427; *Daolat Rai v. Sheikh Chand*, 11 N.L.R. 180; *Ram Narain v. Surath*, 5 P.L.J. 423, 57 I.C. 337; *Subrao v. Manjappa*, 16 Bom. 705 (707); *Sheo Singh v. Birbahadur*, 6 I.C. 707; *Jagjewan v. Rana Jelubha*, A.I.R. 1951 Sau. 53. And the law is the same whether the lease is granted at the time of the mortgage or *subsequently*—*Parashram v. Lakshmibai*, 53 Bom. 360, 31 Bom. L.R. 229, 115 I.C. 405, A.I.R. 1929 Bom. 186 (187); *Subrao v. Manjapa*, *supra*. In fact, such a covenant amounts to a covenant for selling the mortgaged property to the mortgagee. In point of fact, there is very little difference between a contract by the mortgagee to buy the mortgaged property out and out for a consideration, and a contract by a mortgagee to take a permanent lease at a fixed rent, which in effect makes him the owner of the mortgaged premises—*Bhimrao v. Sakhararam*, 46 Bom. 409, 23 Bom. L.R. 1268.

(6) *Long leases to mortgagees at fixed rents* :—Similarly, long leases obtained by the mortgagees from their mortgagors at fixed rents are not allowed—*Morony v. O'Dea*, 1 Ball. & B. 109. Leases by a mortgagor to his mortgagee for a long period at an inadequate rent will not be upheld—*Hickes v. Cooke*, (1816) 4 Dow. 16. Indeed, in such cases, the determination of the question as to whether the rate of rent is fair or not is a matter of extreme difficulty. It is obvious that the parties are not able to deal upon equal terms, and the mortgagee by reason of his position tries to secure an advantage to himself. "Suppose the land, instead of being worth only £50 (the rent at which it was let to the mortgagee) was worth £60, and that £60 was offered for it by a third person; but the lease could not be made to that person without the concurrence of the mortgagee; and the mortgagee may say 'I will give only £50,' and thus by the power which his situation gives him, he prevails, without using a single word of threat, like the beggar in *Gil Blas* who with his gun on his shoulder extorted money from the traveller without uttering a word"—*per* Lord Redesdale in *Webb v. Rorke*, 2 Sch. & Lef. 661 (668). Dr. Ghose, however, is of opinion that a lease by the mortgagor to the mortgagee should not be set aside merely because it was of an improvident character, and that the above observation of Lord Redesdale should be confined to leases obtained by means of fraud. "It must also be remembered that an English mortgagee may harass the mortgagor in various ways which are not allowed in this country. There is thus very little similarity between the Indian mortgagee and the beggar in *Gil Blas* to which Lord Redesdale alludes in *Webb v. Rorke*."—*Ghose's Law of Mortgage*, 5th Edn., p. 246.

(7) *Right of pre-emption given to mortgagee after redemption* :—If the mortgage-deed confers upon the mortgagee a right of pre-emption at a price fixed in the deed, to be exercised after the mortgagor redeems the mortgage, such a right would be "a clog upon redemption," for though

such a stipulation does not bar a suit for redemption, yet it precludes the mortgagor from redeeming the mortgaged property in the same unfettered state in which he had held it when he mortgaged the property, inasmuch as after redemption he will have to hold it subject to a right of pre-emption which the mortgagee has secured under the instrument of mortgage. Such a collateral advantage bargained for by the mortgagee is really a clog upon the right of redemption—*Ramasami v. Chinnan Asari*, 24 Mad. 449 (458). See also *Pinto v. Sheenappa*, A.I.R. 1951 Mad. 524, (1950) 2 M.L.J. 169. Where six days after the mortgage the mortgagor executed an agreement in favour of the mortgagee stipulating that in case the mortgagor should happen to sell the property he would sell it to the mortgagee at a concession rate, it was held that the agreement was part of the same transaction as the mortgage and was a clog on the equity of redemption—*Tirumala v. Kandala*, 52 Mad. 300.

(8) *Covenant to pay interest in addition to usufruct* :—A covenant, in a usufructuary mortgage, to pay interest in addition to usufruct (especially in a case where the mortgagors are a pardanashin lady without independent advice and a boy of tender age without experience, and the mortgagee is the superior proprietor of the mortgagors) is hard and oppressive, and amounts to a clog on redemption—*Mahomed Ali v. Rakdan Ali*, 3 O.L.J. 746, 38 I.C. 454. So also, where the mortgagor is not entitled to rents and profits though he has to pay interest at $7\frac{1}{2}$ per cent. and the mortgagees are entitled to spend any amount they like on improvements and charge the same on the property with interest at 6 per cent. the whole transaction is unconscionable—*Faujdar v. Abdul Samad*, 5 Lah. L.J. 394. But where the profits from the land being small, the mortgagee in possession was allowed to take the produce as well as to charge interest at 6 per cent. at the time of redemption, held that the terms of the mortgage were not unconscionably onerous—*Sarban v. Bhagwan*, 28 P.L.R. 59, A.I.R. 1926 Lah. 457; see *Gokul v. Goitri*, 4 O.W.N. 147, A.I.R. 1927 Oudh 595 (596); *Ramkishore v. Ram Nandan*, 25 A.L.J. 1086, A.I.R. 1928 All. 99 (100); *Sarfaraz v. Udawat*, 4 Luck. 147, A.I.R. 1929 Oudh 30 (32), 113 I.C. 46. A stipulation that the mortgagor would continue to pay interest, even if he wants to redeem the mortgage, till the widow died was a clog on the equity of redemption—*Sarma v. Manikyam*, A.I.R. 1949 Mad. 768, (1949) 1 M.L.J. 468.

(9) *Postponement of redemption for a long term* :—The postponement of redemption for a long period in a mortgage is not necessarily or *per se* a clog on redemption. What has to be seen is whether the effect of such a covenant is to postpone redemption for an unduly long period without any corresponding advantage to the mortgagor or whether the circumstances are such as to indicate that the stipulation postponing redemption is unreasonable and oppressive and intended to fetter the right to redeem. Thus, in the case of a usufructuary mortgage on full consideration of facts it was held that a period of 50 years was not a clog—*Bansi v. Sawanu*, A.I.R. 1933 Lah. 373 (374), 145 I.C. 1016; *Ganga Dhar v. Shankar Lal*, A.I.R. 1958 S.C. 770; *Saleh Raj v. Chandan Mal*, A.I.R. 1960 Raj. 47. The right of redemption and the right of foreclosure are always co-extensive; and where the mortgage-deed expressly gives the mortgagee a power to call in his money at any time, any stipulation for postponement of redemption is unilateral and consequently invalid—

Sayad Abdul Hak v. Gulam Jilani, 20 Bom. 677 ; *Sari v. Motiram*, 22 Bom. 375 (377) ; *Rahmat Ali v. Shadi Ram*, 28 P.L.R. 150, A.I.R. 1927 Lah. 226 (227). A covenant in a mortgage-deed postponing redemption after the expiry of the period fixed in the deed for redemption, amounts to a clog on redemption and is invalid. Thus, a mortgage-deed provided that the mortgagor was to redeem at the end of five years and that if he did not do so, the mortgagee was to have the option of taking possession for a period of 12 years, and that if the mortgagee took possession, the mortgagor was not to be entitled to redeem, till at the expiration of the 12 years. Held by the Privy Council that the mortgage being for a term of five years, the mortgagor had a right to redeem on payment of the mortgage-money on the expiration of the five years, and that the clause in the deed postponing redemption for the further period of 12 years was a clog on redemption and therefore invalid—*Muhammad Sher Khan v. Raja Seth Swami Dayal*, 44 All. 185 (189) (P.C.), 68 I.C. 853, A.I.R. 1922 P.C. 17. A condition in a usufructuary mortgage barring redemption, (1) within 5 years and (2) after 20 years from the date of mortgage amounts to a clog on the equity of redemption—*Vaddiparthi v. Cadimsetti*, 41 M.L.J. 563, 68 I.C. 717. See also *Davis v. Symons*, (1934) 1 Ch. 442. Conditions in a mortgage deed providing for redemption after 49 years and permitting mortgagee to rebuild, repair, pay taxes and to recover at a higher rate of interest the mortgage money amount to a clog—*Sarju Ram v. Taji Bibi*, A.I.R. 1962 All. 422. A clause in a deed of sub-mortgage that if the sub-mortgage is not redeemed for five years the mortgagee will lose his right of redemption is a clog—*Jang Singh v. Jewa Singh*, A.I.R. 1962 Punj. 478. A covenant postponing redemption for a long term does not necessarily of itself amount to a clog on redemption. But where a mortgage was made for a very long term as 40 years, and a provision was inserted in the deed fixing a particular date on which it was to be redeemed, failing which the mortgage was to be renewed for another term of 40 years, held that the provision giving a right of redemption on one day only in 80 years was designed to make redemption almost impossible, and should not be enforced, and that the Court would allow redemption at any time on such terms as it thought fit—*Sarbdawan Singh v. Bijai Singh*, 36 All. 551 (553), 12 A.L.J. 927, 24 I.C. 705 ; *Ram Ganesh v. Rup Narain*, A.I.R. 1925 All. 34, 80 I.C. 944 ; *Bhullan v. Bachcha*, 53 All. 580, A.I.R. 1931 All. 380, 131 I.C. 520 ; *Durga Singh v. Nawab Mirza Muhammad*, 17 O.C. 313, 25 I.C. 912 ; *Kunj Behari v. Prag Narain*, 9 O.L.J. 294, A.I.R. 1922 Oudh 283 ; *Rajai v. Randhir*, A.I.R. 1925 All. 643, 87 I.C. 30 ; *Chandanmal v. Salera*, A.I.R. 1958 Raj. 298. See also the cases under Note 363 (2).

(10) Any covenant in the mortgage-deed conferring on the mortgagee any interest in the property after redemption, constitutes a clog on redemption. Thus, under a mortgage, the mortgagees were entitled to possession for 19 years. It was stipulated that if at the end of that period the mortgagor paid off the mortgage-money, the property was to belong, as to a limited interest therein only, to the mortgagor, and as to the major interest therein, to the mortgagees ; if the mortgagor failed to pay off the mortgage-money at the end of the 19 years, the property was to belong to the mortgagees absolutely. Held that the covenant was a clog on redemption and therefore void—*Mehrban v.*

Makhana, 11 Lah. 251 (P.C.), 34 C.W.N. 529 (534), 32 Bom. L.R. 882, 28 A.L.J. 544, 58 M.L.J. 714, A.I.R. 1930 P.C. 142, 123 I.C. 554. Similarly, a stipulation that the mortgagee, even after the full payment of principal, interest and costs, should continue to receive for a definite or indefinite period a share of the rents and profits of the mortgaged property, is void—*Noakes v. Rice*, [1902] A.C. 24 (31).

(11) An agreement in the mortgage-deed giving the mortgagee a right to purchase the mortgaged property at an inadequate price (e.g., at 40 per cent. of its value) is void—*Samuel v. Jarrah Timber and Wood Paving Corporation, Ltd.*, [1904] A.C. 323.

So also, a stipulation in a mortgage-deed that the mortgagee shall be employed as a broker of the mortgagor-company, and that if the company's goods are sold otherwise than through the mortgagee, he should be paid the amount of commission he would have earned if the goods had been sold through him, is void—*Bradley v. Carrit*, [1903] A.C. 253.

(12) A stipulation which gives the mortgagee an advantage which does not arise legitimately from the mortgage contract is treated as a clog—*Mt. Subratan v. Dhanpat*, A.I.R. 1933 All. 70 (72), 54 All. 1041, 143 I.C. 409.

(13) Where a mortgage-deed embodied a contract to the effect that the mortgagor would pay the rent to the zemindars and that if the rent is paid by the mortgagee then the mortgagor would have nothing to do with the mortgaged field which the mortgagee might get entered in his name as tenant-in-chief, it was held that the covenant in the second part was a clog—*Hardwar v. Sita Ram*, A.I.R. 1934 All. 888, 150 I.C. 879.

(14) A stipulation that it would be open to the mortgagee alone to ask for payment of the mortgage money and that the mortgagor would not be entitled to seek redemption, is a clog on the equity of redemption—*Vaidhyathanam v. Jnanaprakasam*, A.I.R. 1953 Tr.-Coch. 570.

(15) A stipulation that the mortgagor will not be entitled to redeem the mortgage until the happening of an uncertain period of a certain event will be a clog—*Sarma v. Manikyam*, A.I.R. 1949 Mad. 768, (1949) 1 M.L.J. 468.

(16) In a deed of mortgage it was agreed that if the mortgagor paid the amount due within the stipulated period the mortgagee would enjoy the mortgaged property paying every year a fixed amount to the mortgagor. Held that the stipulation was a clog—*Yendru v. Satyavatamma*, A.I.R. 1957 Andhra 30.

363. What is not a "clog":—The mere fact that the terms of a mortgage are hard does not lead to the conclusion that they are to be considered as forming a clog on redemption. A man who enters into a transaction with his eyes open, and without any undue influence being brought to bear upon him, cannot ask to be relieved of the consequences of his action—*Nathu Ram v. Shadi Ram*, 40 P.W.R. 1919, 49 I.C. 946. See also *Aga Mahomed v. Venkatappaya*, 35 M.L.J. 287, 48 I.C. 379 (382). Where at the time of the transaction there was no covenant which could necessarily postpone the mortgagor's right of redemption to a very indefinite period or which would create an insuperable difficulty in his way, there

is no clog—*Jeet Koeri v. Mathura Koeri*, A.I.R. 1926 All. 171, 24 A.L.J. 125, 90 I.C. 87. The following covenants have been held not to constitute any clog on redemption:—

(1) *Condition for redemption of prior mortgages*:—Where subsequent to the execution of a mortgage, the mortgagor executed a fresh mortgage for further advances, and in this subsequent mortgage he stipulated that the prior mortgage should not be redeemed until the principal and interest due under the subsequent mortgage had been paid, it was held that such a stipulation was not a clog on redemption, and the mortgagor must satisfy the subsequent mortgage before he could be allowed to redeem the earlier mortgage—*Sheo Kumar v. Fittu Singh*, 9 I.C. 52 (All.); *Ranjit Khan v. Ramdhan*, 31 All. 482; *Brij Lal v. Bhawani*, 32 All. 651; *Shib-narain v. Gajadhar*, 48 All. 292; *Chauharaja v. Ram Harakh*, 2 O.L.J. 601; *Naunidh Lal v. Mahadeo*, 25 O.C. 134; *Ram Charan v. Jagan*, 24 I.C. 737 (All.); *Gayadin v. Gajadhar*, 24 I.C. 611 (All.); *Mt. Jugesri v. Aftab Chand*, A.I.R. 1928 Pat. 582, 8 Pat. 68, 112 I.C. 655; *Ram Kishore v. Ram Nandan*, A.I.R. 1928 All. 99, 25 A.L.J. 1086, 108 I.C. 149; *Mt. Rangili v. Pearey Lal*, A.I.R. 1940 All. 101, 1939 A.L.J. 1056, 186 I.C. 519; *Har Prasad v. Ram Chandra*, 44 All. 37 (F.B.). So again, a covenant in a subsequent mortgage not to redeem that mortgage without redeeming at the same time a prior debt or mortgage, is not a clog on the equity of redemption but is a part and parcel of the subsequent contract, and the parties are bound by it—*Imam Baksh v. Anwari Begam*, 18 I.C. 718 (All.); *Abhai Narain v. Mata Prosad*, 24 O.C. 240, 64 I.C. 82; *Abdul Hamid v. Jairaj*, 3 A.L.J. 768; *Har Govind v. Tula Ram*, 10 I.C. 222 (All.); *Hari v. Vishnu*, 28 Bom. 349 (F.B.); *Paras Ram v. Sheo Dhan*, A.I.R. 1932 All. 558, 138 I.C. 492. This subject is more fully discussed in Note 378-under section 61.

(2) *Long term in usufructuary mortgage*:—A long term in a usufructuary mortgage does not necessarily amount to a clog on the equity of redemption—*Hira Lal v. Khizar*, A.I.R. 1936 Lah. 168, 161 I.C. 251; *Hasar Ali v. Ajodhya Sah*, I.L.R. 1950 Pat. 173; *Hira v. Sitaram*, A.I.R. 1949 Nag. 12. It is obvious that a long term in a usufructuary mortgage is less likely to operate as a clog on redemption than in any other class of mortgage, because redemption is effected on payment of a fixed sum and there is no danger of arrears of interest amounting up to an extent which may far exceed the value of the property—*Saiyid Zulfiqar v. Suraj Prasad*, 9 O.L.J. 365, A.I.R. 1922 Oudh 221. And so, the Courts have upheld a usufructuary mortgage which stipulated that the mortgagor should not be entitled to redeem until after the expiry of 15 years—*Lila v. Vasudev*, 11 B.H.C.R. 283; or 20 years—*Sarban v. Bhagwan*, 28 P.L.R. 59, A.I.R. 1926 Lah. 457; *Puran Singh v. Kesar Singh*, 39 P.R. 1907; or 35 years—*Sarfara v. Udawat*, 4 Luck. 147, 113 I.C. 46, A.I.R. 1929 Oudh 30; *Dattawan v. Amardeo*, 12 A.L.J. 492; *Aga Muhammad v. Venkatappaya*, 35 M.L.J. 287; or 50 years—*Sundar Singh v. Hukam Singh*, 219 P.L.R. 1914; *Sayad Abdul Hak v. Gulam*, 20 Bom. 677; *Faujdar v. Abdul Samad*, 5 Lah. L.J. 394; *Milkhi v. Fattu*, 40 P.L.R. 1903; *Maiku v. Gayadin*, 57 I.C. 603; *Ram v. Jagrup*, 15 I.C. 880, 10 A.L.J. 157; or 40 years—*Lal Singh v. Kartar-Singh*, A.I.R. 1930 Lah. 1060, 130 I.C. 57; or 51 years—*Abdur Rahman v. Ram Padarath*, A.I.R. 1945 Oudh 113, 20 Luck. 85; or 60 years—*Ralla v. Amin Chand*, 126 P.R. 1908; *Ram Samujh v. Sheoraj*, 20 A.L.J. 607; or even 90 years—*Mahomed Ibrahim v. Mahomed*, 8 I.C. 1068, 1910 M.W.N. 792;

Baldeo v. Losai, 4 Luck. 203, 5 O.W.N. 1091, 114 I.C. 811, A.I.R. 1929 Oudh 54; or 150 years—*Abdulla v. Sadulla*, 15 I.C. 917; *Jagamadham v. Venuthurupalli*, A.I.R. 1944 Mad. 501, (1944) 2 M.L.J. 144; or 61 years—*Side Munja v. Giga Karna*, A.I.R. 1953 Sau. 193; *Jodhiram Sah v. Harihar Missir*, A.I.R. 1958 Pat. 464. But see *Durga Charan v. Poresht*, A.I.R. 1925 Cal. 105, where though the period of redemption was 50 years redemption was allowed after 26 years.

These provisions restraining redemption for a long period have been upheld on the ground that the Indian Limitation Act allows a very long period (viz., 60 years) for suits for redemption, although the soundness of this ground has been doubted in *Sarbdawan v. Bijai*, 36 All. (553). Still in such cases, the Courts should be guided by considerations of justice and equity. Where the effect of a covenant is to postpone redemption for an unduly long period, without any corresponding advantage to the mortgagor, or there are circumstances indicating that the covenant postponing redemption is unreasonable and oppressive and intended to fetter the right to redeem, a Court may allow redemption irrespective of that term—*Durga Singh v. Nawab Mirza*, 17 O.C. 313, 25 I.C. 912; *Darghai v. Rafiqunnissa*, A.I.R. 1927 Oudh 237 (238); *Bachu v. Perbhu*, A.I.R. 1926 Oudh 356, 13 O.L.J. 476; *Abdul Hakim v. Sajjad Husain*, 26 O.C. 209, A.I.R. 1923 Oudh 209, 74 I.C. 304; *Raza Mahomed v. Ram Lal*, 12 O.L.J. 222, A.I.R. 1925 Oudh 406; *Kunj Behari v. Prag Narain*, 9 O.L.J. 294, A.I.R. 1922 Oudh 283; *Saiyed Zulfikar Ali v. Suraj Prasad*, 9 O.L.J. 365, A.I.R. 1922 Oudh 221; *Sohan Lal v. Kunwar*, 61 I.C. 962 (Oudh); *Madho Singh v. Lachhmi*, A.I.R. 1925 Oudh 720. This subject has been very fully discussed in *Balbhaddar v. Dhanpat Dayal*, 27 O.C. 4, A.I.R. 1924 Oudh 237. But it is impossible to lay down a hard and fast rule as to what should and what should not be regarded as an improper restraint or fetter on the right of redemption. The decision in each case must depend upon its own circumstances. The mere fact that the mortgage-deed contained a condition that in case the mortgage was not redeemed on the date on which the mortgage-period (20 years) expired, the mortgagor would not be able to redeem it for another period of 20 years, would not amount to a clog on the equity of redemption, in the absence of materials to show that there was a design to make redemption very difficult, if not impossible—*Narsingh Prasad v. Rupan Singh*, 1929 A.L.J. 606, 116 I.C. 876, A.I.R. 1929 All. 388 (389). Although the mortgage may be for a long period (e.g., 35 years), still if there are no provisions in the mortgage-deed which are wholly advantageous to the mortgagee and do not confer any corresponding advantages on the mortgagor, there is no clog on redemption—*Sarfaraz v. Udawat*, 4 Luck. 147, 5 O.W.N. 974, 113 I.C. 46, A.I.R. 1929 Oudh 30 (31). But where a mortgage-deed contained onerous and one-sided covenants which operated to postpone the right of redemption for 60 years, while allowing the mortgagee to call for the mortgage-money at any time he liked, held that as the covenant postponing redemption was unilateral and an unreasonable fetter on the equity of redemption it could not be enforced—*Lal Bahadur v. Zalim Singh*, 2 O.L.J. 1, 27 I.C. 581; *Sayad Abdul Hak v. Gulam Jilani*, 20 Bom. 677; *Sari v. Motiram*, 22 Bom. 375. A provision fixing a very long term in a usufructuary mortgage is not a ground for holding that the provision should not be enforced, but where a further provision has been inserted in the deed which makes redemption very difficult, if not impossible, at

the end of that term, such a provision is a clog on redemption and cannot be enforced—*Sarbdawan v. Bijai*, 36 All. 551 (553), 12 A.L.J. 927, 24 I.C. 705. Where a usufructuary mortgage-deed provided that redemption should take place after 99 years on payment of double the amount of the principal money secured, *held* that the covenant created an unreasonable and oppressive fetter on the right to redeem, and the Court would allow redemption, irrespective of that term, on such condition as it may deem fit to impose—*Muthura Prosad v. Bhagwat Prosad*, 22 O.C. 191; *Abdul Hakim v. Sajjad Husain*, 26 O.C. 209, A.I.R. 1923 Oudh 209. A covenant postponing redemption for 200 years has been held to be a clog on redemption—*Fateh Mohammad v. Ram Dayal*, 2 Luck. 588, 4 O.W.N. 502, A.I.R. 1927 Oudh 224 (225). Where under the agreement the mortgagor was to redeem the mortgage 99 years after its execution and the mortgagee was authorized to build any structure on the mortgaged plot as he liked, it was held that the two terms were so unreasonable that they amounted to a clog on the equity of redemption—*Vadilal v. Gokaldas*, A.I.R. 1953 Bom. 408. But see *Sarjug Mahto v. Devraj Devi*, A.I.R. 1963 Pat. 114.

(3) A stipulation that if the mortgagee constructed new buildings by demolishing the *kachcha* structure, the mortgagor would pay cost of construction at the time of redemption was not a clog on redemption—*Chhedi Lal v. Babu Nandan*, A.I.R. 1944 All. 204, I.L.R. 1944 All. 302. Where the mortgagor, apart from agreeing to a term of 99 years for redemption gave the mortgagee in possession unlimited right to improve the mortgaged property and to add the cost of improvement to the mortgage money it was held in a suit for redemption after 72 years that the term of 99 years and right to add the cost of improvement operated as a clog and that the suit was not pre-mature—*Chandanmal v. Saleraj*, A.I.R. 1958 Raj. 298.

(4) *Condition of pre-emption by the mortgagee*:—Speaking generally, a mortgagee is not allowed as such to avail himself of the necessities of his debtor so as to obtain a collateral or additional advantage beyond the payment of principal, interest and costs. (Coote on Mortgage, p. 15). But if the covenant creating the collateral advantage is not objectionable on the ground of unfairness or unreasonableness, it will be enforced—*Bimal Jati v. Biranja*, 22 All. 238. Thus a mortgagee may stipulate for the collateral advantage of a right of pre-emption (if the mortgagor sells within the period of mortgage) at the market value of the day; and such a covenant is valid and enforceable, because the option of sale is still left with the mortgagor who may sell or redeem as he likes, the only stipulation being that in the event of his choosing to sell, he shall give the mortgagee the first offer—*Ramaswami v. Chinnan*, 24 Mad. 449 (459); *Matura Subba v. Surendra*, 8 Pat. 243, 9 P.L.T. 747, 113 I.C. 106, A.I.R. 1928 Pat. 637 (638); *Bimal Jati v. Biranja*, 22 All. 238; *Harish v. Jahuruddin*, 2 C.W.N. 575. In a later Madras case, it has been remarked, by way of obiter, that a right of pre-emption given to the mortgagee if the mortgagor wishes to sell the property even within the period of mortgage is a clog on redemption; for, in fact, a right of pre-emption may well prove a hindrance to a sale of the property for full value—*Tirumala v. Srinivasa*, 52 Mad. 300, 121 I.C. 753, A.I.R. 1929 Mad. 243, (250). But a stipulation that the mortgagee would pre-empt not by paying the market-price of the day or the same price as that offered by a stranger, but the price fixed

in the mortgage-instrument itself is oppressive and unconscionable—*Ramašami v. Chinnan*, 24 Mad. 449 (459). Similarly, a covenant by which the mortgagor binds himself to sell to the mortgagee at a *concession price*, i.e., at something less than the full value of the property is a clog on redemption and therefore void—*Tirumala v. Srinivasa*, 52 Mad. 300, 56 M.L.J. 318, A.I.R. 1929 Mad. 243 (250). If the mortgage-deed provides that the mortgagee shall have a right of pre-emption even if the mortgagor sells *after redeeming the property*, such a right exercisable after redemption amounts to a clog on redemption—*Ramašami v. Chinnan*, 24 Mad. 449 (455); *Tirumala v. Srinivasa*, *supra*.

(5) *Granting of leases*:—Leases between mortgagor and mortgagee (e.g., the granting of a usufructuary mortgage, and the subsequent grant of a lease to the mortgagor by the mortgagee) are very common and are not bad in themselves, though like all other transactions between a mortgagor and mortgagee, they are to be looked upon with a certain amount of suspicion—*Mahomed Cassum v. Joseph*, 7 Bom. L.R. 772. Such leases to be valid should last only during the pendency of the mortgage. A lease which is to continue *after redemption* is a clog on redemption—*Ankinedu v. Subbiah*, 35 Mad. 744. See Note 362 (5) *ante*.

But where a usufructuary mortgagee granted a lease of the mortgaged property to the mortgagor for a term of years different from the term of the mortgage and the mortgagor executed a *kabuliyat* whereby he undertook to pay a fixed rent, and the rent was made a charge of the property, held that the two documents could not be read as forming one transaction but that they must be regarded as separate and independent transactions and that the mortgagor was entitled to redeem the mortgage independently of the *kabuliyat* and could not be compelled as a condition precedent of redemption to pay off the rent charge created by the *kabuliyat*—*Khuda Buksh v. Alimunnissa*, 27 All. 313.

(6) There is no clog on the equity of redemption where the mortgagor stipulates that he will not be entitled to redeem the mortgaged property without first paying up the rents of the same property which he held as a tenant under the mortgagee—*Chatter Mal v. Baij Nath*, 28 All. 712. See also 20 All. 401 in Note 369 below. The provision for the payment of “Deorah” (an undertaking to pay at the time of redemption not the principal only but a larger sum) is not a stipulation by way of penalty under sec. 74, Contract Act. It does not also operate as a clog on the equity of redemption—*Lala v. Hira Jan*, A.I.R. 1926 Oudh 502, 96 I.C. 538.

(7) *High rate of interest*:—The mere fact that a high rate of interest has been stipulated in a mortgage-deed does not entitle the mortgagor to put forward a case of clog, in the absence of any proof of undue influence or unfair dealing in the stipulation for interest—*Saheb Baksh v. Mahomed Ali*, 7 O.L.J. 389, 58 I.C. 115; *Sarfaraz v. Udawat*, 4 Luck. 147, 113 I.C. 46, A.I.R. 1929 Oudh 30 (32). See also *Baldeo v. Losai*, 5 O.W.N. 1091, A.I.R. 1929 Oudh 54 (55), and *Ram Krishna v. Herambo*, 33 C.W.N. 388 (390). But interest at 24 per cent. per annum with six-monthly rests on a mortgage amount of Rs. 98 only for a term of 50 years is hard and unconscionable—*Gajraj v. Munna*, 4 Luck. 415, A.I.R. 1930 Oudh 173 (175), 126 I.C. 673. A stipulation for payment of interest at 24 per cent.

on the mortgage-amount and on the cost of improvement made by the mortgagee, which were about ten times the mortgage-amount, was inequitable—*Bechu v. Bhabhuti*, 52 All. 831, A.I.R. 1931 All. 201 (202).

(8) *Stipulation to pay remuneration to mortgagee for services*:—An agreement whereby the mortgagee in possession agrees with his mortgagor to charge for his personal services, (e.g., an agreement for payment of a fair remuneration to the mortgagee who acts as manager) of a large concern like a spinning and weaving mill to keep it in a high state of efficiency is not a clog on redemption—*Hope Mills Ltd. v. Cowasji*, 13 Bom.L.R. 162.

(9) A provision in the deed *postponing the mortgagor's taking possession* so long as there were fruit-bearing trees on the land planted by the mortgagee, is not a clog on the equity of redemption—*Genu Tukaram v. Narayan*, 45 Bom. 117 (123), 59 I.C. 258.

(10) A stipulation in a usufructuary mortgage of agricultural land that redemption should take place only in the month of Jeth, i.e., before the mortgagee commences to sow the crops for the next season, is not a clog on the equity of redemption. The intention of the mortgagee is to permit redemption at a time when the crops are not standing—*Kripal v. Sheoambhar*, 1930 A.L.J. 610, A.I.R. 1930 All. 283 (285), 126 I.C. 366. It is a reasonable practice to provide that redemption shall take place only in the *Khali fasl*, in the month of Jeth, when the crops are off the ground. The mortgagor is allowed a month within which to redeem the mortgage, and if he fails to redeem within the month, he must wait till the following year—*Sarbdawan v. Bijai*, 36 All. 551 (554). See also *Bansi v. Girdhar*, 1894 A.W.N. 143; *Muhammad v. Baldeo*, 38 All. 148; *Narasingha v. Achhaibar*, 36 All. 36 (39); *Kadir Bibi v. Mailappa*, A.I.R. 1946 Mad. 542 (F.B.), I.L.R. 1946 Mad. 739.

364. Payment to whom to be made:—Where there are two or more joint mortgagees, a payment made by a mortgagor to one of them does not operate as a discharge of the debt so far as the other mortgagee or mortgagees are concerned. A payment to one mortgagee is valid only to the extent of his share of the debt. There is nothing to indicate that each of the mortgagees is a creditor for the whole; consequently payment to one would not liberate the debtor against all the creditors—*Hossainara v. Rahimannessa*, 38 Cal. 342; *Ray Satindra Nath v. Ray Jatindra Nath*, 31 C.W.N. 374, A.I.R. 1927 Cal. 425; *Jauhari v. Ganga*, 41 All. 631; *Umesh v. Dinabandhu*, 21 C.L.J. 570, 29 I.C. 966. See also *Mahadeosingh v. Bal-mukund*, A.I.R. 1948 Nag. 279, I.L.R. 1947 Nag. 553; *Md. Sharif v. Abdullah*, A.I.R. 1943 Pesh. 1; *Alburi v. Muthangi*, A.I.R. 1943 Mad. 271, 1943 M.W.N. 228. In England also, the law is the same. As stated by Lord Alvanley M.R.: "Although the mortgagees take a joint security, each means to lend his own money, and take back his own"—*Morley v. Bird*, (1798) 3 Ves. 631; *Steeds v. Steeds*, (1889) 22 Q.B.D. 537; *Matson v. Dennis*, (1864) 10 Jur. N.S. 461; *Powell v. Broadhurst*, [1901] 2 Ch. 160. In a Madras case it was held that if there were several joint mortgagees, a mortgage was fully discharged by payment to one of them, though he was not an agent of the others—*Barber Maran v. Ramanna*, 20 Mad. 461. The Judges who gave this decision followed the English case of *Wallace v. Kelsall*, (1840) 7 M. & W. 264. But the

authority of this case has been considerably shaken by the decision in *Powell v. Broadhurst* (supra). The correctness of the Madras case has been doubted in several cases of the same High Court; see *Ahinsa Bibi v. Abdul Kader*, 25 Mad. 26; *Veeraswamy v. Ibramsa*, 19 M.L.J. 221, 1 I.C. 200; *Ramaswamy v. Muniandi*, 20 M.L.J. 709, 5 I.C. 343; *Sheikh Ibrahim v. Rama Aiyar*, 35 Mad. 685. Where it has been agreed between two joint creditors A and B that A alone shall receive the sum and not B, and the mortgagor with notice of that agreement and defiance of it makes payment to B, it cannot be treated as a valid payment in discharge of the debt. It will be presumed to have been made in fraud of the person who was entitled to receive the money—*Chinnaramanuja v. Padmanabha*, 19 Mad. 471.

Similarly, where the original mortgagee dies, leaving two or more heirs jointly entitled to his estate, a payment made by the mortgagor of the amount due on the mortgage to one of those heirs without the concurrence of the rest does not amount to a valid discharge of the debt. The right which the several heirs jointly get on the mortgagee's death to enforce the mortgage is a right created by law in consequence of the devolution upon them of the single and indivisible right which the original mortgagee had as the sole promisee, and not in consequence of their being 'joint promisees'—*Sitaram v. Sridhar*, 27 Bom. 292. See also *Banamali v. Talua Ramhari*, 5 P.L.J. 151, 55 I.C. 841. The principle is that several co-heirs constitute one heir and are connected together by unity of interest and unity of title. One of the heirs, therefore, cannot enforce the mortgage without the concurrence of the rest so as to give a valid discharge to the mortgagor and free the mortgaged property from the incumbrance—per Tindal C.J. in *Decharms v. Horwood*, (1834) 10 Bing. 526.

A payment to the mortgagor's agent discharges the mortgage-debt. Consequently where in the case of a mortgage in favour of the Karta of a Hindu joint family, the Karta's brother accepts payment of the mortgage-debt during his absence as his agent and grants a receipt, the receipt constitutes a valid discharge for the mortgage-debt—*Ram Kripal v. Baleswar*, A.I.R. 1941 Pat. 246, 192 I.C. 861. A payment may be made to an authorised agent; but payment to an agent, who to the knowledge of the debtor had no authority to receive the payment or who disclaims authority to receive it, does not discharge the debtor—*Mackenzie Lyall v. Shub Chunder*, 12 B.L.R. 360; *Bai Ruttenbai v. Fraser Ice Factory*, 32 Bom. 521.

365. Mode of payment :—A payment may be made not only in the current coin of the realm but in any other medium that the creditor may choose to accept—*Ragho v. Hari*, 24 Bom. 619. But ordinarily, a tender of money in payment of the debt must be made with the actual production of the amount in the current coin or in currency notes; and if a debtor sends a cheque or bill without any authority or request by the creditor that the amount should be remitted in that manner, the latter is not bound to accept it in payment—*Krishna Prosad v. Beni Ram*, 24 All. 85; *Jagat Tarini v. Naba Gopal*, 34 Cal. 305; *Wade's case*, 5 Co. Rep. 114a; *Polglass v. Oliver*, (1831) 2 Cr. & Jer. 15. When a tender is actually made but in a currency different from that required by law, e.g., by a cheque

on a banker, the objection to the *form* of the tender may be expressly or impliedly waived by the creditor, and he will be deemed to have waived the objection, if he rejects the tender on the ground of the insufficiency in amount or on some other ground, without making any objection to the legality of the tender in point of quality—*Jagat Tarini v. Naba Gopal*, 34 Cal. 305; *Polglas v. Oliver*, 2 Cr. & Jer. 15; *Jones v. Arthur*, 8 Dow. 442; *Caine v. Coulton*, 1 H. & C. 764. When a mortgage-debt is contracted in a particular currency, it should be repaid in that currency. Thus, where the loan was of Rs. 450 in the Poona currency, the decree must be for Rs. 430-2-11, which is equivalent in British currency to Rs. 450 of the Poona currency, and not for Rs. 450 of the British currency—*Trimbak v. Sakharam*, 16 Bom. 599 (603). Where in an old mortgage, the money had been advanced in *shikkai* coins, held that the mortgagor would be entitled to redeem on payment of money in British currency calculated according to the value of the *shikkai* coin—*Hiralal v. Narsilal*, 11 Bom. L.R. 318, 2 I.C. 469 (471).

Where there is a stipulation that no payment will be accepted by the mortgagee, unless on a registered receipt or endorsement on the back of the mortgage bond, the mortgagee can, when the stipulation is not fulfilled, refuse to appropriate the payment towards the mortgage-debt—*Gopaljee v. Upendra*, A.I.R. 1942 Pat. 408, 23 P.L.T. 384.

Where no stipulation or covenant has been made between the contracting parties as to the payment of the sum in *instalments*, the lender is entitled to decline to receive payment in instalments, and can claim that the whole sum due be paid at one and the same time—*Behari Lal v. Ram Ghulam*, 24 All. 461.

366. Place of payment:—Where no specific contract exists as to place where the payment is to be made, it is the debtor's duty to seek out the creditor and to make payment where the creditor is—*Motilal v. Surjamal*, 30 Bom. 167; *Mahadaji v. Pairia*, 2 N.L.R. 62; and the creditor cannot be compelled to go to any place the debtor chooses—*Mahadaji v. Pairia*, supra. Where the mortgagee is deliberately keeping out of the way to avoid tender, in order that he might hold the property as long as he could, and after that, transfer it to a particular friend of his own, it will be sufficient if the money is tendered at the mortgagee's house or last place of abode—*Fisher on Mortgage*, 5th Ed., p. 717. The best course in such a case is to deposit the money in Court (Sec. 83).

366A. Evidence of payment:—Even where the mortgage-deed contains a stipulation that the only evidence which the parties could rely upon in support of any payments made in satisfaction of the mortgage-debt would be payments endorsed on the mortgage-deed itself, it is open to the mortgagor to rely on a receipt signed by the mortgagee or his agent—*Ram Kripal v. Baleswar*, A.I.R. 1941 Pat. 246, 192 I.C. 861. A registered deed is not necessary to prove redemption. It can be proved by payment, conduct of the parties and other facts—*Dattajirao v. Prahladas*, A.I.R. 1956 Madh. B. 72.

366B. Effect of payment: Extinguishment of mortgage:—Once the payment of the full dues under a mortgage has been established, the extinguishment follows as an inference of law. A mortgage is not extin-

guished by a subsequent agreement between the parties. It is ordinarily extinguished by operation of law after satisfaction. It can come to an end without any subsequent registered agreement—*Ram Kumar v. Ram Nath*, A.I.R. 1942 Pat. 315, 23 P.L.R. 143, 8 B.R. 519.

367. Tender :—A good tender cannot be made by a stranger, or generally, by any person not entitled to the equity of redemption—*Watkins v. Ashwicke*, Cro. Eliz. 132. A tender by one or more of several mortgagors is not such as a mortgagee is bound to accept, unless it is made conjointly by all the mortgagors, or on their behalf and with their consent—*Ram Baksh v. Mohunt Ram Lall*, 21 W.R. 428.

The practice of the Court is not to require a party to make a formal tender where from the facts stated or from the evidence it appears that tender would have been a mere form and that the party to whom it was made would have refused to accept it—*Venkataraman v. Venkate*, A.I.R. 1923 P.C. 26, 46 Mad. 108, 28 C.W.N. 25, 71 I.C. 1035.

Actual production of money is not in all cases necessary to constitute a tender where it is shown that the creditor would not have accepted the money, even if produced—*Maung Po Tun v. Maung E. Kha*, 9 L.B.R. 18. Actual production of money may be dispensed with by the express declaration or equivalent act of the creditor, if the tender be otherwise sufficient; so that if the debtor says he has the sum ready in his pocket (stating the amount), and brought it for the purpose of satisfying the demand, or being in the house, offers to go and fetch it from another part of the house but the creditor desires him not to trouble himself to produce or to fetch the money, as he will not take it, or if the creditor not communicating personally with the debtor, refuses to authorize his agent to take the money, or to take it himself, the tender will be good—*Fisher on Mortgage*, 5th Edn., p. 719. Thus, a mortgagor went to the mortgagee on the due date to pay the money due on the mortgage. The money, though not actually produced, was ready there and then for the purpose. But the negotiations fell through because the mortgagee demanded three months' extra interest. *Held* that there was a sufficient tender of money by the mortgagor—*Pestonjee v. Hurmasjee*, 5 Bom. L.R. 387. But in some other cases it has been held that the money must be actually produced, unless the party entitled to payment waived it. A mere offer expressing willingness to pay is not sufficient—*Chetan Das v. Govind*, 36 All. 139; *Mahammad Mushtag v. Banke Lal*, 42 All. 420; *Kamaya v. Devapa*, 22 Bom. 440. In an English case it was held that generally the money should be actually produced, for though the creditor may at first refuse, yet the sight of the money must tempt him to take it—*Thomas v. Evans*, 10 East 101.

It is of the essence of a valid tender that it should be unconditional. If the offer is accompanied by a condition which prevents it from being perfect or complete in itself, it cannot be regarded as equivalent to payment and the promisee is under no obligation to accept it—*Hira Lal v. Khizar*, A.I.R. 1936 Lah. 168 (175-176), 161 I.C. 251; *Narain v. Abinash*, A.I.R. 1922 P.C. 347, 69 I.C. 273.

The mortgagor is not bound to pay the executor of the mortgagee's estate until the latter obtains probate. Therefore, where the mortgagor

got the money ready for immediate payment and intimated to the executors that the money was waiting to be paid to them, but did not actually make payment because the executors had not yet taken probate, there was a valid tender as from the time the intimation was given, and the mortgagor was not bound to pay any interest after that date—*Pandurang v. Dadabhay*, 4 Bom. L.R. 453.

A tender of a smaller sum than is due is not a good tender—*Chunder v. Jadoonath*, 3 Cal. 468.

See also Note 509 under sec. 84.

368. Tender whether necessary before suit :—It was once held in an Allahabad case that the mortgagor was not entitled to bring a suit for redemption unless he had made a tender (i.e., offer of payment) of the mortgage-money; and in a suit for redemption it must be shown that he had made such a tender—*Muhammed Ali v. Baldeo Pande*, 38 All. 148, 14 A.L.J. 56; see also *Md. Mushtaq v. Banke Lal*, 42 All. 420. But this view has now been changed. The same High Court now lays down that all that sec. 60 means is that there is an inherent right in the mortgagor to require the mortgagee to deliver the mortgage-deed, etc., when the mortgagor pays the amount due at a proper time and place. It does not necessarily mean that before a suit for redemption can be instituted, the amount must be paid or tendered. In other words, his right to claim redemption on payment of the mortgage-money exists although he has not yet made any tender, provided the mortgage-money has become payable—*Het Singh v. Behary Lal*, 43 All. 95 (97), 59 I.C. 92; *Saiyed Ahmad v. Dharmun*, 43 All. 424 (426); *Mewa Ram v. Ganga*, 17 A.L.J. 910, 52 I.C. 229. All that this section lays down is a definition of the right of redemption; it does not prescribe the conditions under which a suit for redemption can be instituted, and does not require that a tender must be made before the beginning of the suit—*Raghunandan v. Raghunandan*, 43 All. 638 (641, 642) (F.B.), 19 A.L.J. 572; *Dinanath v. Ramarai*, 6 Pat. 102, A.I.R. 1926 Pat. 512. The Madras High Court likewise holds that this section does not apply to a suit for redemption but to redemption by private arrangement alone, and therefore the non-payment or non-tender of the amount due on the mortgage previous to suit is not a bar to a suit for redemption—*Butchanna v. Varahulu*, 24 Mad. 408.

Where one of the terms of redemption was that the mortgagor should deposit the mortgage-money on or before a particular date, the non-deposit of the mortgage-money on that date is no ground for dismissing the redemption suit. The equities of the case, if necessary, may be settled by making a proper order for costs—*Amba Prasad v. Mooga Ram*, A.I.R. 1930 All. 523, 128 I.C. 235.

Where the mortgage-money is alleged to have been satisfied out of the usufruct, a tender is out of the question—*Het Singh v. Behari Lal*, 43 All. 95 (98).

Where the mortgagee in possession resists the right of the mortgagor to get release of the mortgaged property and to give up possession even after a valid tender made by the mortgagor has been refused by the mortgagee or a deposit is made by the former and the latter refused to

withdraw the same, the suit which the mortgagor has to institute is a suit for redemption, and the mortgagor must include in such a suit his claim for over-payments to the mortgagee or excess profit received by him. If he does not do so, he would be debarred from claiming the same in a subsequent suit. The mortgagee does not become a trespasser from the moment of the tender or from the moment he receives the notice of deposit, and a suit for mesne profits after a suit for possession or redemption for a period anterior to the date of the institution of the suit for possession or redemption will not lie. After a tender or deposit the mortgagee still continues as a mortgagee; the only effect is that interest ceases to run and that a heavier burden in the matter of accounts is thrown on the mortgagee—*Raj Mohan v. Saroda*, A.I.R. 1936 Cal. 200 (201, 202), 40 C.W.N. 627, 162 I.C. 709—*per* R. C. Mitter, J.

369. "Mortgage-money":—The term *mortgage-money* has been defined in section 58 as "principal money and interest." A mortgagee is entitled to treat the interest due under a mortgage as a charge on the mortgaged property, in the absence of any contract to the contrary; and the mortgagor is bound to pay, upon redemption, not only the principal debt but the interest also—*Ganga Ram v. Nathu Ram*, 5 Lah. 425 (427, 428) (P.C.), 80 I.C. 820, A.I.R. 1924 P.C. 183. The word 'mortgage-money' includes all money which on taking an account between the parties may be properly allowed to the mortgagee; it includes costs of litigation properly undertaken by him—*Nadershaw v. Shirinbai*, 25 Bom. L.R. 839, A.I.R. 1924 Bom. 264; it will include costs incurred by the mortgagee in defending an unsuccessful redemption suit brought by the mortgagor; and the latter is bound to pay the same before redemption. The Transfer of Property Act is not a consolidating statute; (note that the word 'consolidate' does not occur in the preamble); and the right of mortgagee to a general account of the moneys due to him under the mortgage-contract is saved by the provisions of sec. 2 (b) of this Act, and this right has not been cut down by sec. 58 to an account merely of the principal money and interest—*Varadarajulu v. Dhanalakshmi*, 16 M.L.T. 365, 26 I.C. 184. So also, a mortgagee of agricultural land spending money with the consent of his mortgagor in repairing a well on the property which had been rendered useless by natural causes is entitled to add the amount so expended to his mortgage-debt to be paid by the plaintiff before the latter could claim redemption—*Durga v. Naurang*, 17 All. 282. See also Notes under sec. 72. In case of a mortgage with possession with a lease back to the mortgagor the mortgagor was allowed on his application under the Travancore Debt Relief Act to redeem the mortgage in two years on 22nd. January, 1118. The mortgagee sued for possession with arrears of rent before and after 22nd. January, 1118 on the ground that the arrears of rent constituted charge on the properties and that such rent also had to be paid before redemption could be allowed. *Held*, that the mortgagor was entitled to redeem on payment of the statutory percentage of the debt under the Debt Relief Act and that the mortgagee lost his status as lessor with the disappearance of the mortgage on redemption—*Sivany Chettiar v. Sivaram Iyer*, A.I.R. 1957 Trav.-Co. 13.

Where there have already been payments in part satisfaction of

the mortgage, the payment of the balance will entitle the mortgagor to redemption—*Hira Kuer v. Palku*, 3 P.L.J. 490.

The mere fact that the mortgagor entered into a personal covenant to pay a certain sum does not prevent the said amount being taken into consideration in settling the total sums which would be paid by the mortgagor when redeeming the mortgaged property—*Hardwar v. Sita Ram*, A.I.R. 1934 All. 888, 150 I.C. 879.

Where a sale-deed by which the plaintiff conveyed his land to defendant for Rs. 600, contained a clause by which the purchaser undertook to "resell the land to the vendor at his request within three years for Rs. (blank)", held that the transaction amounted to a mortgage (by conditional sale); that the omission to insert the amount of the price for repurchase was either due to an oversight or intentional; and that in the absence of any specific agreement as to the payment of a different sum for redemption, the mortgagor was entitled to redeem on payment of the "mortgage-money" which in this case meant the amount actually due under the deed (*i. e.*, Rs. 600)—*Maung Pe Gyi v. Hakim Ally*, 2 Rang. 113 (116).

Where a usufructuary mortgagee, instead of taking possession, granted a lease of the property to the mortgagor, the amount of rent payable under the lease being equal to the amount of interest payable under the mortgage, held that any arrears of rent must be treated as arrears of interest included in the mortgage-money and therefore a charge on the property, and the mortgagor is not entitled to redeem the property without payment of the arrears—*Imdad Hasan v. Badri Prasad*, 20 All. 401 (407). See also *Chatter Mal v. Baij Nath*, 28 All. 712. Cf. *Altaf Ali v. Lalta Prasad*, 19 All. 496 (498) cited in Note 403 under sec. 67.

Where it was stipulated that the mortgagor would pay interest until delivery of possession of the mortgaged property to the mortgagee, held that after the mortgagee took possession the mortgagor was not bound to pay interest and was entitled to redeem on payment of the principal sum only—*Partab v. Gajadhar*, 24 All. 521 (531) (P.C.).

370. Mortgagor's right on redemption :—The mortgagor, after paying or tendering the money, can compel the mortgagee: (a) to deliver the mortgage-deed, if any; (b) to deliver possession of the property; and (c) either to reconvey the mortgaged property to the mortgagor; or to execute a registered acknowledgment.

(a) *Return of Mortgage-deed :—*The mortgagee is bound to return not only the mortgage-deed but also "all documents relating to the mortgaged property which are in his possession or power". These words have been added by the Amendment Act, 1929. Similar amendment has been made in sec. 83.

(b) *Delivery of possession :—*Where the mortgagee was in possession of the mortgaged property, he is bound to deliver possession of the property to the mortgagor. Moreover, the mortgagee is bound to account for and to restore the property in its entirety, and he cannot be heard to say that he does not know what has happened to a portion of the property mortgaged—*Ramchandra v. Makund*, 3 Bom. L.R. 152. If a portion

of the mortgaged lands is lost through the negligence of the mortgagee, he is bound to pay for it—*Anandrao v. Bhikaji*, 46 Bom. 218, A.I.R. 1922 Bom. 156. It is the duty of the mortgagee to identify fully the property mortgaged; if he mixes the mortgaged property with his own, the onus will be upon him of distinguishing his own property, and if he is unable to do so, mortgagor will be entitled to the whole property—*Ramchandra v. Makund*, 3 Bom. L.R. 152 (following *Wake v. Conyers*, 2 W. & T.L.C. 438).

When a mortgage is redeemed, the mortgagee is bound to restore the property in the same position in which it was when he took possession. He must therefore restore the property free from the mortgage and all other incumbrances created by him. Where, therefore, he has transferred a portion of the mortgaged land under a lease, the lease comes to an end when the mortgage is redeemed—*Ramchand v. Raj Hans*, 3 A.L.J. 517; *Subrao v. Munjapa*, 16 Bom. 705; *Alagirisami v. Akkulu*, 41 M.L.J. 462, 69 I.C. 651.

Where a property is mortgaged and then a share in the same property is remortgaged to the same mortgagee and both the mortgages are with the stipulation that on default in paying the mortgage-money the mortgagee is to get possession and the mortgagee has on default obtained possession under the first mortgage only, then on redemption of the first mortgage he cannot claim to retain possession under the second mortgage for he has obtained no possession under that mortgage—*Harihar v. Lachhman*, A.I.R. 1934 Oudh 246 (250), 149 I.C. 543. Where both the prior and subsequent mortgages are with the stipulation that on default in paying the mortgage-money the mortgagee is to get possession and the prior mortgagee obtained possession as against the mortgagor and the subsequent mortgagee and afterwards purchases the rights of the subsequent mortgagee, then on redemption of the prior mortgage he cannot claim to retain possession under the subsequent mortgage, for the right which the subsequent mortgagee had was to redeem—*Ibid* at p. 251.

If the mortgagor is wrongfully dispossessed by the mortgagee from a plot comprised in the mortgage and acquiesces in such dispossession, he should not however be heard at the time of redemption in support of his claim as to loss of profits—*Pranpati v. Hasiban*, A.I.R. 1932 Oudh 57, 135 I.C. 892. The mortgagor who is entitled to rents and profits of the property from the mortgagee in possession is a person entitled to possession in a limited sense, and if he is deprived of that possession to his knowledge by open hostile assertion by a stranger, the mortgagor's right to seek possession upon redemption would be barred after the period of 12 years—*Gurunath v. Suryakant*, I.L.R. 1940 Bom. 453, A.I.R. 1940 Bom. 225, 42 Bom. L.R. 399.

Where the mortgagee in possession obtains possession over some plots of land in addition to the mortgaged property, presumably doing so in his capacity as mortgagee, he must deliver over those plots of land to the mortgagor on redemption and is not entitled to retain possession thereof; and he is also bound to account to the mortgagor for mesne profits in respect thereof—*Dildar v. Shukrullah*, 46 All. 152 (153), 78 I.C. 1023, A.I.R. 1924 All. 444. Cf. sec. 63.

(c) *Reconveyance of mortgaged property* :—Such reconveyance can be demanded only in the case of an English mortgage. "I presume that, as there is no transfer of the mortgaged property itself, strictly speaking, except perhaps in the case of an English mortgage, a reconveyance can be demanded by a mortgagor only when the security takes the form of an English mortgage"—Ghose's *Law of Mortgage*, 5th Edn., p. 271.

(d) The mortgagor can, after receiving possession of the property and paying under protest the amount demanded by the mortgagee, sue to recover surplus amount from the mortgagee if the amount paid is in excess of the amount due—*Dattajirao v. Prahaladas*, A.I.R. 1956 Madh. B. 72.

371. Extinguishment of right of redemption—By act of parties :—This section provides that the right of redemption can be extinguished only either by the act of parties or by a decree of Court—*Kunhothi v. Koya*, A.I.R. 1949 Mad. 443 I.L.R. 1949 Mad. 276. The 'act of parties', a phrase used here and elsewhere in the Act in contradiction to "operation of law", must denote a release or other such transaction *standing apart* from the mortgage transaction under which the right of redemption comes into existence. There is no extinguishment of the right by act of parties when by virtue of a stipulation contained in *the very contract* under which the right is created, that right ceases to exist. Therefore, a condition in the mortgage-deed itself to the effect that on default of payment on a certain date, the mortgage shall be treated as an absolute sale, does not amount to an extinguishment of the right of redemption by act of the parties within the meaning of this section—*Perayya v. Venkata*, 11 Mad. 403. A mortgage by conditional sale does not become irredeemable after the expiry of the period fixed; the right of the mortgagor to redeem the property remains unaffected by the expiry of the term—*Lalta Prasad v. Jagdish*, 48 All. 787, 24 A.L.J. 1057, A.I.R. 1927 All. 137 (140), 98 I.C. 961; *Balkissen v. Legge*, 22 All. 119 (P.C.). But if the restrictive condition is entered into *subsequently* to the mortgage transaction, the contract will have the effect of extinguishing the right of redemption—*Ram Singh v. Baij Nath*, 17 A.L.J. 117, 49 I.C. 353. See also 27 Bom. 297 and 22 Bom. L.R. 965 cited in Note 362 (4), *ante*. The 'act of parties' means an act *subsequent* to the mortgage transaction; there can be no extinction of the right of redemption by an agreement contained in the transaction itself, for the law as codified in sec. 60 giving the mortgagor a right of redemption prevents him from contracting himself out of it—*Ambu v. Kelu*, 53 Mad. 805, 123 I.C. 584, A.I.R. 1930 Mad. 305 (313). If a mortgagor in a petition to the Municipality says that the transaction is a sale he will not thereby lose his right of redemption—*Fulchand v. Kanhaiyalal*, 1962 M.P.L.J. 423. Right to redeem is not extinguished by the mortgagor admitting the title of a third party to the mortgaged property in a suit between the mortgagor and the third party—*Hirabai v. Ganesh*, A.I.R. 1959 Bom. 172.

An agreement for sale entered into by a mortgagee with a purchaser does not extinguish the mortgagor's equity of redemption—*Abraham v. Abdul*, A.I.R. 1949 Bom. 154; *Kukaji v. Misri Lal*, A.I.R. 1952 M.B. 6. See in this connection *In re Vanraj*, A.I.R. 1915 Bom. 161, 46 Bom. L.R. 921; *Dadoo v. Venkatrao*, A.I.R. 1951 Nag. 84. Where a usufructuary

mortgage contains a term that the mortgage will be converted into a sale if not redeemed on due date and after the due date the mortgagor grants a receipt to the effect that the property stands sold, the right to redeem is not extinguished by the receipt—*Dulchand v. Dharanidhar*, 1961 M.P.L.J. 404. Where a mortgagor sells the property to a usufructuary mortgagee by an unregistered deed, the possession of the mortgagee from the date of sale becomes adverse to the mortgagor and ripens into ownership after the lapse of the statutory period—*Udaibhanusingh v. Shiv Narain*, 1959 M.P.L.J. (Notes) 232.

Where the mortgagee purchased the mortgaged property under a deed and the sum of money due under the mortgage-deed exactly represented the purchase-money fixed under the deed of sale, it was held that the mortgage was redeemed—*Kunj Behari v. Bisheshwar*, A.I.R. 1934 Oudh 98, 148 I.C. 68. In such a case the redemption was not required by law to be proved by a registered deed to that effect—*Ibid.*, at p. 99. Where the mortgagee accepted a sale of some of the mortgaged properties from the mortgagor in satisfaction of the entire mortgage-debt and there was a clause in the sale-deed to the effect that the mortgage would be kept intact and on partial failure of the consideration by the mortgagee not getting part of the property he sued on the mortgage, it was held that the mortgage-debt was extinguished by the sale and the remedy of the mortgagee was one for breach of contract, the clause being intended merely to preserve to the mortgagee a shield against the claims of persons setting up a subsequent charge upon the same property—*Kedar v. Bhagwat*, A.I.R. 1936 Pat. 404 (405), 15 Pat. 120, 163 I.C. 391.

A mere admission by a mortgagor or an understanding between him and the mortgagee that the latter has become the owner of the mortgaged property does not extinguish the mortgage or destroy the right of redemption of the mortgagor—*Ram Singh v. Baij Nath*, 17 A.L.J. 117, 49 I.C. 353. Sometime after the execution of a usufructuary mortgage, the mortgagor entered into a registered contract to sell the equity of redemption to the mortgagee but the sale-deed was never executed. *Held* that there was no transfer of the equity of redemption and the right to redeem was not lost—*Sitla Sahai v. Dhum Singh*, 28 O.C. 100, 11 O.L.J. 543, A.I.R. 1925 Oudh 114 (115), even if possession is transferred to the mortgagee—*Eilappa v. Sivasubramaniam*, A.I.R. 1937-Mad. 293, 169 I.C. 244.

Where the mortgagee in collusion with the Forest Department took other lands in exchange for the mortgaged lands from the Government (who acquired the mortgaged lands), *held* that the mortgagee would be deemed to be a trustee for the mortgagor in respect of the new plots of lands, which the mortgagor would be entitled to redeem, and the latter's right of redemption was not extinguished—*Babaji v. Magniram*, 21 Bom. 396. The mere fact that one of several co-mortgagors is the registered occupant of the mortgaged land does not entitle him to transfer the portion of the equity of redemption belonging to his co-mortgagors. Such a transfer in favour of the mortgagee does not operate to extinguish the right of the co-mortgagors to redeem their shares of the mortgaged land—*Lalchand v. Khandu*, 22 Bom. L.R. 1431, 59 I.C. 762 (763).

The withdrawal by the mortgagor of a previous suit for redemption does not extinguish the right of redemption or bar a second suit for redemption—*Ramchandra v. Hanmanta*, 44 Bom. 942, 58 I.C. 42. So also is the effect of a compromise—*Basangouda v. Rudrappa*, 28 Bom. L.R. 1507, A.I.R. 1927 Bom. 87. Similarly where a redemption suit was dropped on the basis of two documents, one executed by the mortgagor and the other by the mortgagee, the right of redemption was not extinguished—*Subba Rao v. Raju*, A.I.R. 1950 F.C. 1, 1949 F.L.J. 398, (1950) 1 M.L.J. 752.

When a person who is not a mortgagor under a mistaken claim pays off a mortgage debt, he cannot extinguish it; for he has no right to do so. The only person who can extinguish the right is the person who is entitled to redeem the mortgage—*Maramittath v. Kutteyil*, A.I.R. 1937 Mad. 451, 172 I.C. 47.

Though this section does not speak of extinguishment by operation of law, it may take place in that way, e.g., where the mortgagee obtains the right of redemption by succession or by adverse possession or the mortgagor gets the mortgagee's right by inheritance—*Markanda v. Varada*, A.I.R. 1949 Pat. 197, 26 Pat. 717. But where a suit, if brought on the second mortgage-deed, is barred by limitation, the right of the mortgagee setting up such a deed in a suit for redemption of a prior usufructuary mortgage redemption of which is made conditional on payment of mortgage-dues thereunder and under subsequent mortgage-deed, is not extinguished—*Jokhu v. Sitta*, A.I.R. 1930 All. 416 (417), 52 All. 539, 122 I.C. 411; *Kesar Kumcar v. Kashi Ram*, 37 All. 634, 30 I.C. 777, 13 A.L.J. 889. Where the mortgaged property vests in the State free from incumbrance during the pendency of the suit for redemption the decree for redemption becomes infructuous—*Raja Sailendra Narayan v. Kumar Jagat Prasad*, A.I.R. 1962 S.C. 914.

The equity of redemption can only be lost either by a fresh agreement between the parties or by foreclosure proceedings. An entry recording the mutation of names of the mortgagee as owner is of very little help in the determination of the point—*Harihar v. Lachhman*, A.I.R. 1934 Oudh 246 (248), 149 I.C. 543. Possession for however long a period by a mortgagee can give him no title other than the title which he has acquired by his mortgage—*Basdeo v. Jaimangal*, A.I.R. 1932 All. 53, (1931) A.L.J. 914, 136 I.C. 69. But where subsequent to a mortgage an oral arrangement was made whereby the mortgagee was to give up certain lands and retain certain other in full ownership in satisfaction of the mortgage-debt and other debts, and the mortgagee remained in possession as full owner for 12 years, he must be taken to have acquired a good title by prescription. Although in a suit for redemption such a transaction cannot be set up as having the effect of itself to transfer any interest in the property, it is permissible to consider, as showing the nature of the defendant's possession, that it is not as mortgagee but as full owner, and such possession having been ripened into a full title, the plaintiff's right of redemption is barred—*Kandasami v. Chinnappa*, 44 Mad. 253, 62 I.C. 603; *Badri Singh v. Baldeo Singh*, A.I.R. 1962 Pat. 195.

In the case of a usufructuary mortgage the equity of redemption may be extinguished by adverse possession on the part of a stranger

while the mortgagee continues in possession and the period of redemption is still running—*Kanhoo Lal v. Mt. Manki*, 6 C.W.N. 601.

372. Auction-purchase of mortgaged property by the mortgagee:— If a mortgagee has attached the mortgaged property in execution of a money-decree obtained by him against the mortgagor for a debt other than the mortgage, or in execution of a decree obtained by him upon a subsequent mortgage, and has himself purchased the property at the sale in execution of that decree, such sale does not extinguish the mortgage or destroy the right of redemption of the mortgagor—*Martand v. Dhondo*, 22 Bom. 624; *Nand v. Hari Raj*, 20 All. 23 (F.B.). The same reasoning applies to a mortgagee purchasing the equity of redemption under a decree obtained on a collateral instrument to secure the same mortgage-debt—*Martand v. Dhondo*, 22 Bom. 624. The same principle applies also to a case when a mortgagee buys the equity of redemption at a Court-auction held in execution of a personal decree for money obtained by a third person against the mortgagor, even though there be no fraud or collusion between him and the third party—*Erusappa v. Commercial Land Mortgage Bank*, 23 Mad. 377; see also *Bhailal v. Keshavji*, A.I.R. 1952 Kutch 1; *Eapen v. Manachee*, A.I.R. 1951 Tr.-Coch. 101, but see *Mrutunjay Pani v. Narmada Bala Sasmal*, A.I.R. 1961 S.C. 1353 where it has been laid down that where the mortgagee purchases the equity of redemption in execution of his mortgage decree with the leave of court or in execution of a mortgage or money-decree obtained by a third party the equity of redemption may be extinguished. In all these cases, the mortgagee-purchaser does not acquire the property free from the equity of redemption, but it is liable to be redeemed by the mortgagor. The reason in support of this view is the "impossibility of the mortgagee by such sales and purchases as these freeing himself from his liability to be redeemed"—*Martand v. Dhondo*, 22 Bom. 624. Indeed, by reason of the advantage which his position as mortgagee gives him over competing bidders in respect of his presumably superior knowledge or better opportunities of knowledge of the mortgaged property and its value and otherwise, the mortgagee must be looked upon as availing himself of his position as mortgagee who obtained an undue advantage over the mortgagor or otherwise acting *mala fide* in the eye of law (whether there be actual fraud or collusion or not), and in contravention of the principle which underlies sec. 99 (old) of the Transfer of Property Act and which is given expression to in sec. 88 of the Indian Trusts Act—*Erusappa v. Commercial Land Mortgage Bank*, 22 Mad. 377; *Naki Yathu Ummal v. Muhammad Mythun*, 1963 Ker. L.J. 1177. In a recent case the Bombay High Court has, however, held that the purchase of the equity of redemption by the mortgagee does not *ipso facto* put an end to the relation of mortgagor and mortgagee and that the sale is therefore not a nullity, and the mortgagor is bound to follow the procedure allowed by the law to get the sale set aside: otherwise his right to redeem is barred—*Tukaram v. Nanaji*, A.I.R. 1936 Bom. 177, 38 Bom. L.R. 242, 162 I.C. 822. See also *Jagadish v. Bhubaneswar*, A.I.R. 1923 Cal. 121, 27 C.W.N. 38, 76 I.C. 241; *Gangaram v. Butrusao*, A.I.R. 1952 Nag. 202. Where the mortgagee, with the permission of the Court, purchases at a sale in execution of a decree obtained by a stranger on a prior hypothecation the mortgagor's right of redemption is extinguished—

Sankaran Lakshmi v. Adima Kunju, A.I.R. 1965 Ker. 132. If under a usufructuary mortgage both the mortgagor and the mortgagee are liable to pay the rent but both commit default, then the purchase of the property by the mortgagee in execution of the rent decree obtained by the landlord extinguishes the right of redemption—*Mt. Barti Kuer v. Brahmachari Singh*, A.I.R. 1961 Pat. 439. Where the shares of some of the mortgagors are effectively sold and purchased by the mortgagee in execution of money-decrees, the equity of redemption with respect to those shares is extinguished and the redemption of those shares cannot be claimed by the other mortgagors whose interests were unaffected by the decrees or the execution proceedings—*Wajid Ali v. Alidad Khan*, A.I.R. 1940 Pat. 45, 184 I.C. 124.

The mortgaged property, occupancy raiyati lands, was part of a larger holding. The usufructuary mortgagee agreed to pay a portion of the rent of the entire holding, and the mortgagors agreed to pay the balance. The entire holding was brought to rent-sale by the superior landlord primarily on the ground that the mortgagors defaulted in paying their share of the rent. Held that the equity of redemption was extinguished even though the holding was purchased at the rent-sale by the mortgagee—*Sachidananda v. Sheo Prasad*, A.I.R. 1966 S.C. 126.

Where a simple mortgagee gets the mortgaged property by succession from an auction-purchaser of the property, the mortgage debt is not extinguished, and the mortgagee can enforce the personal covenant abandoning the security. Section 60 has no bearing on such a question—*Ramgopal v. Ramchandra*, A.I.R. 1949 Nag. 354, I.L.R. 1949 Nag. 284.

The mortgage-debt of a mortgagee who purchases for a small value the equity of redemption in an estate with a notification and subject to his debt is satisfied by the purchase of the village—*Suraj Narain v. Bisheshwar Singh*, 19 Pat. 688, A.I.R. 1940 Pat. 707 (712), 191 I.C. 495.

Where a co-sharer who has become mortgagee of the entire holding purchases it in execution of a rent decree, the equity of redemption of the co-owners is not extinguished—*Satdeo v. Kamal*, A.I.R. 1953 Pat. 27; *Raman v. Cherian*, A.I.R. 1952 Tr.-Coch. 53.

On the issue whether a suit for redemption was barred by adverse possession for more than 12 years by the purchaser at an execution sale of the equity of redemption, it was held by the Privy Council that as the evidence showed that the purchasers were nominees of the mortgagees and not independent third parties, their possession was not adverse—*Khiraamal v. Daim*, 32 I.A. 23, 32 Cal. 296. A Court has no jurisdiction to sell an equity of redemption unless the mortgagors are parties to the decree or proceedings which led to it, or are properly represented on the record—*Ibid.*

Where the mortgaged land was sold for arrears of revenue owing to the default of the mortgagee, and was purchased by him at the auction-sale, such sale did not deprive the mortgagor of his right to redeem—*Thakur Jai Karan v. Sheo Kumar*, 50 All. 36, A.I.R. 1927 All. 747 (748); *Kalappa v. Shivayya*, 20 Bom. 492 (494); *Lakshmayya v. Appadu*, 7 Mad. 111 (112). But when between the mortgagor and the mortgagee

there is an agreement that the mortgagee need pay only the Government-revenue on the land in the patta mortgaged, and as a result of default on the part of the mortgagor to pay the revenue on the other lands in the patta the land mortgaged is sold and purchased by the mortgagee, the right of redemption is extinguished—*Minor Pachi v. Perumal Thevar*, 1955 Mad. W.N. 662; *Suraj Narayan Prasad v. Rameshwar Prasad*, 1956 P.L.J.R. 495. Where, in execution of a rent decree for arrears of rent for the period prior to the mortgage the property is sold, the right of redemption is extinguished even if the property is purchased at the rent-sale by the mortgagee—*Jay Prasad v. Mt. Jasoda*, A.I.R. 1958 Pat. 649. Where the mortgagee acquires a portion of the mortgaged property at a rent-sale he is not liable for the payment of any portion of the debt—*Ibid*.

Purchase by mortgagee of a portion of mortgaged property—Effect:— If several items of property are mortgaged and the mortgagee purchases one of the items, the question arises whether the mortgagee ought to give credit to the mortgagor for the value of the property purchased by him and proceed against the other items for the balance, or whether the mortgagee is entitled to proceed against the other items for the full amount of his mortgage-debt. The determination of this question depends on whether the mortgagee purchased only the equity of redemption or the entire interest of the mortgagor in that item of property. If the mortgagee purchased only the equity of redemption, he must allow proportionate reduction to the extent of the amount fairly chargeable upon the property purchased by him; and he cannot claim the entire debt from the other properties—*Bisheshur v. Ram Sarup*, 22 All. 284 (F.B.); *Pannambala v. Annamalai*, 43 Mad. 372 (379) (F.B.); *Bhora Thakur Das v. Collector*, 28 All. 593; *Nyaunglebin Co-operative Bank v. Maung Ba*, 6 Rang. 217, A.I.R. 1928 Rang. 266; *Somanatha v. Ananta*, A.I.R. 1932 Mad. 18, 135 I.C. 911; *Munga Lal v. Sagar Mal*, A.I.R. 1936 Pat. 629, 15 Pat. 481, 166 I.C. 29. (This is in consonance with the doctrine of contribution enunciated in sec. 82). Where two joint owners with right of survivorship mortgage their land in equal shares and one of them transfers his share to the mortgagee, the mortgage is split up with the result that the other joint owner can redeem only his share of the land—*Ramla Baldev v. Kiran Singh*, A.I.R. 1960 Punj. 420. But where the circumstances under which the purchase was made show that the purchase was made free from all encumbrances, the mortgagee can enforce his entire security against the remaining property, because the mortgagor impliedly agreed, by receiving the full value of the property, that no portion of the mortgage-debt would be extinguished by virtue of the purchase by the mortgagee—*Jasodha v. Kali Kumar*, 34 C.W.N. 673 (674, 675), A.I.R. 1930 Cal. 619; *Mir Eusuff v. Panchanan*, 15 C.W.N. 800 (804, 805), 11 C.L.J. 639, 6 I.C. 842; *Mahendra v. Harshamukhi*, 40 C.W.N. 108.

If the mortgagee purchases only the equity of redemption, the purchase has the effect of discharging the mortgage-debt to an extent proportionate to the extent of the property purchased, i.e., the purchase will discharge a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the entire property comprised in the mortgage (even though the

value of the property purchased be equal to the amount due on the mortgage—*Pannambala v. Annamalai*, 43 Mad. 372 (379, 380) (F.B.); *Shamshad Ali v. Mahammad Ali*, 21 O.C 172; *Bisheshar Dial v. Ram Sarup*, 22 All. 284 (F.B.); *Nyaunglebin Co-operative Bank v. Maung Ba*, 6 Rang. 417, A.I.R. 1928 Rang. 263. Compare *Lakshmi Das v. Jamnadas*, 22 Bom. 304 (313); *Sankaran Lekshmi v. Adima Kunju*, A.I.R. 1965 Ker. 132; *Venkappa v. Gangadhar*, A.I.R. 1959 Ker 112. In this respect there is no distinction in principle between a private sale and an execution sale, i.e., whether the mortgagee purchases a portion of the mortgaged property under a private contract or at Court-auction. The distinction is not so much between a private sale and an execution sale, as between a purchase of the equity of redemption and a purchase of the entire interest of the mortgagor in the property—*Mir Eusuff v. Panchanan*, supra; *Mutty Lal v. Nanda Lal*, 12 C.W.N. 745, 8 C.L.J. 92; *Munga Lal v. Sagar Mal*, supra. In spite of the integrity of the mortgage being broken by the mortgagee, one of several mortgagors or a purchaser of the equity of redemption is entitled to redeem the whole of the mortgaged property, subject to the equities which other persons may have and due provision being made for their rights—*Periakaruppa v. Satyanarayanamoorthi*, A.I.R. 1937 Mad. 136, 168 I.C. 899. When, however, the integrity of a mortgage is broken on account of purchase by the mortgagee of the equity of redemption in a portion of the mortgaged property, the right of redemption of each of the mortgagors is confined to his own interest therein—*Abdul Wahib v. Raghunandan*, A.I.R. 1945 All. 388, I.L.R. 1945 All. 637. See also *Purna v. Gobinda*, A.I.R. 1952 Pat. 101.

373. Extinguishment of right of redemption by decree of Court:— The mortgagor's right of redemption is extinguished by a final decree of the Court for foreclosure. So long as such a decree has not been passed, the right to redeem is not extinguished by reason of non-payment of the money within the time fixed by the preliminary decree for foreclosure. The Court can extend the time for payment. See O. 34, r. 2 in the Appendix. The mortgagor can redeem at any time until the final decree is made under O. 34, r. 3—*Parash Nath v. Ramjadu*, 16 Cal. 246; *Somesh v. Ram Krishna*, 27 Cal. 705. Where in the final decree passed under Or. 34, r. 3 (2), C.P.C. there is no order of the Court to the effect that the mortgagor's right of redemption is extinguished, the right of redemption is not lost—*Ram Rao v. Bhim Rao*, A.I.R. 1955 Hyd. 190. When after the passing of the preliminary decree and before a final decree under Order 34, rule 3 (2) C.P.C. a mortgagee is allowed to stay in possession of the mortgaged property, the equity of redemption will not be extinguished—*Ibid.* See also *Govinda v. Narain*, A.I.R. 1956 Hyd. 107. In a suit for sale a mortgagor has the right to redeem at any time before the actual sale, notwithstanding the fact that a final decree for sale has been passed—*Syed Shah v. Ismail*, 42 All. 517; *Sukhi v. Gulam*, 43 All. 469 (P.C.). See also *Bibijan v. Sochi Bewa*, 31 Cal. 863 (S.B.); *Mistri Lal v. Mittu Lal*, 28 All. 28; *Adipurana v. Gopalasami*, 31 Mad. 354. In *Krishnaji v. Mahadev*, 25 Bom. 104, the mortgagor was allowed to redeem the property even after its formal sale and before confirmation. This is now expressly provided in O. 34, r. 5 (1). See also *Raghunath v. Krishnadas*, A.I.R. 1937 Nag. 196, 171 I.C. 612. But after a final decree for sale has been passed,

the mortgagor cannot sue for partial or total redemption under sec. 60, his remedies being under Or. 34, r. 5 C.P.C.—*Karam Chand v. Telu Ram*, A.I.R. 1968 Punj. 473.

The word "decree" has been substituted for "order" in para 2 of this section, for the following reason:—"As the old practice of passing orders absolute in mortgagee-suits has been abolished by the enactment of O. 34, in the C. P. Code, 1908, we propose, in secs. 60, 67 and 67A of the Transfer of Property Act, to substitute the word 'decree' for the word 'order' wherever it occurs.—*Report of the Select Committee* (1929).

Where the purchaser of the equity of redemption at a Court-sale does not redeem the mortgage, his right of redemption as purchaser is extinguished by the sale of the mortgaged property in execution of the mortgage-decree, and his suit for redemption after the mortgage-sale is wholly untenable—*Baiju Lal v. Thakur Prasad*, 18 Pat. 155, 19 P.L.T. 781, A.I.R. 1939 Pat. 7 (12). If a property mortgaged by way of usufructuary mortgage is sold for arrears of land revenue and the auction purchaser sells the property to the mortgagee a suit for redemption is not maintainable unless the auction purchaser is the *benamdar* of the mortgagee—*Mohon Chandra Datta v. Dinai Keot*, A.I.R. 1963 Assam 176. But where a mortgagee in possession who is bound to pay rent under the terms of the mortgage commits default and purchases the mortgaged property at a sale in execution of a decree for arrears of rent by the landlord the right of redemption is not extinguished—*Mrutunjay Pani v. Narmada Bala Sasmal*, A.I.R. 1961 S.C. 1353.

The right of redemption is extinguished when the land is sold by order of the Government owing to non-payment of assessment under sec. 56, Bombay Land Revenue Code—*Abdul Rahaman v. Vinayak*, 29 Bom. L.R. 1056, A.I.R. 1927 Bom. 540. Where as a result of revenue sale of the rights of the mortgagee were transferred to the auction purchaser it was not allowed to be contended that while the mortgagee parted with his mortgage rights in respect of the whole of the mortgage-debt, yet he could retain any part of his rights in respect of some part of the mortgaged property, whether the mortgagee sells himself, or the rights are sold by the paramount authority, the position is the same—*Ghulam Sarwar v. Abdul Wahab*, A.I.R. 1949 P.C. 330, 54 C.W.N. 386. Where the mortgagee takes settlement from an auction-purchaser in a revenue sale, the mortgagor is not deprived of his right of redemption—*Ram Rup v. Jang Bahadur*, A.I.R. 1951 Pat. 566, 30 Pat. 391. But see *Abdul Ghafoor v. Mt. Paharia*, A.I.R. 1957 Pat. 136 which says that where a tenant mortgages his property with possession and the holding is brought to sale by the landlord in execution of the rent decree, but later the property comes into the hands of the original mortgagee the mortgagor has no right of redemption in the absence of fraud.

The order (decree) of Court does not mean an order passed without any trial or ordinary hearing of the parties. Such an order does not extinguish the right of redemption. Where a prior suit for redemption was compromised, and the Court passed the order: "Compromised: Dismissed with costs," held that this dismissal did not invoke that the right of redemption was extinguished, and did not bar a subsequent suit

for redemption—*Basangouda v. Rudrappa*, 28 Bom.L.R. 1507, A.I.R. 1927 Bom. 87 (90). So also, a previous dismissal of a suit for redemption for default of appearance does not extinguish the right of redemption, nor prevents the mortgagor from bringing a fresh suit for redemption—*Shridhar v. Ganu*, 52 Bom. 111, A.I.R. 1928 Bom. 67; *Kashiram v. Maheshwar*, 30 Bom.L.R. 1089, A.I.R. 1929 Bom. 116 (118). An abatement of a previous suit brought by the father does not bar a second suit for redemption brought by the son—*Ramchandra v. Shripatrao*, 40 Bom. 248, 33 I.C. 771. The provision in a decree in a redemption suit that in case of default by the plaintiff in payment his case will stand “dismissed” cannot be construed as meaning that the plaintiff was to be debarred of all right to redeem and that the decree was an order of a Court extinguishing the right to redeem within the meaning of the proviso to this section. A second suit for redemption will be maintainable in such cases—*Raghunath v. Mt. Hansraj*, A.I.R. 1934 P.C. 205 (207, 208), 56 All. 561, 61 I.A. 362, 39 C.W.N. 9, 151 I.C. 37. Unless it could be said that a decree involved a decision that the mortgagor’s right to redeem was extinguished, it cannot operate by way of *res judicata* so as to prevent the Court under sec. 11, C. P. C., from trying a second redemption suit—*Ibid.* at p. 207. Unless and until a final decree is passed in a redemption suit, the right of redemption is not extinguished and a second suit for redemption is not barred by *res judicata*—*Jote Lal v. Sheo Dhayan*, A.I.R. 1936 Pat. 420, 15 Pat. 607, 163 I.C. 908; *Ambalal Jasraj v. Ambalal Bodarmal*, A.I.R. 1957 Raj 321; *S. Krishnan Nambodiri v. Karunakaran*, 1957 Ker. L.T. 1237.

374. Para 4—Notice before redemption :—The fourth para is merely an enabling clause, and does not make it compulsory on the part of the mortgagor to give notice, but merely validates it, if provided for in the deed. The object of notice is to give the mortgagee a reasonable time to enable him to find another borrower.

Where a mortgage contains a provision that the mortgagee, if he wanted payment of the mortgage-money, must give notice before the beginning of the cultivating season in any year, *held* that the provision did not affect the mortgagor who could bring a suit for redemption at any time—*Rarichan v. Manakkal Raman*, 44 M.L.J. 515, A.I.R. 1923 Mad. 553 (556).

375. Para 5—Redemption of portion of mortgaged property :—The principle of the last para of sec. 60 is that in a mortgage-transaction the creditor values his security as one and indivisible, and if the mortgagor is allowed to redeem the property piecemeal, the mortgagee would suffer in the depreciation which may be caused to it in consequence.—*Nilakanth v. Suresh Chandra*, 12 Cal. 414 (423) (P.C.). But where the mortgagee acquires a part of the mortgaged property and thus a fusion takes place of the rights of the mortgagee and the mortgagor in the same person, the indivisible character of the mortgage is broken up, and one of several mortgagors may in such a case redeem his own share only on payment of a proportionate part of the mortgage-money—*Kallan Khan v. Mardan Khan*, 28 All. 155; *Pawan Kumar v. Dulari Kocr*, 5 P.L.R. 544.

Under this section, even before its amendment in 1929, the integrity of a mortgage is not broken except in the only case of acquiring by pur-

chase or otherwise as proprietor a portion of the mortgaged property. Where the mortgagee has allowed a co-sharer of the mortgagor to redeem his part of the mortgaged property, any other co-sharer cannot redeem his part on payment of its proportion of the debt except where there is a contract to that effect—*Shah Ram Chand v. Parbhu Dayal*, A.I.R. 1942 P.C. 50 (54), 47 C.W.N. 1; *Chiva Harakh v. Akbar Ali*, A.I.R. 1948 All. 55, 1947 A.L.J. 224. Such is also the case where the property mortgaged belongs to, or after the mortgage becomes the property of, several persons as owners of different portions, and the mortgagee releases a part of the mortgaged property—*Shah Ram Chand v. Parbhu Dayal*, supra. But where there is no release of a portion of the mortgage-debt, the owner of a portion of the mortgaged property is not entitled to claim rateable abatement—*Moideen v. Subromonia*, A.I.R. 1953 Tr.-Coch. 283. See also *Bagga Singh v. Lal Chand*, A.I.R. 1952 Pepsu 6. Where the integrity of the mortgage is not broken it cannot be redeemed in parts, unless the mortgagee agrees—*Dadoo v. Venkatras*, A.I.R. 1954 Nag. 84.

The words "remaining due" in this para are, to some extent, misleading and must not be taken too literally. The right of a mortgagee of several properties to recover his money under the mortgage is, on his purchasing the equity of redemption in one of the properties mortgaged with him, extinguished *pro rata*, i.e., he can recover only a proportionate part of the amount due on the mortgage, that is to say, the portion of the debt which bears the same relation to the whole amount of the debt as the value of the property not purchased bears to the value of the whole properties comprised in the mortgage, unless it is found that it was to the benefit of the mortgagee to keep his mortgagee rights alive or that he declared his intention either expressly or by necessary implication, that he would keep his subsequently acquired rights distinct from his prior mortgagee-rights—*Arunagiri v. Radhakrishna*, (1941) 2 M.L.J. 520, A.I.R. 1942 Mad. 44.

The general rule under this clause is that a mortgage in indivisible, and a suit by a co-mortgagor to redeem only his portion of the properties mortgaged is not maintainable—*Naga Rao v. Naga*, 10 N.L.R. 72; *Aughore Kumar v. Mahomed Mussa*, 2 I.C. 662; *Jagabandhu v. Haladhar*, 27 C.L.J. 110; *Lala Ram Narain v. Lala Murlidhar*, 5 P.L.J. 644, 1 P.L.T. 616, 58 I.C. 129; *Mian Mohammad v. Abdul Karim*, A.I.R. 1947 Pesh. 45. The Court has no power to compel the mortgagee to submit to a piecemeal redemption—*Mirza Qaiser Beg v. Shero Shankar*, A.I.R. 1932 All. 85 (90), 53 All. 391, 129 I.C. 708. A mortgage for an entire sum is from its very purpose indivisible; a division of such a mortgage is conceivable in theory, and may be carried out in practice. But in order that a mortgage may fully attain its end of securing satisfaction of the entire obligation in the rank and with the efficiency which the law or the will of the parties determined, it is essential that it should not suffer any dis-integration—*Keelleber on Mortgage in Civil Law*, pp. 11, 12; *Huthasanam v. Parameswaran*, 22 Mad. 209 (211, 212).

This section does not preclude the mortgagee himself from splitting up the mortgage and pray for a decree for sale of a portion only of the mortgaged property. In that case the lessees are entitled to redeem on payment of the proportionate part of the mortgage dues and are not bound

to redeem the entire mortgage—*Kamakshya v. Ramzan*, A.I.R. 1945 Pat. 106, 23 Pat. 648. See in this connection *Bapurao v. Bulakidas*; A.I.R. 1944 Nag. 225, I.L.R. 1945 Nag. 194.

The last para of this section does not apply to a decree which is not for a lump sum, as in the case of maintenance charge. Thus, by purchasing a portion of the property charged, the decree-holder does not split up the claim which had not accrued on the date of the purchase—*Debendra v. Trinayani*, A.I.R. 1945 Pat. 278, 24 Pat. 245. But where a mortgagee has obtained a foreclosure decree against the proprietary interest of the mortgagor only, the provision of the last para of this section is attracted and the occupancy tenant of the mortgagor, if he has a right to redeem, can redeem his interest on paying a proportionate part of the mortgage dues—*Pawankumar v. Jakdeo*, A.I.R. 1947 Nag. 210, I.L.R. 1947 Nag. 740.

Piecemeal redemption must be allowed if once the integrity of the mortgage has been split up owing to redemption by one of several co-mortgagors—*Phula Singh v. Harnaman*, A.I.R. 1941 Lah. 421. Where there has been a severance of the security and the integrity of the mortgage has been broken, it is the right of the mortgagee as well as of the mortgagor or the person having the equity of redemption to insist on the apportionment of the mortgage-debt upon the several mortgaged properties and on partial redemption—*Mt. Azizunnissa v. Komal Singh*, A.I.R. 1930 Pat. 579 (581), 9 Pat. 930; and when there are several owners of the equity of redemption the rights of all should be safeguarded and partial redemption of each one's share should be allowed—*Ibid*, at p. 582.

There must however be an acquisition of the equity of redemption in the mortgaged property or part thereof by a mortgagee *qua* mortgagee. The principle of this clause applies in whatever manner the equity of redemption is acquired by the mortgagee, whether by purchase in execution of a decree, by private treaty, inheritance or devise—*Krishna Iyer v. Susai Reddiar*, A.I.R. 1940 Mad. 498, (1940) 2 M.L.J. 1003, 1940 M.W.N. 200. If before or at the time of acquisition the mortgagee renounces his character of mortgagee and purchases the property, this clause would have no operation. It is open to the mortgagor to agree that the amount paid for the purchase might go in reduction of any debt due to the mortgagee unconnected with the mortgage—*Ibid*; see also *Perumal v. Raman*, 40 Mad. 968 (F.B.). Therefore where A and B, distinct owners of properties X and Y, mortgage the same to C, who subsequently purchases the property Y free from mortgage in consideration of some other liability of B to C, this clause of sec. 60 has no application and C is entitled to recover the entirety of the debt from the rest of the mortgaged property. But that does not affect A's right of contribution against the person in possession of Y—*Krishna Iyer v. Susai Reddiar*, *supra*.

Where the consideration of a mortgage proceeds from different sources, but one lump-sum is saddled on an entire estate, the mortgage is a joint and indivisible one in which the mortgagees hold as tenants-in-common. Where one of the three mortgagees acquires in part a share in the property mortgaged without the consent of the other mortgagees, the mortgage is not split up so far as other mortgagees are concerned

and they are entitled to proceed against the entire property—*Sadasheo v. Rupchand*, A.I.R. 1939 Nag. 136, 1939 N.L.J. 142, 184 I.C. 719. In order that the integrity of the mortgage may be broken, it is necessary that all the mortgagees should have purchased a share in the mortgaged property. Where the mortgagor brings a suit for redemption against all the mortgagees, but the suit is not maintainable against one of the mortgagees (in this case the Court of Wards and no notice having been served on the Collector who was impleaded after the period of limitation), then it is not open to the mortgagor to claim a decree for redemption of the remaining property by payment of whole of the mortgage-money to the remaining mortgagees—*Md. Bashir Uddin v. Waheed Uddin*, A.I.R. 1939 All. 600, 1939 A.L.J. 590, 184 I.C. 862.

The integrity of a mortgage is necessary for the benefit of the mortgagee alone. Where the integrity has been broken by purchase of the shares of some of the mortgagors by the mortgagee, the only right which each mortgagor has, is to redeem his own share. There is no equity in favour of one of the mortgagors to redeem the remaining property—*Durga v. Chuni*, A.I.R. 1940 All 528, 1940 A.L.J. 793.

A mortgagor of an undivided share may redeem the entirety, at any rate if the mortgagee does not object, and will be compelled to do so, if required by the mortgagee—*Chaudhuri Ahmed Baksh v. Seth Raghubar Dayal*, 28 All. 1 (17) (P.C.). This section does not debar the owner of a part of the equity of redemption from offering to redeem the whole mortgage. Indeed, he is bound to offer to redeem the whole—*Srikanta v. Jak Sah*, 3 Pat. 818 (823), A.I.R. 1925 Pat. 57, 84 I.C. 293; *Subbiah v. Ram Sabad*, A.I.R. 1936 Rang. 266, 14 Rang. 198, 163 I.C. 444. It is the law in India, as in England, that one of the several mortgagors can redeem the entire mortgage, without the consent of the owners of the other shares, subject to the safeguarding of the rights which those owners may possess—*Yadalli Beg v. Tukaram*, 48 Cal. 22 (29) (P.C.); *H. V. Low & Co. v. Pulin*, A.I.R. 1933 Cal. 154, 59 Cal. 1372; but see *Bai Keval v. Modhu Kala*, A.I.R. 1922 Bom. 319, 46 Bom. 535, 64 I.C. 972. As the owner of the equity of redemption of one of two estates comprised in the same mortgage cannot insist on redeeming that estate separately, so he cannot be compelled to redeem it separately, his right being to redeem the whole, subject to the equities of the other persons interested—*Hall v. Heward*, L.R. 32 Ch. D. 430; *Pearce v. Morris*, L.R. 5 Ch. 227.

So also, a purchaser of a portion of the mortgaged property is not at liberty to redeem that portion only without redeeming the rest—*Kuppusami v. Papathi*, 21 Mad. 369 (371); *Yadalli Beg v. Tukaram*, 48 Cal. 22 (28) (P.C.), 57 I.C. 585; *Nainappa v. Chidambaram*, 21 Mad. 18 (26); *Huthasanam v. Parameshwaram*, 22 Mad. 209 (212). The purchaser of a portion of the equity of redemption is entitled to maintain a suit for redemption of the entire mortgage—*Huthasanam v. Parameshwaram*, 22 Mad. 209 (211); *Baikuntha v. Mahesh*, 22 C.W.N. 128 (129); *Pratap Chandra v. Peary Mohan*, 22 C.W.N. 800 (802); *Rugad Singh v. Sat Narain*, 27 All. 178 (179, 182); *Chandu Agasta v. Chandrabali Kalar*, A.I.R. 1965 Orissa 63.

A partial owner of the equity of redemption is entitled to redeem the

whole mortgage—*Fakir Chand v. Babu Lal*, 39 All. 719 (721); *Sankar v. Bhikaji*, 53 Bom. 353; *Baikuntha v. Mahesh*, 22 C.W.N. 128 (129) (dissenting from *Girish v. Juramani*, 5 C.W.N. 83); *Pratap Chandra v. Peary Mohan*, 22 C.W.N. 800 (802); *Rugad Singh v. Sat Narain*, 27 All. 178 (182); and this he can do even against the will of the mortgagee—*Fakir Chand v. Babu Lal*, supra; *Huthasanam v. Parameshwaram*, 22 Mad. 209 (211); *Velayudam v. Alangaran*, 15 I.C. 605, 23 M.L.J. 475; *Mustafa v. Shadi Lal*, 10 O.C. 81 (84). As observed by the Privy Council, each and every one of the mortgagors who owns separate shares in certain mortgaged property is not merely interested in the payment of the mortgage-money and the redemption of the estate, but *has a right* by payment of the money to redeem the estate, seeking contribution from the others—*Norendra v. Dwarka*, 3 Cal. 397 (P.C.), 5 I.A. 18 (27).

"The character of indivisibility exists not only with reference to the mortgagee, who may generally be more benefited thereby, but also with reference to the mortgagor. And save as a matter of special arrangement and bargain entered into between all the persons interested, neither the mortgagor nor the mortgagee, nor persons acquiring through either, a partial interest in the subject, can under the mortgage get relief, except in consonance with the principle of indivisibility"—*per* Subramania Ayyar, J. in *Huthasanam v. Parmeshwaram*, 22 Mad. 209 (212); *Lachhmi Narain v. Babu Ram*, A.I.R. 1935 All. 391, 154 I.C. 437.

Where four mortgages were consolidated, the consolidation gave rise to an anomalous mortgage; so the mortgagee was entitled to decline to be redeemed unless he was redeemed as to all—*Chacko v. Subramania*, A.I.R. 1952 Tr.-Coch. 552.

The mortgagor who redeems the whole property is entitled to a rateable contribution from the other mortgagors, and he is entitled to hold the entire property in charge until he is in turn redeemed by his co-sharers on payment of their quota of the debt, with all incidental expenses—*Jagat Narain v. Qutab Hussain*, 2 All. 807; *Changa Das v. Gansing*, 20 Bom. 615. Until then he is, to all intents and purposes, in the position of the mortgagee redeemed—*Asansah v. Vamana*, 2 Mad. 223. See secs. 92 and 95.

The rule as to indivisibility of a mortgage applies not only where there are several mortgagors but also where there are several mortgagees. And no redemption can be effected of a portion of the mortgaged property by paying to one of the mortgagees his separate debt—*Sunitibala v. Dhara Sundari*, 47 Cal. 175 (179) (P.C.). Their Lordships observed in this case: "It would of course be possible—though inconvenient—to execute in one document a mortgage of one-half of an entire property in favour of each of two mortgagees. By this means two independent mortgages would be combined in one deed, and in such a case independent relief might be granted to each mortgagee—*Ibid*, at p. 179; *Lachhmi Narain v. Babu Ram*, A.I.R. 1935 All. 391, 154 I.C. 437. A mortgage debt created by four mortgagees was settled by an award under the Bengal Agricultural Debtors Act at Rs. 3000. Thereafter a suit for mortgage was instituted by them claiming Rs. 11508 on the allegation that the award was a nullity. The award was held to be valid as against plaintiffs 1 and 2 and invalid

as against plaintiffs 3 and 4 who were minors when the award was made. Consequently the mortgage debt had to be apportioned between the plaintiffs. Plaintiffs 1 and 2 got a decree in their half share on the footing that the amount of the mortgage debt was Rs. 3000, whereas plaintiffs 3 and 4 obtained decree in their half share on the basis of Rs. 11508. It was however held that the security could not be split up and that the plaintiffs would be entitled to proceed against the entire mortgaged property for the realisation of the total decretal amount—*Hrishikesh v. Sushi Chandra*, A.I.R. 1957, Cal. 211.

But the rule in this para should be applied subject to a contract to the contrary. Therefore, where one of the terms of a mortgage was that the mortgagor might redeem any portion of the mortgaged property upon payment of a proportionate part of the debt, one of the heirs of the mortgagor was allowed to redeem his own share of the property—*Shafaat-ullah v. Izzatullah*, 13 A.L.J. 372, 28 I.C. (678). As an instance of such a contract see *Nathu Mal v. Raman Mal*, A.I.R. 1937 P.C. 124, 67 I.A. 126, 41 C.W.N. 901, 167 I.C. 786, I.L.R. (1937) Lah. 245, where upon construction of the mortgage-deed their Lordships held that the mortgagor had power to redeem part without redeeming the whole of the mortgaged property—a power consistent with the preservation of the security—at p. 126. Where the mortgage is invalid for absence of a registered deed, the rules relating to partial redemption of a mortgage are not applicable, and a purchaser of a portion of the mortgaged property can obtain the area bought by him on re-payment of a proportionate amount of the debt. He will not be required to redeem the whole mortgage—*Maung Tun v. Maung Aung Dun*, 2 Rang. 313 (319).

The legal effect of the proviso to sec. 60 after the amendment of 1929 was considered by Kapur J. in *Narain Singh v. Teza Singh*, A.I.R. 1955 Punjab 96. There in 1945 one Ujagar Singh, mortgaged to Lehna Singh 86 kanals 12 marlas of land plus some other land for Rs. 2000. In 1949 the heirs of Lehna Singh transferred to Narain Singh for Rs. 1000 the mortgagee rights in 86 kanals 12 marlas, because the other land was allowed to be redeemed by Ujagar before that date for Rs. 1000. In 1950 Ujagar mortgaged 39 kanals 12 marlas out of 86 kanals 12 marlas to the plaintiff on receiving Rs. 2000. The plaintiff instituted a suit for declaration that they were entitled to redeem the whole of 86 kanals and 12 marlas of land. It was contended by the contesting defendants that the heirs of Lehna Singh having allowed a portion of the mortgaged property to be redeemed by the mortgagor there was a splitting up of the mortgage and that the plaintiffs were entitled to redeem only 39 kanals 12 marlas of land. This contention was rejected and the suit was decreed. His Lordships has held that there is no splitting up of the mortgage in the following cases: (1) Where the mortgagee allows redemption of a part of the mortgaged property and (2) where there is a release of a part or a share by the mortgagee; and that only when the mortgagee acquires a share or part of the property mortgaged there will be a splitting up of the mortgage.

376. Acquisition by mortgagee of the share of a mortgagor:—If the indivisibility of the mortgage is broken by the mortgagee purchasing, inheriting or otherwise, the mortgagor, his successor or any other person

entitled to redeem will be entitled to redeem his share only of the mortgaged property—*Maulabux v. Sardarmal*, A.I.R. 1952 Nag. 341 (F.B.). The fact that the mortgagee releases a part of the mortgaged property does not however give rise to the right of partial redemption—*Delansingh v. Darbarilal*, A.I.R. 1949 Nag. 346, I.L.R. 1949 Nag. 376. Where the mortgagee acquires a share of the mortgaged property, one of the co-mortgagors can redeem the entire residue left in spite of the mortgagee's opposition—*Pala Singh v. Attar Singh*, A.I.R. 1954 Punj. 81. The inference as to release is appropriate where the purchase is made for an independent consideration. But when the substance of the transaction is the purchase of the equity of redemption there will be a splitting up of the mortgage—*Ananthayya v. Hengsu*, A.I.R. 1956 Mad. 293. The mortgage security is split up only where there is a person interested in a share only of the mortgaged property and seeking to redeem his own share only paying a proportionate part of the amount due, and a mortgagor whose share the mortgagee had acquired—*Ibid*; *Patel Kempegowda v. Channaveeriah*, A.I.R. 1958 Mys. 43. The mortgage-debt may be apportioned where circumstances have happened, the effect of which, in fact or in law, is to create a severance of the security; e.g., where the mortgagee himself has become the owner of a part of the equity of redemption or where by his own conduct there has been a break up of the entire security—*Rajat Kamini v. Satya Niranjana*, 23 C.W.N. 824. The test is, whether there has been a severance of the security at the instance or with the consent of the mortgagee, and an apportionment will not be imposed upon the mortgagee unless equitable considerations are established—*Debendra Nath v. Mirza Abdul*, 10 C.L.J. 150, 1 I.C. 264 (277). If a part of the mortgaged property be acquired by a sole mortgagee (or by all the mortgagees where there are more mortgagees than one), the integrity of the mortgage is thereby broken up, and each of the owners of the remainder of the property becomes entitled to redeem his own share upon payment of a proportionate part of the amount due on the mortgage—*Kudhai v. Sheo Dayal*, 10 All. 570; *Shiam Saran v. Banarsi*, 20 A.L.J. 258, A.I.R. 1922 All. 192; 66 I.C. 866; *Nilakant v. Suresh*, 12 Cal. 414 (P.C.); *Debendra v. Mirza Abdul*, 10 C.L.J. 150, 1 I.C. 264; *Ranghunath v. Sadhu Saran*, 5 P.L.T. 312, A.I.R. 1925 Pat. 31, 75 I.C. 821; *Nand Kishore v. Raja Hariraj*, 20 All. 23; *Moro v. Balaji*, 13 Bom. 45. Thus, when a mortgage is split up by the mortgagee buying up the equity of redemption from some of the heirs of the original mortgagor, any one of the remaining heirs is entitled to redeem his share of the mortgaged property on payment of a proportionate sum due on his share—*Mewa Ram v. Ganga Ram*, 17 A.L.J. 910, 52 I.C. 229. This rule equally applies whether the mortgagee-decreeholder acquires a part of the mortgaged property before a decree for sale or after it—*Sarju Kumar v. Thakur Prosad*, 18 A.L.J. 690, 58 I.C. 743. This rule also enures to the benefit of the purchaser of a portion of the equity of redemption; so that, when the mortgagee has destroyed the indivisibility of the original contract, the purchaser of the equity of redemption of a portion of the mortgaged property is entitled to redeem that portion on payment of a proportionate amount of the mortgage-money—*Marana v. Pendyala*, 3 Mad. 230; *Makabir v. Moham-mad*, 38 All. 103; *Subramanyan v. Mandyan*, 9 Mad. 453; *Jagannath v. Jaipal*, A.I.R. 1933 All. 257 (F.B.), 142 I.C. 410. Conversely, where one

of two mortgagors purchases the entire mortgagee-rights, the integrity of the mortgage is broken up, and the other mortgagor is entitled to a decree for redemption in respect of his share in the mortgaged property—*Sarfaraz v. Md. Salim*, A.I.R. 1934 Oudh 348, 150 I.C. 140.

But in such cases, (*i.e.*, where the mortgagee acquires a portion of the mortgaged property, and a fusion takes place of the rights of the mortgagee and the mortgagor in the same person, and the indivisible character of the mortgage is broken up) neither a co-mortgagor nor the purchaser of a portion of the equity of redemption is entitled to redeem *more than his own share* in the property. Each co-mortgagor or purchaser may redeem *his own share only*, on payment of a proportionate part of the mortgage-money; but he cannot claim to redeem the shares of other persons in which he is not interested, against the wishes of the mortgagee—*Kullan Khan v. Mardan Khan*, 28 All.155 (157); *Munshi v. Daulat*, 29 All. 262 (263); *Dina Nath v. Luchmi Narain*, 25 All. 446; *Jagannath v. Jaipal*, 55 All. 359 (F.B.), A.I.R. 1933 257 (259); *Rathna Mudali v. Perumal* 38 Mad. 310; *Ahamad Husain v. Md. Qasim* 48 All. 171, 24 A.L.J. 88, A.I.R. 1926 All. 46; *Zaibunissa v. Parbhu Narain*, 39 All. 618; *Girish Chander v. Juramani*, 5 C.W.N. '83; *Mustafa v. Shadi Lal*, 10 O.C. 81 (84); *Jai Govind v. Abhai Raj*, 26 O.C. 308, A.I.R. 1924 Oudh 40; *Mahomed Zaki Ali v. Ahmad Shah*, 7 O.L.J. 585, 58 I.C. 983; *Ramadhin v. Jokhan*, 5 O.L.J. 248, 47 I.C. 115; and the mortgagee can claim from the co-mortgagor or his assignees only so much of the mortgage-debt as is proportionate to the portion of the mortgaged property owned by them—*Ko Thina v. Ismail Cassim*, 1 Bur. L.J. 117, 68 I.C. 887. If a mortgagee omits to implead persons interested in a portion of the mortgaged property and then brings about the property to sale and purchases it himself, he is bound to allow redemption of the portion on payment of the proportionate amount—*Bhekdhari v. Radhika*, A.I.R. 1934 Pat. 648, 13 Pat. 364; *Madhuram v. Bhotong*, A.I.R. 1935 Cal. 59, 86 I.C. 193. Where the integrity of the first mortgage was broken, the first mortgagee becoming also the purchaser of the property, the second (usufructuary) mortgagee could redeem only the portion mortgaged to him and had no right to redeem all the properties purchased by the first mortgagee—*Amir Chand v. Moti*, A.I.R. 1931 Pat. 434, 134 I.C. 959. See also *Ahmad v. Md. Qasim*, A.I.R. 1926 All. 46, 90 I.C. 80. Although the suit be one for possession, the Court can grant redemption to prevent further litigation—*Amir Chand v. Moti*, *supra*, at pp. 435, 436. Where the rights of the mortgagors have vested partly in a prior mortgagee and partly in a subsequent mortgagee after a suit had been brought by each of them to enforce his own mortgage without impleading the other, neither the former can be compelled to redeem the whole nor can he compel the latter to give up his interest in the share which he has acquired. Each can redeem to the extent of the shares of his mortgagors acquired by him—*Amba Prosad v. Wahidullah*, 44 All. 708 (710, 711), A.I.R. 1922 All. 405, 68 I.C. 260.

But this rule does not apply where the mortgage is split up not by the mortgagee, but by the act of one of the *mortgagors*. Thus where by the terms of a mortgage-deed, one of the four mortgagors was allowed to redeem separately his one-fourth share by paying one-fourth of

the mortgage-debt, the integrity of the mortgage was not broken up by any act of the mortgagee, and another mortgagor (who was entitled to $\frac{1}{2}$ share) could redeem the whole of the remaining $\frac{1}{2}$ share and to obtain possession of the same—*Shafaatullah v. Izzatullah*, 13 A.L.J. 372, 28 I.C. 677 (678).

A distinction has been drawn by the Bombay High Court between cases in which the mortgagors are the owners of distinct parcels of land, and cases in which the mortgagors are joint tenants or tenants-in-common in the mortgaged property; and the High Court lays down that in the event of the mortgagee becoming the owner of a portion of the equity of redemption, if the mortgagors are owners of *distinct* parcels of land, each of them can redeem only to the *extent of his share*, but if they are joint tenants or tenants-in-common in the mortgaged property, they must redeem the whole—*Bhikaji v. Lakshman*, 15 Bom. 27 Note; *Narayan v. Ganpat*, 21 Bom. 619. But the Allahabad High Court does not recognize such distinction and lays down that each of the mortgagors (whether they are owners of distinct parcels or are joint tenants or tenants-in-common) is entitled to redeem his own share only, on payment of a proportionate part of the mortgage-debt. See *Kullan v. Mardan*, 28 All. 155; *Dina Nath v. Luchmi* 25 All. 446; *Munshi v. Daulat*, 29 All. 262; *Zaibunnessa v. Parbhu*, 39 All. 618 (621); *Ghose's Law of Mortgage*, 5th Edn., pp: 266-267, where this subject has been fully discussed. See also *Md. Ismail v. Sharfutullah*, 57 Cal. 872, 129 I.C. 310, A.I.R. 1930 Cal. 810 (814).

Where the mortgagee has purchased the equity of redemption in one portion of the mortgaged property, but there has been no severance of the equity of redemption according to the shares of the mortgagors, one mortgagor can redeem the whole of the remaining portions of the mortgaged property—*Sidheswar v. Ganpatrao*, 50 Bom. 331, 28 Bom. L.R. 588, 96 I.C. 361, A.I.R. 1926 Bom. 303

The rule in this section applies when the mortgagee acquires the 'share of a mortgagor' i.e., a portion of the mortgaged property. But where the mortgagee purchases that *whole* of the mortgaged property in execution of a decree in a suit on his mortgage, without impleading a purchaser of the equity of redemption in a portion of the property, there is no splitting up of the mortgage, and the purchaser of the equity of redemption is liable to redeem his portion of the mortgaged lands only on payment of the entire decree-amount—*Venkat Reddy v. Kunjappa*, 47 Mad. 551 (566). But see *R. C. Sardar v. Tarubala*, 69 C.W.N. 688, where it has been held that if a mortgagee obtains a decree for foreclosure without impleading one of the co-mortgagors having $\frac{1}{6}$ share, the latter can by a subsequent suit redeem his $\frac{1}{6}$ share by making a deposit of the proportionate amount.

The rule in this section does not apply where a mortgagor makes a deposit in Court of the whole mortgage-money under section 83. The owner of a share only of the mortgaged properties is entitled to deposit in Court the whole of the mortgage-debt and redeem the whole mortgage, in spite of the fact that the mortgagee has purchased the equity of redemption in some of the mortgaged properties. In such case, the part owner

of the mortgaged properties becomes entitled upon such deposit, to all the mortgagee's rights including the right to possession (if the mortgagee was a mortgagee in possession) of the whole of the mortgaged properties, including those purchased by the mortgagee—*Subba Rao v. Sarvarayudu*, 47 Mad. 7 (11, 20).

This clause applies when *all the* mortgagees (when there are more than one) have acquired the share of a mortgagor. If, however, *some* only of the mortgagees have purchased a share of a mortgagor, there is no merger of interest, for the purchaser is not the sole mortgagee. In such a case, a co-mortgagor has no right to redeem his share of the mortgaged property by payment of a proportionate part of the mortgage-debt but is bound to pay the entire mortgage-debt—*Mahtab Rai v. Sant Lal*, 5 All. 276; *Mohan Lal v. Parshadi Lal*, 45 All. 46 (48), 74 I.C. 999, A.I.R. 1924 All. 11; *Subba Rao v. Sarvarayudu*, 47 Mad. 7 (19); *Jagmohan v. Harbans*, 1 O.W.N. 637, A.I.R. 1925 Oudh 609. The purchaser-mortgagee is in no different position from an outsider so far as his rights conferred by his purchase are concerned. The mortgage remains one and undivided, and if redeemed at all, can only be redeemed in its entirety—*Jagmohan v. Harbans*, (supra). If a mortgagee releases a portion of the mortgaged property by receiving the amount of money alleged to be due from such property, he does not thereby break the integrity of the mortgage, nor does it entitle the mortgagor to redemption of a portion only of the mortgaged property. The integrity of the mortgage can only be broken up in case the mortgagee or mortgagees purchase a part of the mortgaged property—*Haji Ali Jan v. Majiduddin*, A.I.R. 1923 All. 499, 45 All. 524.

“Acquired”:—The word ‘acquired’ in this section is not restricted to acquisition by *purchase*, but it also applies to acquisition by any other mode of transfer recognised by law. Thus, where the mortgagee has acquired a share of the mortgaged property by *foreclosure*, an owner of another portion of the equity of redemption is entitled to redeem his portion without redeeming the whole mortgage—*Brij Kishore v. Madho Sing*, 28 All. 279 (280). So also, where the mortgagee acquires a portion of the mortgaged property by *inheritance*, there is a merger of rights, and the integrity of the mortgage is broken up. In such a case, a co-mortgagor will be allowed to redeem his own share only—*Hamida Bibi v. Ahmed Husain*, 31 All. 335; *Zafar v. Zubaida*, 27 A.L.J. 1114, A.I.R. 1929 All. 604 (606), 121 I.C. 398. Similar results follow where the mortgagee purchases a portion of the mortgaged property at a sale in execution of a money-decree—*Ariyaputri v. Alamelu*, 11 Mad. 304. Where the mortgagee who is entitled to possession of the mortgaged properties gets possession of only half of the properties by consent of the mortgagors, and the possession of the other half is withheld, it cannot be said that the mortgagee by accepting possession of half the property only had acquiesced in the integrity of the mortgage being broken up; and the mortgagors cannot claim to redeem the property piecemeal. The integrity of a mortgage can be broken up only in the case of a mortgagee acquiring a portion of the mortgaged property—*Thakur Prosad v. Chandrika*, 11 O.L.J. 436, A.I.R. 1925 Oudh 150 (152), 81 I.C. 742.

Where the mortgagee allows the mortgagor to pay off a portion of

the mortgage-debt and so releases a proportionate part of the mortgaged property, he does not thereby break up the mortgage so as to entitle the mortgagor to redeem the remainder of the property piecemeal—*Ali Jan v. Majiduddin*, 45 All. 524 (525), A.I.R. 1923 All. 449; *Lachmi Narain v. Muhammad Yusuf*, 17 All. 63 (66); *Baldeo v. Jawahir*, 2 O.C. 344 (348); *Mt. Beti v. Tantiye*, A.I.R. 1926 All. 136, 89 I.C. 574. Where a mortgagee voluntarily releases a portion of the property the debt is not reduced proportionately; hence he is entitled to recover the whole of the mortgage amount from any portion of the mortgaged property—*Ananthayya Holla v. Thimaju Hengsu*, A.I.R. 1956 Mad. 293; *M. Ramanna v. C. Butchamma*, A.I.R. 1958 Andh. Pra. 598.

But this rule was not followed in some cases. Thus, in a Madras case, where the mortgagee allowed the mortgagor to redeem a portion of the mortgaged property, it was held that the mortgagee destroyed the indivisibility of the mortgage—*Subramanyan v. Mandayan*, 9 Mad. 453 (454). The Bombay High Court held that an owner of a part of the equity of redemption of mortgaged properties was entitled to redeem that portion when the mortgagee had acted in such a way as to release a portion of the properties from the mortgage-debt—*Mayashankar v. Burjorji*, 27 Bom. L.R. 1149, A.I.R. 1926 Bom. 31 (32). So also, where the three mortgagors made a partition of the property, by which each of them became entitled to a 1/3 undivided share, and two of the mortgagors redeemed their two shares by paying 2/3 of the mortgage-money, held that the other mortgagor must also be allowed to redeem his 1/3 share—*Lakshuman v. Madhav*, 15 Bom. 186. See also *Mahadaji v. Ganpatshet*, 15 Bom. 257. A Calcutta case expressed the view that if a portion of the property was released by the mortgagee, the mortgage should be treated as having been split up—*Hari Kissen v. Veliat*, 30 Cal. 755 (757). A mortgagee can not release a part of the mortgaged land and then seek to enforce his entire claim upon another in which third parties have become to his knowledge interested as assignees of the equity of redemption—*Pranballav v. Bhagaban*, A.I.R. 1934 Cal. 775, following *Surjeram v. Bahramdeo*, 1 C.L.J. 337. The mortgage-debt could be always split up by consent, and on such splitting up, a mortgagee could sue one of the mortgagors for a proportionate part of the mortgage-debt, provided the burden of the mortgagor did not increase—*H. V. Lowe & Co. v. Pulin Bihari*, 59 Cal. 1372, A.I.R. 1933 Cal. 154 (162); *Waleyatunnissa v. Chalakhi*, 10 Pat. 341, 132 I.C. 100, A.I.R. 1931 Pat. 164 (168). But this view has been disapproved of by the Legislature, and the object of inserting the word "only" in this para has been thus stated by the *Special Committee*:—

"The last paragraph of the section relates to what is known as the principle of the indivisibility or integrity of a mortgage. 'Such integrity or indivisibility exists not only with reference to the mortgagee, who may be generally benefited thereby, but also with reference to the mortgagor. Save as a matter of special arrangement, neither the mortgagor, nor the mortgagee nor any person claiming through either of them should get relief except in consonance with the principle of indivisibility' [22 Mad. 209, (212).] We do not think it necessary to alter the last paragraph of the section except that the word 'only' should be inserted between the

words 'except' and 'where' with a view to get rid of the effect of the decision in 27 Bom. L.R. 1449. The *only* case, therefore, when the integrity of a mortgage may be allowed to be broken, apart from special arrangement, is when a mortgagee acquires a share in the mortgaged property."

So under this section the integrity of a mortgage is not broken except where the mortgagee has purchased or otherwise acquired as proprietor a certain portion of the mortgaged property. So long as the integrity of the mortgage remains intact, each item of the property mortgaged is liable for the whole amount due under the mortgage—*Ram Chand v. Parbhu Dayal*, A.I.R. 1936 All. 595, (1936) A.L.J. 1116, 164 I.C. 613. But where a mortgagee-decreeholder purchases at the auction sale one of the mortgaged properties, such purchase has the effect of discharging and extinguishing a portion of the mortgage-debt which is chargeable on the property purchased by him. The decree-holder can in such a case proceed against the other property but only to that extent of the decretal dues which bears the same proportion to the total decretal dues as the absolute value of that property bears to the absolute value of the properties comprised in the mortgage. By "absolute value" is meant the value of the property free from a charge—*Krishna Chandra v. Pabna Model Co.*, A.I.R. 1932 Cal. 319, 59 Cal. 76, 137 I.C. 260. But in *Raghubir v. Panchaiti Akhara*, A.I.R. 1937 All. 44, (1937) A.L.J. 113, 167 I.C. 783 it has been held that, where a mortgagor sells to a third person a portion of the mortgaged property and then sells an item thereof to the mortgagee, the integrity of the mortgage is broken and such third person can redeem his share in the mortgaged property on payment of a proportionate part of the amount due, *not in proportion to the value of different items of the property but in proportion to the liabilities of the parties under the sale-deed*. Where the mortgagee agrees to place himself in possession of a portion of the property so that the proportionate mortgage debt may be satisfied by the enjoyment of its usufruct for a certain term, a suit for possession of that portion of the property would not be bad for partial redemption as the mortgagee has already allowed the mortgage-security to be split up—*Tarapada Mondal v. Hajai Khatum Bibi*, A.I.R. 1956 Cal. 625.

60A. (1) *Where a mortgagor is entitled to redemption, then, on the fulfilment of any conditions on the fulfilment of which he would be entitled to require a re-transfer, he may require the mortgagee, instead of re-transferring the property, to assign the mortgage-debt and transfer the mortgaged property to such third person as the mortgagor may direct; and the mortgagee shall be bound to assign and transfer accordingly.*

(2) *The rights conferred by this section belong to and may be enforced by the mortgagor or by any encumbrancer notwithstanding an intermediate encumbrance; but the requisition of any encumbrancer shall prevail over a requisition of the mortgagor and, as between encumbrancers, the requisition of a prior*

Obligation to transfer to third party instead of re-transfer to mortgagor.

encumbrancer shall prevail over that of a subsequent encumbrancer.

(3) The provisions of this section do not apply in the case of a mortgagee who is or has been in possession.

60B. *A mortgagor, as long as his right of redemption subsists, shall be entitled at all reasonable times, at his request and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of, or extracts from, documents of title relating to the mortgaged property which are in the custody or power of the mortgagee.*

Sections 60A and 60B have been added by section 23 of the Transfer of Property Amendment Act (XX of 1929).

"We have added, on the lines of sections 95 and 96 of the English Property Act, two new sections—sections 60A and 60B—to define the obligation of a mortgagee, when so required, to transfer the mortgage-debt to a third person named by the mortgagor, and also to make it clear that a mortgagor has a right to inspect and take copies of the documents of title relating to the mortgaged property which are in the possession of the mortgagee"—*Report of the Select Committee (1929).*

61. *A mortgagor seeking to redeem any one mortgage shall, in the absence of a contract to the contrary, be entitled to do so without paying any money due under any separate mortgage, made by him or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.*

61. *A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together.*

Illustration.

A, the owner of farms Z and Y, mortgages Z to B for Rs. 1,000. A afterwards mortgages Y to B for Rs. 1,000, making no stipulation as to any additional charge on Z. A may institute a suit for the redemption of the mortgage on Z alone.

(Omitted.)

Amendment :—This section has been redrafted by sec. 24 of the T. P. Amendment Act (XX of 1929) for the following reasons:—

"Section 61 abolished the doctrine of the consolidation of mortgages. The section was based on section 17 of the Conveyancing Act, 1881 (corresponding to section 93 of the Property Act, 1925). In England before that statute was enacted, and in this country before Act IV of 1882 was passed, a mortgagee was allowed to consolidate securities in his hands and force a mortgagor to redeem all of them or to prevent him from redeeming one of them without redeeming the others. [Ghose on Mortgage, 5th Ed., Vol. I, p. 429; 6 B.H.C.R. (A.C.J.) 90.] This was inequitable and was altered by section 61 of the Act. But even that section is not exhaustive. It is proposed, therefore, that a mortgagor should be allowed to redeem simultaneously all debts or any one or more of them which have become due to the same mortgagee. The same principle ought to apply where portions of one and the same property are mortgaged separately. Accordingly, any reference to 'property' has been omitted and the words 'two or more mortgages' have been used and the illustration has been omitted."—*Report of the Special Committee.*

The effect of the amendment is to abolish the consolidation of mortgages whether in respect of the same property or different properties—*Jai Narain v. Gokul Singh*, A.I.R. 1937 Oudh 406. 168 I.C. 725.

Old Law :—Before the passing of the present Act, under the common law as recognised in the Cochin State, the mortgagor seeking redemption was bound to redeem all subsisting mortgages in favour of the same person in respect of the same property simultaneously—*Narayana v. Raman*, A.I.R. 1952 T.C. 150.

Scope :—Principle of this section was applicable in Cochin even before the introduction of the Act in that State. Where there were several mortgages on the same property in favour of the same person and the mortgagee's remedy in respect of one of them was barred, he can still insist on their redemption when redeeming others, because limitation bars the remedy, but does not extinguish the liability—*Neelakantam v. Ummuni Pillai*, A.I.R. 1952 Tr.-Coch. 295.

In respect of a deed of further advance, the mortgagee was entitled to consolidate the two documents and claim the amount due thereunder, before he was compelled to give up possession—*Kunjuvarianthu v. Chacku Vareethu*, A.I.R. 1952 Tr.-Coch. 363.

376A. Section whether retrospective :—This section, as it stood before the amendment in 1929 impliedly gave a statutory right that where there were two encumbrances (including charges) on the same property, the mortgagor was not entitled to redeem one without redeeming the other. This right of consolidation was a vested right in property. Hence the mere fact that sec. 24 of Act XX of 1929 which amended the present section was not included in the sections mentioned in sec. 63 of that Act does not make the present section retrospective, and the right of consolidation given by the old section was not taken away—*Nachappa v. Samiappa*, A.I.R. 1947 Mad. 18, (1946) 2 M.L.J. 35; *Chappan Nair v. Pariyaikutty*, 1957 Ker. L.J. 726. A right of consolidation presupposes

the union of several mortgages in the mortgagee and that at the time when he claims that right. But this does not mean that the law applicable in such cases is that which prevails at the date of the suit. The right accrues when the mortgages become combined in the mortgagee—*Ibid.*

377. Abolition of consolidation :—This section (both old and new) abolishes the consolidation of mortgages in this country in the same way as the Conveyancing Act (and recently the Property Act, 1925) has done in England. The doctrine of consolidation of mortgages over different properties was recognised by the Courts of India prior to the passing of this Act, and compelled the mortgagor who came to Court for redemption of a mortgaged property, to discharge *all* the debts due to the mortgagee and secured to him by mortgages on that or other property of the mortgagor. "If the owner of two or more different estates mortgaged them successively for distinct debts to the same person, the mortgagee had a right to insist that one security should not be redeemed alone, leaving him exposed to the risk of deficiency as to the others But Parliament intervened, and not a moment too soon, to put a stop to the flagrant injustice which was too often inflicted under the name of equity, and now in this country as well as in England, a mortgagee in the absence of a contract to the contrary, cannot consolidate his securities"—*Ghose's Law of Mortgage*, 5th Ed., p. 429. Thus, where two mortgages were executed with respect to six items of property, and a third mortgage was executed with respect to the same six items and also two other items, *held* that a decree which consolidated the amounts due under all the three mortgage-bonds, and made all the mortgaged properties liable for the consolidated amount, was contrary to the provisions of this section. Such a consolidation impedes the right of redemption of the mortgagor and is illegal—*Parmeshwar v. Raj Kishore*, 3 Pat. 829 (837), A.I.R. 1925 Pat. 59, 80 I.C. 34.

A man may borrow money on the security of his property, and both the lender and borrower may agree that the property is capable of serving as a security for further loans. In such circumstances if there is a second loan on the security of the property, and the borrower repays *one of the loans*, the lender has nothing to lose.—*per Mukerji J.* in *Lallu v. Ram Nandan*, 52 All. 281 (F.B.), A.I.R. 1930 All. 136 (138), 124 I.C. 735.

The old section applied (as shown by the illustration and the marginal note), to cases where *different* properties were mortgaged, and not where the *same* property was mortgaged under several mortgages—*Balasubramania v. Sivaguru*, 21 M.L.J. 562, 11 I.C. 629; *Dorasami v. Venkateshaya*, 25 Mad. 108 (115). Therefore, a mortgagor seeking to redeem a mortgage on a property was not entitled to do so without paying the money due under a separate mortgage or charge relating to the same property—*Ramarayanimgar v. Maharaja of Venkatagiri*, 50 Mad. 180 (P.C.), 31 C.W.N. 670, A.I.R. 1927 P.C. 32 (36) (overruling *Ramarayanimgar v. Maharaja*, 44 Mad. 301); *Meloth Kannan v. Kodath Kannaran*, 1914 M.W.N. 231, 22 I.C. 609; *Ram Ratan v. Aditya*, 3 Luck. 459, 112 I.C. 481, A.I.R. 1928 Oudh 273 (276). Even a mortgagor could not redeem one mortgage on his property without at the same time paying off another mortgage or charge on the *same and other properties* as well—*Ganga Rai v. Kirtanath*, 33 All. 393; *Tajjobibi v. Bhagwan*, 16 All. 295; *Ramara-*

yanimgar v. Maharaja of Venkatagiri, 50 Mad. 180 (P.C.). This view is no longer correct. In a recent Patna case where before the amendment of 1929 the same property was mortgaged to the same mortgagee, but in the second mortgage the first mortgage was stated to be kept alive, it has been held that the mortgagee had a right of consolidation of the two mortgages in one suit and a consolidated decree on them can be passed—*Sm. Nathuni v. Dharanidhar*, A.I.R. 1937 Pat. 156, 15 Pat. 742, 165 I.C. 310.

The doctrine of consolidation can only apply where a mortgagee holds (say) a mortgage on property A and also a separate mortgage on property B belonging to the same mortgagor. In the case, however, of a mortgagee holding a first mortgage on property A and also a second mortgage on the same property, the mortgagor cannot on payment off of the first mortgage redeem the property, unless he repays what is due on the second mortgage. But this is not because of the doctrine of consolidation but by reason of the fact that he has a second mortgage on the property—*Janaki Nath v. Pramatha Nath*, 44 C.W.N. 261 (P.C.), I.L.R. (1940) 1 Cal. 291, A.I.R. 1940 P.C. 38 (43).

378. Covenant as to consolidation :—This section (both old and new) applies "*in the absence of a contract to the contrary*," so that the parties are left free to covenant among themselves that a mortgagor of two properties shall not redeem one property without redeeming the other. *Tajjobibi v. Bhagwan*, 16 All. 295 (299). Thus, where by each of two mortgages a separate property was mortgaged with possession and the second mortgage contained the clause: "and when the whole of the mortgage-money due under this deed together with the amount due under the previous deed shall be paid, then the mortgage shall be redeemable and the deed shall be taken back," held that the mortgagee was entitled to consolidate the two mortgages by the 'contract to the contrary'—*Jadu Rai v. Ram Birch*, A.I.R. 1922 All. 403, 70 I.C. 637. In *Ganga Bai v. Kirtanath*, 33 All. 393, however, such a covenant was not given effect to. But the circumstances of that case were peculiar; the properties in the two mortgages were partly identical and partly different; one of the mortgagors of the first mortgage did not join in the second mortgage; and the person who brought the suit for redemption of the prior mortgage was a purchaser of one of the properties mortgaged and had no interest in the property comprised in the second mortgage.

Where the stipulation was that possession obtained under the first mortgage would remain with the mortgagee till the second mortgage in his favour was redeemed the Collector could not order that the possession be handed over to the mortgagor without payment of the mortgage debt—*Gurditte Mal v. Mohammad*, A.I.R. 1947 Lah. 278 (F.B.), I.L.R. 1947 Lah. 259.

Where a father in a joint family executes a mortgage and after his death his son, the then manager, executes another mortgage agreeing to repay the second loan along with the first, then the agreement amounts to a contract to consolidate, for the expression "mortgagor" includes also his heirs and survivors—*Harihar v. Lachhman*, A.I.R. 1934 Oudh 246 (249), 149 I.C. 543. Where in a subsequent document there is a stipula-

tion that without payment of the two sums the property previously mortgaged is not to be redeemed, the effect of the clause is to create a further mortgage or the property is made security for the additional debt—*Jeut Koeri v. Mathura Koeri*, A.I.R. 1926 All. 171, 24 A.L.J. 125, 90 I.C. 87.

Where after the execution of a mortgage-bond in favour of the mortgagor, the mortgagor takes further advances and executes a fresh bond creating a charge on the property, and in that bond he stipulates that he will not redeem the earlier mortgage without paying off the money due under the subsequent bond, held that the mortgagor, according to the terms of the contract, will not be entitled to redeem the earlier mortgage without paying off the subsequent charge. The covenant in the subsequent bond will not be treated as a clog on redemption—*Ranjit Khan v. Ramdhan*, 31 All. 482; *Brij Lall v. Bhawani*, 32 All. 651; *Har Prasad v. Ram Chandra*, 44 All. 37 (42) (F.B.), A.I.R. 1922 All. 174; *Jagannath v. Jaipal*, 55 All. 359 (F.B.), A.I.R. 1933 All. 257 (258), 142 I.C. 410; *Shib Narain v. Gajadhar*, 48 All. 292, A.I.R. 1926 All. 506, 92 I.C. 772; *Lal Bahadur v. Rameshwar*, 3 Luck. 113, A.I.R. 1927 Oudh 510 (511); *Ganpat v. Abdulji*, A.I.R. 1937 Nag. 54, 169 I.C. 23; *Ram Ratan v. Aditya*, 3 Luck. 459, 112 I.C. 481, A.I.R. 1928 Oudh 273 (276), affirmed *Aditya v. Ram Ratan*, 5 Luck. 365 (P.C.), 57 I.A. 173, 34 C.W.N. 625 (627), 59 M.L.J. 342, 28 A.L.J. 646, 123 I.C. 191, A.I.R. 1930 P.C. 176; *Janardan v. Anant*, 32 Bom. 386 (390); *Pramatha v. Janaki*, A.I.R. 1937 Cal. 194, 41 C.W.N. 472, 171 I.C. 747; *Md. Khan v. Chandi Shah*, A.I.R. 1933 Lah. 864, 147 I.C. 193; *Sultan v. Ladha Singh*, A.I.R. 1926 Lah. 633, 96 I.C. 844; *Kanhaya v. Tulsi*, A.I.R. 1931 All. 197, 129 I.C. 550. Such a covenant will be enforceable even against a subsequent transferee of the equity of redemption—*Gaya Prasad v. Jagannath*, supra. So also, where three successive mortgages were specifically charged on the same land and there was an express stipulation in the second mortgage that the first mortgage should not be redeemed without discharging the second mortgage, and in the third mortgage there was a stipulation that the mortgagor would pay the amount of that mortgage before discharging the earlier debts, held that the mortgagor was not entitled to redeem the first mortgage without at the same time discharging the second, and that the third mortgage must be discharged before or simultaneously with the redemption of the first—*Shib Narain v. Gajadhar*, 48 All. 292; *Punnu Ram v. Ghulam Hussain*, 7 Lah. 297, 96 I.C. 630, A.I.R. 1926 Lah. 494.

So also, a covenant in a subsequent mortgage or charge not to redeem that mortgage or charge without redeeming a prior mortgage created in respect of the same property is enforceable, and is not to be regarded as a clog on redemption—*Jagesri v. Aftab Chand*, 8 Pat. 68, 10 P.L.T. 41, A.I.R. 1928 Pat. 582 (584); *Imam Baksh v. Anwari Begam*, 18 I.C. 718 (All.); *Har Govind v. Tula Ram*, 10 I.C. 222 (All.); *Abdul Hamid v. Jairaj*, 3 A.L.J. 768.

In order to enable the mortgagee to compel the mortgagor to redeem both the mortgages at one time, it is necessary that the mortgages should be enforceable, (by the mortgagee) i.e., not barred by limitation. Therefore, if at the date of redeeming the prior mortgage it is found that a suit on the subsequent mortgage if brought by the mortgagee would have been

barred by limitation, the mortgagor will be entitled to redeem the earlier mortgage only, without paying any money due on the subsequent mortgage—*Kesar Kunwar v. Kashiram*, 37 All. 634; *Ram Krishna v. Nekkar*, 33 M.L.J. 581, 43 I.C. 286; *Kesar Kunwar v. Kashi Ram*, 37 All. 634.

Moreover, in order that the covenant as to consolidation may be enforced, it is necessary that both the prior and subsequent mortgages have been created in favour of the *same* person. Thus, one N mortgaged his property to defendants 1, 2, 3 and 4 who traded as a firm. Subsequently he gave a second mortgage of the same property to *defendant* no. 2 alone for a loan advanced by him personally. The second mortgage-deed contained a stipulation that the debt due thereunder must be paid off before the prior mortgage-debt. *Held* that the subsequent mortgage-debt in the second defendant's favour being a personal one, in his *individual* capacity, he cannot insist on his being paid before redemption of the prior mortgage created in favour of the *firm*—*Chhotalal v. Mathur*, 18 Bom. 591.

Covenant must be express:—A covenant as to consolidation of mortgages must be express and unequivocal—*Jiwandas v. Theraj*, 1 Lah. 105, 55 I.C. 509; *Bhartu v. Dalip*, 3 A.L.J. 672 (674); *Jai Narain v. Gokul Singh*, A.I.R. 1937 Oudh 321, 160 I.C. 40. A mere undertaking by the mortgagor to pay the money advanced on the later mortgage to the same mortgagee with the money due on the earlier security is merely an indication of the time fixed for payment of the same and does not amount to a consolidation of the debt so as to preclude the redemption of the first mortgage without the redemption of the later one—*Ibid* at p. 322. If there is a mortgage with possession and a lease-back of the mortgaged properties to the mortgagor with arrears of rent charged on the equity of redemption the two transactions cannot be treated as one, and the mortgagor can redeem the mortgage without redeeming the charge on account of rent—*Venkitasubramania Ayyar v. Vadasseril Thiruvad Karnavani*, A.I.R. 1956 Mad. 434.

379. Covenant as to consolidation of unsecured debts:—If a mortgagor, after executing a mortgage, takes a subsequent loan from the mortgagee under a *simple money-bond*, and in that bond stipulates that he will not redeem the mortgage without paying off the subsequent loan, the stipulation cannot be enforced—*Sheo Shankar v. Parma Mahton*, 26 All. 559; *Lallu v. Ram Nandan*, 52 All. 281 (F.B.), 124 I.C. 733, A.I.R. 1930 All. 136 (149); *Rama v. Martand*, 9 Bom. 236 (Note); *Rajmal v. Shivaji*, 27 Bom. 154 (156) (doubting *Hari v. Balambhat*, 9 Bom. 233); *Durga Prasad v. Dukki Roy*, 9 C.W.N. 789; *Unni v. Nagammal*, 18 Mad. 368; *Jang Bahadur v. Mate Din*, 46 I.C. 80, 5 O.L.J. 159; *Rugad Singh v. Sat Narain*, 27 All. 178; *Kandhaiya v. Ram Charitar*, 85 I.C. 328, A.I.R. 1925 Oudh 593 (594). Such by-agreements to pay unsecured debts as a condition precedent to redeeming a mortgage are inconsistent with the general principles of justice, equity and good conscience—*Lallu Singh v. Ram Nandan*, 52 All. 281 (F.B.), 1930 A.L.J. 156, 1930 All. 136 (150), 124 I.C. 733. In England also the law is the same—Coote's *Law of Mortgage*, 8th Edn., Vol. II, page 1175. And so Dr. Ghose observes in his learned work: "To say that a mortgagee may not foreclose for anything beyond the debt on his security but that a mortgagor must pay, as the price of redemption, *unsecured* debts due to the mortgagee as well as the mortgage-

debt, is not only to violate a homely English proverb, but also to postulate something that is not true, namely, that redemption is not a right of the mortgagor but a mere favour shown to him"—*Law of Mortgage*, 5th Edn., p. 242. The question as to whether the subsequent deed creates a further mortgage or charge on the property or merely amounts to a simple bond creating a personal liability, is to be decided with reference to the terms of the deed. See *Lallu v. Ram Nandan*, (supra); *Aditya v. Ram Ratan*, 5 Luck. 365 (P.C.), 34 C.W.N. 625 (627); *Kandhaiya v. Ram Charitar*, (supra); *Ashraf Ali v. Chandrapal*, (supra); *Gaya Prasad v. Rachpal*, 9 O.L.J. 484, 70 I.C. 66, A.I.R. 1923 Oudh 24; *Ramadhin v. Sitla*, 17 O.C. 303, 25 I.C. 905. A stipulation by the mortgagors that they would not mortgage or sell the property previously mortgaged till the money due on the subsequently executed simple bond had been paid, has been held by a Full Bench of the Allahabad High Court to mean that the previously mortgaged property was made security for the payment of the money subsequently borrowed and the bond was an agreement creating a charge on the property previously mortgaged—*Jannath v. Jaipal*, A.I.R. 1933 All. 257 (F.B.), 142 I.C. 410.

Prior to the passing of the T. P. Act, no distinction was made between secured and unsecured debts, and a mortgagor was not allowed to redeem a prior mortgage without clearing off the subsequent debts, even though such subsequent advances were unsecured—*Allu Khan v. Roshan Khan*, 4 All. 85 (explained in 26 All. 559); *Hari v. Balambhat*, 9 Bom. 233 (235); *Krishnaji v. Maheshwar*, 20 Bom. 346 (367); *Hiralal v. Narsilal*, 11 Bom.L.R. 318, 2 I.C. 469 (471). But even after the passing of the T. P. Act, it has been held in certain Oudh cases that redemption of the mortgage cannot be allowed without payment of the money due under a subsequent simple bond—*Raisunnissa v. Zorawar*, 1 Luck. 92, A.I.R. 1926 Oudh 228; *Gaya Prasad v. Rachpal*, 9 O.L.J. 484, A.I.R. 1923 Oudh 24, 70 I.C. 66. This view is opposed to the trend of recent case-law, and can hardly be regarded as correct. See Ghose's *Law of Mortgage*, page 242.

But if the *prior debt is unsecured*, and the *subsequent debt secured*, and in that mortgage-bond he stipulates not to redeem the mortgage without paying off the debt under the earlier simple bond, held that the covenant will be enforced because the stipulation in respect of the earlier debt constitutes a part of the transaction of the mortgage—*Hari v. Vishnu*, 28 Bom. 349 (361) (F.B.). The prior debt on the simple money-bond may not strictly speaking be a *charge* on the land, but the equity of redemption is made *conditional on the payment* of both the debts; and the mortgagor cannot redeem the mortgage without paying off the prior debt—*Yashvant v. Vithoba*, 12 Bom. 231 (234). And the result is the same if the secured and unsecured debts are *contemporaneous*. See *Sundar v. Bapuji*, 18 Bom. 755 (757). In this case, the covenant as to payment of the contemporaneous unsecured debt was enforced even though the debt was *barred* at the time of the suit for redemption of the mortgage.

Covenant cannot be enforced against mortgagor's assignee:—In the case of a covenant in the mortgage to pay an *unsecured* debt, the assignee of the equity of redemption is entitled to redeem without paying the unsecured debt which the original mortgagor had contracted to pay along with the mortgage-amount—*Unni v. Nagammal*, 18 Mad. 368. "It may

be safely affirmed, whatever may be the liability of the mortgagor himself, that neither justice nor equity nor the rescripts of the Emperor Gordian can prevent an assignee of the equity of redemption from redeeming the mortgage on payment only of the secured debt"—Ghose's *Law of Mortgage*, 5th Edn., p. 242. The contrary view taken in *Allu Khan v. Roshan Khan*, 4 All. 85 (which was decided prior to the passing of the T. P. Act) is no longer good law.

Invalid charge :—An invalid charge stands on the same footing as an unsecured debt. Consequently, the mortgagor cannot be compelled to pay off the debts created by a subsequent invalid charge, as a condition of redemption of the prior mortgage—*Lallu Singh v. Ram Nandan*, 52 All. 281 (F.B.), 1930 A.L.J. 156, A.I.R. 1930 All. 136 (149), 124 I.C. 733.

380. Conditional covenants :—A deed of subsequent mortgage contained a stipulation that the mortgagor could not redeem the earlier mortgage until the money due on the previous mortgage was first paid. There was an additional covenant allowing redemption independently of the previous mortgage, if the money due under the subsequent mortgage was paid within a certain period. *Held* that the mortgagor could redeem the subsequent mortgage, independently of the earlier mortgage, if he paid the amount due under the subsequent mortgage within the stipulated period ; but in default of payment within the period fixed, the two mortgages must be redeemed at one time—*Suraj Balli v. Ram Dular*, 6 O.L.J. 147, 50 I.C. 897. Such a covenant can be enforced not only against the mortgagor but also against his transferee—*Ibid*.

Similarly, where a property was mortgaged for Rs. 1,500 and the mortgage-deed recited an earlier debt of Rs. 5,000 due on a previous account and provided that if the mortgagor did not repay this Rs. 5,000 within two years from the date of the deed, he was not at liberty to redeem the property unless both the debts of Rs. 1,500 and Rs. 5,000 were paid, and the suit for redemption was brought after the expiry of 2 years, *held* that the charge as to Rs. 5,000 took effect on the expiry of two years from the date of the mortgage-deed ; that is, after the expiry of two years, the property must be deemed to be mortgaged for Rs. 5,000 as well as Rs. 1,500 ; but before that period the debt of Rs. 5,000 was merely personal ; and if the mortgagor had brought his suit for redemption before that date, he could have redeemed the mortgage by paying Rs. 1,500 only—*Hari v. Vishnu*, 28 Bom. 349 (358, 360) (F.B.).

62. In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property—

Right of usufructuary mortgagor to recover possession.

62. In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee,—

Right of usufructuary mortgagor to recover possession.

(a) where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property—when such money is paid :

(b) where the mortgagee is authorized to pay himself from such rents and profits the interest of the principal money—when the term (if any) prescribed for the payment of the mortgage-money has expired, and the mortgagor pays or tenders to the mortgagee the principal money, or deposits it in Court as hereinafter provided.

(a) where the mortgagee is authorised to pay himself the mortgage-money from the rents and profits of the property,—when such money is paid ;

(b) where the mortgagee is authorised to pay himself from such rents and profits *or any part thereof a part only of the mortgage-money*, when the term (if any), prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee *the mortgage-money or the balance thereof* or deposits it in Court as hereinafter provided.

Amendment :—This section has been amended by sec. 25 of the Transfer of Property Amendment Act (XX of 1929).

"Together with.....mortgagee" :—"In order to make section 62 comprehensive, we have on the lines of section 60 provided that the mortgagor has a right to require the mortgagee to deliver back the title-deeds and other documents relating to the mortgaged property"—*Report of the Select Committee* (1929).

In clause (b) the italicised words have been substituted for the following reasons :—

"Section 62 which relates to a usufructuary mortgage requires to be amended on the same lines as section 58 (d)".

"Clause (b) of the section is limited to a case where out of the rents and profits of the mortgaged property the mortgagee is entitled to recover only the interest due to him on his principal. The clause should also be made applicable to cases where the rents and profits are to be appropriated in payment of a part of the mortgage-money, *i.e.*, in payment of either interest in part or principal in part or both in part. To effect this change, the words 'principal money' should be changed into the 'balance of the mortgage-money'."—*Report of the Special Committee*.

381. Scope and application :—This section should be read as supplemental to sec. 60. This section however is in marked contrast to sec. 60 which contemplates a subsisting mortgage and its redemption while the present section speaks of recovery of possession. At the moment when the rents and profits of the mortgaged property are sufficient to discharge the mortgage-money the mortgage comes to an end—*Ram Prasad v. Bishambhar*, A.I.R. 1946 All. 400, 1946 A.L.J. 175. Prior to the amendment of this section it was held that this section did not apply to cases

where from the conditions contained in the mortgage, accounts had to be made up between the parties—*Zahid Ali v. Kedar Nath* 17 O.C. 388, 27 I.C. 427 (429). This ruling would now apply only to clause (a) which presupposes a case in which there would hardly be any need for elaborate accounts, but not to clause (b) which, as now amended, involves a more elaborate accounting, except in cases where the rents and profits are to be taken in complete satisfaction of the interest.

Where a usufructuary mortgage was followed by a deed of further charge to secure a subsequent advance, and the deed stipulated that the mortgagor could not get redemption of the usufructuary mortgage without paying off the amount due under the deed, it was held that sec. 62 did not apply, and that the mortgagor was not entitled to recover possession without paying off the sums due under the subsequent deed—*per Lindsay, J.C. in Zahid Ali v. Kedar Nath*, 17 O.C. 388, 27 I.C. 427 (429). But this view, it is submitted, is not correct. The right given by sec. 62 is *absolute*, notwithstanding any covenant to the contrary. Niamatullah, J., in his dissentient judgment in *Lallu v. Ram Nandan*, 52 All. 281 (F.B.), A.I.R. 1930 All. 136 (157), 124 I.C. 735, followed the Oudh case and read into this section the words “in the absence of a contract to the contrary”. This is unwarrantable, for had it been the intention of the Legislature, they might have easily inserted these words in the section, as they have done in sec. 61.

A fortiori, where the agreement creating a further charge contains *no covenant* to the effect that the usufructuary mortgage shall not be redeemed unless the charge is paid off, the mortgagor is entitled to redeem the usufructuary mortgage and recover possession under this section. If there is any money due under the further charge, the mortgagee may seek to enforce the hypothecation by a separate suit—*Khuda Bakhsh v. Alimunnissa*, 27 All. 313 (316, 318, 319).

But if the further advances are also secured by way of usufructuary mortgages over the property originally mortgaged, the mortgagor can redeem the first mortgage though he will *not be entitled to recover possession* by reason of the existence of the second or subsequent mortgages with possession. In the circumstances, if the mortgagor wants to *take possession* of the property, he must pay not only the amount secured by the first mortgage, but also the amounts secured by the second or subsequent usufructuary mortgages—*Lallu Singh v. Ram Nandan*, 52 All. 281 (F.B.), 1930 A.L.J. 156, A.I.R. 1930 All. 136 (139, 157), 124 I.C. 735. In a Privy Council case, where a usufructuary mortgagor borrowed a further sum from the mortgagee by executing a document which created a further charge on the property, and the document recited that the mortgagor would not redeem the usufructuary mortgage without payment of the amount borrowed under the subsequent document, it was held that the mortgagor was not entitled to redeem the usufructuary mortgage without payment of the subsequent debt—*Aditya v. Ram Ratan*, 5 Luck. 365 (P.C.), 34 C.W.N. 625 (627), A.I.R. 1930 P.C. 176, 123 I.C. 191. In this case the relevant sections of the T. P. Act were not specifically referred to as the transaction took place in 1881, prior to the passing of this Act, but the case was decided on general principles underlying the Act

regarding covenant as to consolidation of mortgages (see Note 378 under sec. 61).

Where the usufructuary mortgagee grants a lease to the mortgagor and the payment of the rent reserved is a charge on the property, the mortgagor cannot redeem the mortgage without paying in addition to the mortgage money the amount due under the lease—*Ramarayanimgar v. Maharaja of Venkatagiri*, 50 Mad. 180 (P.C.), 31 C.W.N. 670, A.I.R. 1927 P.C. 32 (36). But the Allahabad High Court applied this section to an exactly similar case, see *Khuda Bakhsh v. Alimunnissa*, 27 All. 313 (318, 319), where it was held that the lease-deed executed by the mortgagor was not a part of the mortgage but was an *independent* transaction.

382. Clause (a)—Satisfaction of the mortgage-money out of the usufruct :—Where the mortgagee is asked to pay himself the principal and interest out of the rents and profits of the mortgaged property, the general rule is that the mortgagee is entitled to remain in possession till the mortgage-debt is wiped off from the rents and profits of the property—*Narasimha v. Seshayya*, 48 M.L.J. 363, A.I.R. 1925 Mad. 825 (826), 90 I.C. 138.

Clause (a) contemplates a case in which *no time is fixed* for payment and the mortgage-deed provides for the mortgagee paying himself the debt (with interest) from the rents and profits of the estate—*Tirug-nana v. Nallatombi*, 16 Mad. 486 (488). In such a case the mortgaged property can be recovered immediately after the discharge of the mortgage-debt by means of the rents and profits of the property. And the same rule is to be applied even though a *term of years is fixed*—*Seshayya v. Lakshminarasimha*, 57 M.L.J. 800, A.I.R. 1930 Mad. 160 (162), 124 I.C. 282. If a time is fixed, the time is not of the essence of the transaction but should be regarded as a protection for the debtor, and the mortgagor is entitled to recover possession before the fixed period on his showing that the principal and interest have been wholly discharged by the usufruct before the stipulated period—*Kundan v. Thakurlal*, 6 C.P.L.R. 43. Even if the usufructuary mortgage-deed *expressly* provides that the mortgagee will be entitled to remain in possession for 12 years notwithstanding that the mortgage-debt is satisfied out of the property before the expiry of the term, *held* that the mortgagor will be entitled to recover possession before that period as soon as the mortgage-debt is satisfied out of the usufruct—*Ankinedu v. Subbiah*, 35 Mad. 744 (748). Even a special agreement to the effect that the mortgagee shall remain in possession until the payment of the debt is made in one lump sum does not prevent the mortgage from being at an end whenever the mortgagee has realised both the principal and interest out of the usufruct—*Jaijit Rai v. Govind*, 6 All. 303. A usufructuary mortgagee has no right to remain in possession of the mortgaged property after the mortgage-money is satisfied from the usufruct, even though the parties may have wrongly calculated that the liquidation of the mortgage-money from the usufruct shall take a longer period and may have said so in the deed—*Prag v. Mohanlal*, 5 O.L.J. 263, 47 I.C. 161.

This clause provides for cases in which no term is fixed and the whole of the mortgage-money is stipulated to be recovered out of the

rents and profits. The mortgagee can claim to retain possession until the discharge of the debt out of the usufruct. Until the debt is discharged in that manner, the mortgagor's suit to recover possession even by cash payment is premature—*Tirugnana v. Nallatombi*, 16 Mad. 486 (488, 490). The Oudh Chief Court, however, allowed the mortgagor to recover the property on payment of the balance found due to the mortgagee on taking accounts—*Hardeo v. Dy. Commissioner*, 1 Luck. 367, A.I.R. 1926 Oudh 281 (285), 98 I.C. 542.

If the mortgage-deed provides for the payment of *interest* or a part of the mortgage-money only out of the usufruct, the mortgagor will be entitled to redeem by cash payment of the principal. See Clause (b).

Where the mortgagors are in possession of the mortgaged property as Adhidars under the usufructuary mortgagee or as labourers or as tenants, their possession in law is the possession of the mortgagee, and therefore they can claim to be restored to possession of the properties in their own right—*Prafulla v. Soaru*, 44 C.W.N. 726, A.I.R. 1940 Cal. 499, 191 I.C. 720.

In the case of a usufructuary mortgage the *onus lies* on the mortgagee to prove what is due to him on the date of the application for redemption—*Baffan Singh v. Ram Subhag*, A.I.R. 1950 All. 466, 1950 A.L.J. 378.

383. Clause (b) :—If there is a balance left after satisfying the interest or part of the mortgage-money, the mortgagee should pay the balance to the mortgagor; if he does not pay it to the mortgagor, he is bound to apply it in further reduction of the principal. But he is not bound to accept the mortgage-amount from the mortgagor if he tenders it *before the expiry* of the term of the mortgage. See *Narasimha v. Seshayya*, 48 M.L.J. 363, A.I.R. 1925 Mad. 825 (826), 90 I.C. 138.

Where a mortgage-deed has provided that the mortgage is for the duration of a certain period and that at its end the mortgagee can either claim possession or recover the mortgage-money with interest at the rate agreed upon, the mortgagee's failure in a suit for possession to claim the relief for recovery of the mortgage dues does not preclude him from seeking that relief in a subsequent suit—*Mt. Har Kaur v. Udham Singh*, A.I.R. 1939 Lah. 112, 183 I.C. 745.

Clause (b) lays down that if it is stipulated in the mortgage-deed that the interest alone will be satisfied out of the usufruct, the mortgagor will be able to redeem on payment only of the *principal money*. Thus, where on the same day on which a usufructuary mortgage-deed is executed, the mortgagee executes a lease under which the mortgagor becomes a tenant of the mortgagee and is to pay rent in lieu of interest, the mortgagee takes the chance of the rent being greater or less than the interest reserved in the mortgage-bond, and the mortgagor will be entitled to redeem on payment of the principal sum only—*Partab Bahadur v. Gajadhar*, 24 All. 521 (P.C.). Where under a usufructuary mortgage (in which the interest was to be satisfied out of the usufruct) the mortgagee was placed in possession but shortly after was dispossessed of a portion of the mortgaged property by a person holding a superior

title or in pursuance of a decree, and the mortgagee acquiesced in such dispossession, held that the mortgagor was entitled to redeem on payment of the principal money only, and the mortgagee could not claim anything from the mortgagor on account of rents and profits in respect of the property of which he was dispossessed—*Partab Bahadur v. Gajadhar*, 24 All. 521 (P.C.); *Khuda Buksh v. Alimunnissa*, 27 All. 313; *Jhunku v. Chhotkan*, 31 All. 325; *Dubri v. Ram Naresh*, 3 O.W.N. 176, A.I.R. 1926 Oudh 224, 93 I.C. 287. If a right of pre-emption is expressly given in the mortgage-deed that right cannot be set up as a defence to a suit for possession by the vendee of the mortgagor; a separate suit for specific performance is required to enforce the right of pre-emption—*Md. Yusuf v. Sarifan Bibi*, A.I.R. 1962 Cal. 457.

Deposit in Court:—See section 83.

63. Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession.

Where such accession has been acquired at the expense of the mortgagee and is capable of separate possession or enjoyment without detriment to the principal property the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property; the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, *with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent. per annum.*

In the case last mentioned the profits, if any, arising from the accession shall be credited to the mortgagor.

Where the mortgage is usufructuary and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession shall, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended.

Amendment :—By section 26 of the T. P. Amendment Act (XX of 1929), the italicised words have been substituted for “at the same rate of interest” in the second para. The *Special Committee* observes :—

“Section 63 relates to accessions and the second paragraph of the section provides for the payment of the costs of accessions by the mortgagor where such accessions are made in certain circumstances and

are delivered to the mortgagor. It is stated that the proper cost payable by the mortgagor is to be added to the principal money 'at the same rate of interest'. Nothing is stated in the section about any rate of interest. Difficulty might also arise where a mortgage-deed is silent as to the rate of interest. For the words 'at the same rate' the following words should be substituted, *viz.*:—

'at the rate of interest payable on the principal, and, where no such rate is fixed in the mortgage-deed, at the rate of nine per cent. per annum'."

384. Principle :—This section is an illustration of the maxim "*Accessio cedit principali*" (the increase follows the principal). It may be compared with sec. 90 of the Indian Trusts Act. The combined effect of sec. 90 Trusts Act and the present section is that till the redemption of the security the accession does not become the absolute property of the mortgagor—*Maya Debi v. Rajlakshmi*, A.I.R. 1950 Cal. 1. In considering the question whether a purchase by the mortgagee in possession is an accession the Court must bear in mind the provisions of sec. 90, Trusts Act—*Sho Pujan v. Bhagwati*, A.I.R. 1949 Pat. 99, 27 Pat. 705. But it is not an absolute rule that a benefit or interest acquired by the mortgagee must in all cases be held in trust for the benefit of the mortgagor—*Parvali v. Cheriyan*, A.I.R. 1951 Tr.-Coch. 94.

The general principle, well-recognised in England, is that any acquisitions by the mortgagee are treated as accretions to the mortgaged property, and therefore, subject to redemption—*Maheshwar v. Babu Ram*, 2 P.L.T. 225, 60 I.C. 308 (309). The principle recognised by English law is that most acquisitions by a mortgagor enure for the benefit of the mortgagee (see sec. 70); and, on the other hand, many acquisitions by the mortgagee are, in like manner, treated as accretions to the mortgaged property or substitutions for it, and therefore subject to redemption—*Kishendat v. Mumtaz Ali*, 5 Cal. 198 (210) (P.C.).

Accession :—The question whether a property acquired by the mortgagee in possession is an accession or not depends upon the entire facts and circumstances of the case. The test is whether the mortgagee availing himself of his position as such has gained any particular advantage—*Sho Pujan v. Bhagwati*, *supra*.

Where a usufructuary mortgagee brought to sale certain holdings of tenants for arrears of rent under the Madras Rent Recovery Act, ejected the tenants and obtained possession of the holding, *held* that these holdings were accessions to the mortgaged property—*Vencatachariar v. Srinivasa Aiyangar*, 4 I.C. 357 (358). Where a usufructuary mortgagee obtained a mortgage by conditional sale of a holding of a tenant, got a decree for foreclosure of the holding and in execution thereof obtained possession of the holding, *held* that the tenancy plot was an accession to the mortgaged land—*Ketki v. Dinabandhu*, 10 C.L.J. 83, 3 I.C. 395 (396); *Mohanlal v. Chaodhry Pulandar*, 14 C.P.L.R. 169. Large extensions into waste adjoining lands cannot be regarded as accessions. But if an extension is recent and of small area in comparison with the mortgaged land, it may be treated as an accession—*The Dun v. The Zan*, 4 Bur. L.T. 167, 11 I.C. 808 (809). But Government waste-lands adjoining the mort-

gaged property which are brought under cultivation by the mortgagee do not come within the category of an accession within the meaning of this section—*Maung Shwe v. Ponniah*, 1 Bur. L.T. 262, A.I.R. 1923 Rang. 127, 82 I.C. 787; *S. R. &c. Firm v. Ko Po Sin*, A.I.R. 1936 Rang. 127, 162 I.C. 383.

A building which has not been added but substituted for an existing one is not an accession but an improvement—*Chhedi Lal v. Babu Nandan*, A.I.R. 1944 All. 204; I.L.R. 1944 All. 302. If the mortgagor having only a life interest constructs new structure after the execution of the mortgage-deed the mortgagee is entitled to a mortgage decree in respect of the new structure—*Atmukur Venkatasubbiah Chetty v. Thirupurasundari Ammal*, A.I.R. 1965 Mad. 185.

A tree falling down on the ground by natural causes is not an accession to the mortgaged property, as there is no addition to the property—*Durga Shankar v. Ganga*, 1932 A.L.J. 493, A.I.R. 1932 All. 500 (502).

Accession must take place during the mortgage :—For the purposes of this section as well as of sec. 70, the accession to the mortgaged property must take place before the mortgage becomes extinguished—*Kap-niah Sivananjiah v. Sithay Goundan*, 41 M.L.J. 490, A.I.R. 1921 Mad. 627, 70 I.C. 367. Where the usufructuary mortgagee of a share in a village took a mortgage by conditional sale of a holding of a tenant, and after the expiry of the usufructuary mortgage got a decree for foreclosure of the holding, and in execution obtained possession thereof, held that this mortgagor was entitled to take the accession upon payment, in addition to the mortgage-money, of the costs of acquiring the holding—*Keiki v. Dinabandhu*, 10 C.L.J. 83, 3 I.C. 395 (396); *Mohanall v. Chaodhry Pulandar*, 14 C.P.L.R. 169.

385. Acquired accessions :—The second para deals with acquired accessions, *i.e.*, accessions made at the expense of the mortgagee. These are divided into two clauses—(1) accessions capable of severance from the principal; the mortgagor according to his option may or may not redeem them along with the principal, but if he desires to take them, he must pay to the mortgagee the expenses of acquiring them—*Khudadad v. Girdhari*, 163 P.W.R. 1917, 42 I.C. 468; (2) accessions incapable of severance from the principal; these *must* be delivered by the mortgagee to the mortgagor along with the principal; but the mortgagor is bound to pay for them only when they are necessary for the preservation of the principal property, or when they were made with his consent.

386. Accessions acquired by mortgagee :—It has been held in some cases that a mortgagor can claim the accession if it was acquired by the mortgagee *in his capacity as mortgagee*. (Compare the words "by availing himself of his position as such" in sec. 90 of the Indian Trusts Act, cited in Note 384 above). A mortgagee who has acquired what any stranger or even the mortgagor himself could have acquired equally well despite the mortgage, cannot be compelled to hand over his acquisition to the mortgagor. Therefore, it is competent to a mortgagee, during the continuance of the mortgage, to purchase an absolute occupancy tenure for himself and to treat it as his separate property after the mortgage comes to an end—*Girdhari v. Muhammad Karmdad*, 63 P.R. 1918, 44

I.C. 266. When the estate mortgaged is a Zemindari out of which a *patni* tenure has been granted or within the ambit of which there is an ancient *mokurari istemrari* tenure, a mortgagee of the Zemindari with possession can purchase that *patni* or *mokurari* with his own funds and keep it alive as a separate property for his own benefit. In such a case, the mortgagee can hardly be said to have derived from the mortgagor any peculiar means or facilities for making the purchase which would not be possessed equally by a stranger, and he may therefore be held, equally with a stranger, to make it for his own benefit—*Kishen Dutt v. Mumtaz Ali*, 5 Cal. 198 (204) (P.C.). This section does not entitle the mortgagor to recover acquisitions (e.g., occupancy rights) made by the mortgagee for his own benefit under circumstances which do not bring him within sec. 90, Trusts Act, i.e., when he did not have any special advantage by reason of his position as mortgagee in acquiring them—*Sorabjee v. Dwarkadas*, 36 C.W.N. 947 (953) (P.C.), 138 I.C. 557 A.I.R. 1932 P.C. 199. It cannot be affirmed that every purchase by a mortgagee must be regarded as an accession to the mortgaged property. If it appears that by reason of his position as mortgagee in possession, he has had peculiar facilities for acquiring the properties in question, such properties should be regarded as an acquisition to the mortgaged property. If, on the other hand, it appears that in regard to such acquisitions the mortgagee-in-possession is in the same position as any third person, then the properties so acquired should not be regarded as an accretion to the mortgaged property—*Moghab Pande v. Ragho Pande*, 10 P.L.T. 865, 118 I.C. 314, A.I.R. 1929 Pat. 730. The question whether a property acquired by a mortgagee-in-possession is an accretion to the mortgaged property or not depends upon the *intention* of the mortgagee which has to be found from a careful appreciation of the entire facts and circumstances of each case—*Moghab Pande v. Ragho*, supra; *Maheshwar v. Babu Ram*, 2 P.L.T. 225, 60 I.C. 308 (310). If it appears from the evidence that the mortgagee, instead of merging the acquisitions in the mortgaged property, kept them distinct and apart from it for his own benefit, they should be treated as his own property and the mortgagor was not entitled to claim them on redemption—*Maheshwar v. Babu Ram*, 2 P.L.T. 225, A.I.R. 1921 Pat. 69, 60 I.C. 308 (309). Where the mortgagee-in-possession purchased certain occupancy holdings which were transferable only by custom and could not be obtained by strangers, it must follow that the mortgagee could only have acquired them by reason of his position as a mortgagee-in-possession and not otherwise, and therefore the holdings formed part of the mortgaged property and liable to redemption along with it—*Moghab Pande v. Ragho Pande*, supra.

On the other hand, the Calcutta High Court holds that this clause applies to all cases whether the mortgagee makes the accessions (at his expense) either as mortgagee or in *any other capacity*. Thus, where the plaintiff's share in a mehal was mortgaged to the co-proprietor of the mehal, and the mortgagee purchased some of the raiyati holdings of the mehal from the tenants and obtained possession thereof, *held* that on redemption of the mortgage the plaintiff was entitled to get *khass* possession of the holdings to the extent of his share in the mehal, on payment to the mortgagee of the proportionate share of the expenses incurred by him in acquiring them. This section applies to all cases

where the mortgagee holds the property either as co-proprietor or as mortgagee—*Ram Brich Narain v. Ambika Prosad*, 17 C.W.N. 586, 19 I.C. 90. This is also the view held by the Nagpur Court—*Pyarelal v. Pannalal*, 56 I.C. 193. But this view must be deemed as overruled by the Privy Council in *Sorabjee v. Diwarkadas*, cited above; see also *Umraon Singh v. Chakauri Singh*, A.I.R. 1958 Pat. 302 (F.B.) where a subordinate interest purchased by the mortgagee in execution of a decree for rent payable to him has been held to be not an accretion.

Where certain *khoti* lands were mortgaged with possession and the mortgagee purchased *khoti nibat* lands in the village from the occupancy tenants without the permission of the *khot* and subsequently all the rights in the equity of redemption were sold to the mortgagee, it was held that whether the lands were to be regarded as *khoti nisbat* or *khoti khasgi* they must be treated as accretion to the mortgaged property and the mortgagee as purchaser of the equity of redemption was entitled to them—*Kondu v. Mahidev*, A.I.R. 1932 Bom. 526, 139 I.C. 812.

387. Accessions capable of severance :—Where the accessions are made at the expense of the mortgagee, and capable of severance from the principal property without any detriment to it, they may, at the option of the mortgagor, be acquired by him on payment to the mortgagee of the expenses of acquiring them. If the mortgagor elects to take them, the mortgagee cannot refuse to part with their possession—See *Dildar v. Shukrulla*, 46 All. 152 (153), 78 I.C. 1023; and compare also section 90 of the Trusts Act.

In an Allahabad case it was stated that a building erected on the mortgaged land by the mortgagee in place of a *kutch* house which had fallen down, was an accession capable of separate enjoyment, and that if the mortgagor refused to pay for it, the mortgagee was entitled to remove the materials of the house—*Gopi Lal v. Abdul Hamid*, 26 A.L.J. 887, A.I.R. 1928 All. 381 (386), 116 I.C. 91. But in a Full Bench case of the same High Court, it has been ruled that a new house erected on the mortgaged land is not capable of separate possession or enjoyment as a house, and that the house is a good deal more than the mere building materials; it therefore follows that the mortgagor can insist on the house being delivered with the mortgaged land and the mortgagee can not claim compensation—*Nannu v. Ram Chander*, 53 All. 334 (F.B.), 132 I.C. 401, 1931 A.L.J. 273, A.I.R. 1931 All. 277 (283, 284). Where the mortgagee erected a stable on the mortgaged land, and the materials of the stable could be removed without injury to the other property, held that it was an accession capable of separate enjoyment and the mortgagee was allowed to remove the materials—*Durga Shankar v. Ganga Sahai*, 1932 A.L.J. 493, A.I.R. 1932 All. 500 (502). A mortgagee is not entitled to compensation for a *kacha kotha* built by him on the mortgaged property, he can only remove the materials—*Pal Singh v. Bhola Singh*, A.I.R. 1934 Lah. 242, 149 I.C. 969.

The mortgagee is entitled to claim only the costs incurred by him in acquiring the accessions and not their estimated *market value*. If the mortgagor desires to have possession of the accessions, he should *immediately on the expiry of the mortgage*, tender to the mortgagee the costs

incurred by him in making the acquisitions. If the mortgagor never treats the lands as accessions or makes any claim on the expiry of the term of the mortgage, but allows the mortgagee to remain in possession of the lands as occupancy *raiyat*, he cannot subsequently claim the accessions—*Ram Lagan v. Mary Coffin*, 8 P.L.T. 23, A.I.R. 1926 Pat. 572 (574), 97 I.C. 159.

388. Inseparable acquisitions :—The mortgagor on redemption is entitled to all acquisitions which are not capable of separate enjoyment without detriment to the principal property, but he is liable to pay for the expenses in two cases; (1) where the accessions are necessary to preserve the property from destruction, forfeiture or sale, or (2) where they were made with the mortgagor's consent.

*Accessions necessary to preserve the property :—*In a suit for redemption it was found that a certain grove was planted by the mortgagee-in-possession and that separate possession and enjoyment of the grove without detriment to the principal property was not possible. It was further found that the planting of the grove was *not* necessary to preserve the property from destruction, forfeiture or sale, and the grove was not planted with the consent of the mortgagor. Consequently, under this section, the mortgagor was entitled to obtain delivery of possession of the grove and the mortgagee was not entitled to be compensated for it—*Zubeda v. Sheo Charan*, 22 All. 83 (85); *Nageswari v. Nanda Lal*, A.I.R. 1926 All. 67; *Ajodhya v. Indra*, A.I.R. 1929 All. 330. So also, where the mortgagee, without the consent of the mortgagor, constructed a building which was in no way necessary for the maintenance or preservation of the property, the mortgagee could not recover the costs of the building—*Sammo v. Abdul Wahid*, 1883 A.W.N. 208, followed in *Rupan v. Champa Lal*, 37 All. 81 (85). See also *Nannu v. Ram Chander*, 53 All. 334 (F.B.), cited in Note 387, *ante*. So again, where the mortgagee excavated a new well and such excavation was not necessary for the preservation of the property, which was an agricultural land, he was not entitled to be compensated for the expenses—*Raja Ram v. Vithal*, 10 N.L.R. 166, 26 I.C. 712. If a house falls down, the rebuilding of it is not an accession necessary to preserve the property from destruction; for when it has fallen down, it is impossible to preserve it from destruction. The remedy of the mortgagee would lie under sec. 68—*Kallu v. Ganesh*, A.I.R. 1929 All. 348 (349), 116 I.C. 747. But see *Rupan v. Champa*, 37 All. 81, where the building of a *pucca* room in place of a *kutch*a room which had fallen down was held to be an expense necessary for the preservation of the property, for otherwise the house would be uninhabitable.

63A. (1) *Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, been improved, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled to the improvement; and the mortgagor shall not, save only in cases provided for in sub-section (2), be liable to pay the cost thereof.*

(2) *Where any such improvement was effected at the cost*

of the mortgagee and was necessary to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient, or was made in compliance with the lawful order of any public servant or public authority, the mortgagor shall, in the absence of a contract to the contrary, be liable to pay the proper cost thereof as an addition to the principal money with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent. per annum, and the profits, if any, accruing by reason of the improvement shall be credited to the mortgagor.

This section has been inserted by sec. 27 of the Transfer of Property Amendment Act (XX of 1929), because the Act before its amendment in 1929 contained no express provision allowing the mortgagee to make improvements to the mortgaged property. In the absence of any such provision, there was a great divergence of opinion as to the right of the mortgagee to claim compensation for improvements made. The present section has been inserted to set at rest the difference of opinion between the different High Courts.

This section closely follows the language of the preceding one, but differs from it in this respect that while sec. 63 makes a distinction between accessions capable of separate enjoyment and accessions not so enjoyable, no such distinction is recognised in the present section as to improvements. Further, the section says nothing about improvements made with the *consent* of the mortgagor.

389. Improvements by mortgagee :—Before the enactment of this section, the question as to whether and to what extent the mortgagee is entitled to make improvements on the mortgaged property was decided with reference to clause (b) of sec. 72. The present section is a statutory embodiment of the principles enunciated in some of those decisions.

Sub-section (1) lays down the general rule that ordinarily a mortgagee is not at liberty to effect improvements and charge the mortgagor therewith. See *Arunachella v. Sithayi*, 19 Mad. 327 (329); *Jangi Ram v. Sheoraj*, 2 O.L.J. 338, 30 I.C. 234 (237). The object of the law is to prevent the mortgagee from laying out large sums of money and thereby increasing his debt to such an extent as to cripple the power of redemption. The mortgagee has no right to lay out money in improving the property which may be done in such a way as to make it utterly impossible for the mortgagor with his means ever to redeem. This is called 'improving a mortgagor out of his estate'—*Sandon v. Hooper*, 6 Beav. 246; *Dnyanu v. Fakira*, 45 Bom. 1301 (1305), 64 I.C. 16, A.I.R. 1921 Bom. 250. Thus, where the amount of improvements was five times the mortgage-money, the mortgagee's claim for the value of the improvements was disallowed—*Ramappa v. Yellappa*, 52 Bom. 307, A.I.R. 1928 Bom. 150 (152), 109 I.C. 532; *Charan Dass v. Shadiram*, A.I.R. 1955 Pepsu, 87. Where a mortgagee-in-possession under a usufructuary mortgage effects improvements in the property knowing fully well that he was the mortgagee and not the owner, the mortgagee is not entitled to compensation for the improvements in a suit for redemption by the mortgagor—*Ganpat v. Abdulji*, A.I.R. 1937 Nag. 54, 169 I.C. 23.

The mere consent of the mortgagor to the improvement being made would not make him liable; unless given under circumstances to make it equivalent to a promise to re-imburse the cost to the mortgagee—*Arunachella v. Sithayi*, 19 Mad. 327 (329).

In some cases it was held, following *Shepard v. Jones*, (1882) 21 Ch. D. 469, and *Henderson v. Astwood*, (1894) A.C. 150, that the mortgagee was entitled to be repaid the expenses if the improvements were accretions within the meaning of sec. 63, or were necessary for the preservation of the property under sec. 72 (b) or were lasting improvements reasonably made for the benefit of the property and added to its selling value—*Rahmatulla v. Yusuf*, 10 A.L.J. 124, 16 I.C. 635 (638); *Rupan v. Champa*, 37 All. 81 (85); *Durga v. Naurang*, 17 All. 282 (284); *Dnyanu v. Fakira*, 45 Bom. 1301 (1305); *Nijlingappa v. Chenabasawa*, 43 Bom. 69 (74); *Rikhi Kesh v. Jawal Sahai*, 78 P.R. 1919, 52 I.C. 862; *Labhu Ram v. Abdulla*, 75 I.C. 183, A.I.R. 1923 Lah. 587. See also Fisher on *Mortgages*, 6th Edn., p. 897. In allowing the costs of improvements, the Court must naturally be on its guard against extravagant and unfounded claims, and should enquire strictly into the facts and fairness of the claim in each particular case—*Nijlingappa v. Chenabasawa*, supra. Under the present section the question as to whether the improvement is reasonable or not must be decided with reference to the rule laid down in sub-section (2). See the *Report of Special Committee* quoted above.

Contract to the contrary :—This section applies only when there is no contract to the contrary; otherwise improvements are subject to the contract. Whether the mortgagor is liable for improvements depends upon the question whether the improvements come within sub-sec. (2). But the contract prevails over that sub-section—*Chhedi Lal v. Babu Nandan*, A.I.R. 1944 All. 204, I.L.R. 1944 All. 302. Where there was a contract that the mortgagee would make certain improvements some of which were effected and the others were not, the mortgagee was not entitled to more than a rateable proportion of the amount provided for in the document—*Neelakantani v. Ummeni*, A.I.R. 1952 Tr.-Coch. 295. As to the custom in Malabar, see this case and *Sundaram v. Mannadiar*, A.I.R. 1947 Mad. 197, I.L.R. 1947 Nag. 411. Where the mortgagee was directed to make some special improvements, he was not entitled to make other improvements and claim compensation for them—*ibid*. In some cases the mortgagee may be entitled to special repair costs incurred in keeping the house in sound condition—*Jetha v. Ashpar*, A.I.R. 1950 Kutch 74.

If there is a contract between the parties as to making improvements, it must be given effect to. Thus, where the mortgage was of a *katcha* house, and the terms of the mortgage-deed expressly authorised the mortgagee to rebuild any portion of the house that might fall down during the rains, and the *katcha* house having tumbled down during the rains, the mortgagee rebuilt a *pucca* house which was not bigger than the old one but was of the same size and pattern, held that the mortgagee's claim to recover the cost of rebuilding the house was quite fair and must be allowed—*Qasim v. Bhagwandeem*, 7 O.W.N. 488, A.I.R. 1930 Oudh 337 (338), 126 I.C. 397; *Muhammad Mohideen v. N. N. H. Muhammad Mohideen*, A.I.R. 1960 Mad. 24.

Mortgagor:—Where a person purchases property improved by the mortgagee from the mortgagor, he will be liable to pay the mortgagee the costs of the improvements if he claims possession with the improvements—*Haraka v. Daya Naya*, A.I.R. 1950 Kutch. 14.

Mortgagee:—Where a sub-mortgagee in possession in Travancore makes improvements in the mortgaged property, he is entitled to the value of the improvements, though the mortgagee was not authorised to effect improvements—*Chandi v. Thomman*, A.I.R. 1951 Tr.-Coch. 109.

If a certified guardian of a minor executes a mortgage on behalf of the minor without taking the permission of the Court under sec. 29, Guardians and Wards Act, and the minor on attaining majority avoids the mortgage, there is no relationship of mortgagor and mortgagee, and the latter making any improvement on the mortgaged property is not entitled to add the costs of the improvement on the mortgage-money—*Bechu v. Bhabhuti* 52 All. 831, A.I.R. 1931 All. 201 (202).

'Necessary to preserve the property,' etc.:—Sub-section (2) lays down that the mortgagor shall be liable to pay the cost of improvements if they are necessary to preserve the property from destruction, deterioration, etc.; compare clause (b) of sec. 72. What has to be determined is whether the expenditure was necessary to preserve the property from destruction—*Arunachella v. Sithayi*, 19 Mad. 327 (329). Thus, where a mortgagee of agricultural land had spent money in repairing a well on the property which had been rendered useless from natural causes, it was held that the mortgagee was entitled to add the amount so expended to the mortgage-debt—*Durga Singh v. Naurang*, 17 All. 282 (284). But it is otherwise where it is not so necessary—*Fayaz v. Shafi*, A.I.R. 1951 Aj. 10. Where the mortgaged property was a mill, the mortgagee was allowed the value of improved machinery in place of the old, on proof that it was necessary in order to run the mill in successful competition with other mills in the neighbourhood which contained such machinery—*Pingrey on Mortgages*, § 2117, 2120. If the mortgagee has rebuilt any fallen portion in order to retain the income which was derivable from the same, he can legitimately get the cost thereof and charge the same on the property in connection with which such expense was incurred—*Amba Prasad v. Wahidullah*, 44 All. 708 (712). Where the *kutch* room fell down and the mortgagee built a *pucca* room in place of it, the expense was held to have been properly incurred for the preservation of the property; for otherwise the house would have been uninhabitable—*Rupan v. Champa*, 37 All. 81 (84); especially when it appeared that the rebuilding was within the contemplation of the parties when the mortgage-deed was executed—*Qasim v. Bhugwandeem*, 7 O.W.N. 488 A.I.R. 1930 Oudh 337; but where the mortgagee also built a second storey, held that such a building altered the character of the house, and having been made without the mortgagor's consent and not being necessary for the preservation of the estate, the mortgagee was not entitled to the money spent on it—*Rupan v. Champa*, 37 All. 81 (84). Where the repairs made by the mortgagee was in the nature of improvements calculated to bring in increased rent and none of them were proved to be necessary within the meaning of this section, the mortgagee was not entitled to credit for the sum spent by him in effecting the repairs—*Suraj Mal v. Chander Bhan*, A.I.R. 1939 Lah. 129, 41 P.L.R. 80. Where

the mortgagee claimed the expenses incurred for building a granary and laying out water-pipes, held that the laying out of pipes was not a necessary improvement or substantial repair so as to make the mortgagor liable, and as the granary was a moveable object, the mortgagee could remove the same and no credit should be allowed for it—*Narayanaswami v. Soranammal*, 15 M.L.T. 374, 22 I.C. 635. The mortgagee will not be justified in demolishing the house and rebuilding it at a cost equivalent to several times the mortgage-debt, and charging the mortgagor therewith—*Surapee v. Diwan Chand*, 59 I.C. 764 (Lah.); *Charan Das v. Shadiram*, A.I.R. 1955 Pepsu, 87. The mortgagee has no right to charge for the cost of a gratuitous structure made without the consent of the mortgagor and in no way necessary for the maintenance or preservation of the mortgaged property—*Sammo v. Abdul Wahid*, 1883 A.W.N. 208. See also *Bechu v. Bhabhuti*, 52 All. 831, A.I.R. 1931 All. 201 (202), 124 I.C. 731; *Gopi Lal v. Abdul Hamid*, 26 A.L.J. 887, A.I.R. 1928 All. 381 (385, 386), 116 I.C. 91; and also the Full Bench case of *Nannu v. Ram Chander*, 63 All. 334 (F.B.), cited in Note 387 under sec. 63.

The law on the subject of improvements has been thus succinctly laid down by Fisher in his work on Mortgages § 1781: "The mortgagee will be allowed for proper and necessary repairs to the estate, and if buildings are incomplete or become ruinous so as to be unfit for use, he may complete or pull them down and rebuild them for the preservation of his security. And the rebuilding or repairing may be done in an improved manner and more substantially than before, so that the works be done providently, and that no new or expensive buildings be erected for purposes different from those for which the former buildings were used; for the property when restored ought to be of the same nature as when the mortgagee received it. And if it be thus wholly or in part converted from its original purposes, the money expended will not be allowed to be charged upon it." See also *Charan Das v. Shadiram*, A.I.R. 1955 Pepsu, 87.

The planting of trees on the mortgaged land is not an improvement necessary for the preservation of the property—*Raghu-nandan v. Raghu-nandan*, 43 All. 638 (643) (F.B.); *Zubeda v. Sheo Charan*, 22 All. 83 (85); and the mortgagor is entitled to the trees without paying any compensation for them. See *Nageshwari v. Nand Lal*, 48 All. 70, *Zubeda v. Sheo Charan* (supra), *Ajodhya v. Indra*, 113 I.C. 405, A.I.R. 1929 All. 330 (331), *Ma E v. Maung Po*, 8 Rang. 233, and *Jahangir v. Ram Har-akh*, 13 O.L.J. 243 92 I.C. 263, cited in Note 388 under sec. 63. In *Raghu-nandan v. Raghu-nandan* (supra), it was held that the mortgagor was not entitled to trees, as they were not planted by him, but that the mortgagee should be allowed to cut down and remove the trees. A similar view was taken in *Ram Birich v. Chhakaury*, A.I.R. 1925 All. 748 (750), 86 I.C. 929. In a more recent Allahabad case it has been held that, the question as to whether the mortgagor should be allowed to remove the trees should be decided on a consideration whether it is practicable to remove the trees—*Ajodhya v. Indra*, supra. A mortgagee is not entitled to claim compensation for the amount spent in order to increase the yield of the mortgaged land—*Rup Ram Dhan Singh v. Munshi Chillu*, A.I.R. 1960 Punj. 480.

Costs of improvements :—Where under the terms of the mortgage executed before the insertion of this section the mortgagee could make improvements and repairs and to recover from the mortgagor the costs thereof, the question of such costs has to be determined with reference to the terms of the mortgage and principles of common justice—*Kukaji v. Misri Lal*, A.I.R. 1952 M.B. 6. Where the improvements are such that they are not severable from the land, the mortgagor is liable to pay the costs thereof—*Sundaram v. Mannadiar*, A.I.R. 1947 Mad. 197, I.L.R. 1947 Mad. 411. The burden of proof in such cases is upon the mortgagee to show the execution of the improvements and the actual expenses incurred—*ibid.* Where the mortgagee in possession of a Kuchcha building demolishes it and constructs a *pucca* one at the place without the mortgagor's consent, it is an improvement, and in the absence of a contract to the contrary, the mortgagor is entitled to the building and will not, save in the cases provided for in sub-sec. (2), be liable to pay the costs thereof—*Ram Asray v. Hira Lal*, A.I.R. 1949 All. 681. As to the value to be ascertained of buildings, fruit-bearing trees *etc.*, see *George v. Muthalier*, A.I.R. 1953 Tr.-Coch. 507.

The value of improvements payable to a usufructuary mortgagee should not be restricted to the amount advanced under the mortgage—*Francis v. Onseph*, A.I.R. 1953 Tr.-Coch. 441. The costs of a suit for recovery of possession of the property do not come within any of the purposes mentioned in sub-sec. (2) and the mortgagee is not entitled to them—*Palani Devasthanam v. Md. Gani*, A.I.R. 1954 Mad. 89.

In case of a mortgage with possession, although no condition is inserted in the mortgage-deed about crediting rents and profits to the mortgagor, this condition is implied. If the mortgagee has incurred the cost of the improvement which has yielded the rents and profits, he is of course entitled to claim the costs with interest, but the mortgagor should be given credit for the rents received by the mortgagee—*Wasu Ram v. Md. Ramzan*, A.I.R. 1940 Lah 199, 42 P.L.R. 196, 188 I.C. 570. The mortgagee can claim the value of those improvements which are on the land in a reasonably good condition at the time of actual redemption. So, where the value of improvements has been assessed in the redemption-decree, but some of the improvements have been destroyed between the date of decree and the date of actual redemption, the mortgagor would be entitled to obtain a reduction of the amount mentioned in the decree—*Krishna v. Srinivasa*, 20 Mad. 124 (126, 128). Similarly, the mortgagee can claim a revaluation if he can show that since the passing of the redemption-decree, the value of the improvements has increased—*Ramunni v. Shanku*, 10 Mad. 367.

64. Where the mortgaged property is a lease, * * *, and the mortgagee obtains, a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease.

Amendment :—The words "for a term of years" have been omitted by sec. 28 of the T. P. Amendment Act (XX of 1929), because they are unnecessary according to the opinion of the *Special Committee*. These words have also been omitted from sections 65 and 71.

389A. Scope of section :—This section embodies the law as laid down in *Rawe v. Chichester*, (1773) Amb. 719, where Lord Bathurst stated the rule thus : "If trustees, mortgagees and persons interested obtain renewal, the new lease is always subject to the trusts and limitations of the old lease".

This section may be compared with illustration (a) of sec. 90, Indian Trusts Act :—"A, the tenant for life of leasehold property, renews the lease in his own name and for his own benefit. A holds the renewed lease for the benefit of all those interested in the old lease." A similar illustration is appended to sec. 3 of the Specific Relief Act. The principle of this section is that if a trustee or a mortgagee obtains a lease during the continuance of the trust or mortgage, the benefit of the lease taken by the trustee or mortgagee enures to the benefit of the *cestui que trust* or the mortgagor—*Baijnath v. Harikishen*, 6-C.W.N. 372. Therefore, if the mortgagee obtains a renewal, the mortgagor has generally the benefit of the new term upon redemption; because, the additional term comes from the old root subject to the same equity of redemption—*Rakestraw v. Brewer*, 2 P. Wms. 510. The mortgagee is entitled to recover the costs of the renewal and may add the costs to the principal money; see sec. 72 (e).

Where the form in which a current lease was drawn up indicated that the lease was capable of being renewed, it was held that the current lease could not be said to be a renewal merely from the form—*Lachhman v. Mt. Gulab*, A.I.R. 1936 All. 270, 162 I.C. 143.

65. In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee—

Implied contracts by mortgagor.

- (a) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same ;
- (b) that the mortgagor will defend, or if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto ;
- (c) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property ;
- (d) and, where the mortgaged property is a lease * * *, that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee have been paid, performed and observed down to the commencement of the mortgage ; and that the mortgagor will, so long as the security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed

lease, perform the conditions contained therein and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts ;

- (e) and, where the mortgage is a second or subsequent incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on such prior incumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior incumbrance.

* * * * *

The benefit of the contracts mentioned in this section shall be annexed to and shall go with the interest of the mortgagee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

Amendment :—By section 29 of the Transfer of Property Amendment Act (XX of 1929) the words “for a term of years” have been omitted from clause (d), as they are unnecessary, and the last paragraph but one has been omitted. This para stood as follows :—

“Nothing in clause (c), or in clause (d), so far as it relates to the payment of future rent, applies in the case of a usufructuary mortgage.”

The reasons for omitting this para have been thus stated :—

“This section relates to the implied covenants by a mortgagor, and provides in the penultimate paragraph that covenants regarding payment of public charges and future rent in the case of leasehold property do not apply in the case of a usufructuary mortgage. This provision is not clear. Covenants specified in the section are binding on a mortgagor in consequence of his obligation to preserve the mortgage-security. No sufficient reason is apparent why, in the case of a usufructuary mortgage when possession is not delivered to the mortgagee, the mortgagor should not be under a duty to pay the public charges and future rent. It appears from the papers underlying the Act that the provision at present contained in this paragraph was first introduced in Bill IV of 1879, when clauses (c) and (d) did not contain the words ‘so long as the mortgagee was not in possession’. In the case of a usufructuary mortgage, if the mortgagor has not put the mortgagee in possession, it is as much his duty as it is in the case of any other mortgage to preserve the property on the security of which he has obtained a loan. The words ‘so long as the mortgagee was not in possession’ were added in sub-clauses (c) and (d) of section 65 in the final Bill, but, apparently through inadvertence, this paragraph was not omitted.”—*Report of the Special Committee.*

390. Scope of section :—This section, like sec. 55, is to operate only when the parties have not entered into a *contract to the contrary*.

But the contract made by the parties must be a valid one. A contract that payments of the mortgage-money which are not entered on the back of the bond should not be recognised is not a valid one and cannot come within the section—*Narayan v. Motilal*, 1 Bom. 45 (49).

This section enumerates implied contracts by the mortgagor and does not cast any duty upon him to make any disclosure of previous encumbrances—*Ramkrishna v. Ganesh*, A.I.R. 1934 Nag. 149, 150 I.C. 20.

Not only the mortgagee but any one claiming under him is entitled to the benefit of the implied covenants under this section (see the last para of the section). But the contract is personal to the mortgagor; the purchaser of the equity of redemption from a mortgagor is not a party to such a covenant and therefore there is no obligation on him to pay the public charges accruing due in respect of what he has purchased, though it may be to his interest to do so and avert revenue sale of the mortgaged property—*Srinivasachari v. Ganaprakasa*, 30 Mad. 67 (71).

391. Clause (a)—Covenant for title :—Compare sec. 55 (2). This clause does not apply to a case where the mortgage was created prior to the passing of this Act though one of the further charges was subsequent to it—*Saiyid Abdulla v. Saiyid Basharat Hussain*, 35 All. 48 (P.C.), 17 C.W.N. 233, 17 I.C. 737.

The covenant implied in clause (a) is twofold—(1) as to the *quantum* of interest mortgaged and (2) as to the transferability of the interest by the mortgagee.

(1) The *interest* which the mortgagor profess to transfer will have to be construed in the light of section 8. The combined effect of that section and this clause is that in the absence of a contract to the contrary the interest which the mortgagor professes to transfer must be deemed to be all that the mortgagor has, which he shall be deemed to transfer unreservedly—*Chiranji Lal v. Bhagwan*, 8 I.C. 826 (All.).

(2) The *power of transfer* implies that the property is alienable, i.e., it does not fall within the category of non-transferable properties mentioned in section 6, and that the mortgagor is a person competent under section 7 to transfer it.

Where it was found that the mortgagor had no title, but the mortgagee took the mortgage *bona fide* without notice of the absence of title, the latter was awarded a decree on the mortgage against the property—*Venkata Narasimha v. Gundu Sastrulu*, 9 M.L.T. 365, 3 I.C. 504.

Once the mortgagor has mortgaged the property, he cannot, in a suit by the mortgagee take up the position that he had no power to transfer the property by mortgage. And this estoppel will operate also against the successors-in-interest of the mortgagor—*Achhaibar v. Rajmati*, 51 All. 802, A.I.R. 1929 All. 483 (484), 121 I.C. 111. Further, a mortgagor is estopped from asserting that he is not in possession of the property mortgaged—*Jadunath v. Isar Jha*, A.I.R. 1939 Pat. 47, 178 I.C. 198; *Bholanath v. Balaram*, 27 C.W.N. 607 (P.C.), A.I.R. 1922 P.C. 382, 70 I.C. 932; nor can he urge that he had no title to convey—*Dhondappa v. Kasabai*, A.I.R. 1949 Nag. 206, I.L.R. 1948 Nag. 936. In the absence of fraud etc. the question of title is irrelevant in a mortgage suit—*ibid*, per

Bose J. A person named as the mortgagee in the mortgage deed is entitled to sue on the mortgage whether he has any interest therein or not—*Shanta Bai v. Narayanrao*, A.I.R. 1949 Nag. 81, I.L.R. 1948 Nag. 290.

If a person professes to have an interest in a property, whatever interest he may have is bound by the mortgage and he cannot claim that a personal decree should have been passed—*Bholanath v. Balaram*, A.I.R. 1922 P.C. 382, 31 M.L.T. 306.

The purchaser at an execution-sale of the interest of the mortgagor is also bound by the same rule of estoppel as his judgment-debtor (mortgagor)—*Debendra v. Mirza Abdul*, 10 C.L.J. 150, 1 I.C. 264 (271).

For failure of the mortgagor's title, the mortgagee is entitled to compensation and interest—*Babu Lal v. Mangat Rai*, A.I.R. 1944 All. 195, I.L.R. 1944 All. 277. The cause of action arises when the event depriving the fruits of his mortgage occurs—*ibid*.

392. **Substituted security—mortgage of undivided share**:—Where the owner of an undivided share in a joint and undivided estate mortgages his undivided share, he cannot, by so doing, affect the interests of the other co-sharers; and the persons who take the security, *i.e.*, the mortgagees, take it subject to the right of these co-sharers to enforce a partition and thereby convert what is an undivided share of the whole into a defined portion held in severalty—*Byjnath v. Ram Oodeen*, 1 I.A. 106, 21 W.R. 233 (P.C.). That is, a person who advances money upon a mortgage of property, which the mortgagor holds in an undivided share, must be deemed to take it subject to the liability of the property to be subsequently partitioned—*Shahebzada v. Hills*, 35 Cal. 388. Therefore, a mortgagee of an undivided share, when there takes place a subsequent partition, will be entitled, as his security after the partition, to the separate share allotted to his mortgagor, in place of the undivided share—*Hem Chunder v. Thako Moni*, 20 Cal. 533; *Lakshman v. Gopal*, 23 Bom. 385; *Joy Sankari v. Bharat Chandra*, 26 Cal. 343; *Blup Singh v. Chkheda Singh*, 42 All. 596 (599); *Amolak Ram v. Chandan*, 24 All. 483; *Pullamma v. Pradosham*, 18 Mad. 316; *Mt. Imlianzunissa v. Abdur Qasim*, A.I.R. 1942 All. 267; *Deokinandan v. Aghorenath*, A.I.R. 1925 Pat. 400, 24 Pat. 268. The mortgage cannot, in the absence of a fraud in the partition, be enforced against the share originally mortgaged; the mortgagee's sole remedy is to proceed against the share which has been allotted to his mortgagor in lieu of the share mortgaged—*Amolak Ram v. Chandan*, 24 All. 483; *Muthia Raja v. Appala Raja*, 34 Mad. 175; *Hakim Lal v. Ram Lal*, 6 C.L.J. 46; *Shahebzada v. Hills*, 35 Cal. 388; *Md. Afzal v. Abdul*, A.I.R. 1932 P.C. 235, 59 I.A. 405, 36 C.W.N. 1129, 13 Lah. 702, 139 I.C. 85; *Dewan Chand v. Manak Chand*, A.I.R. 1934 Lah. 809, 36 P.L.R. 185; *Amar v. Bhagwan*, A.I.R. 1933 Lah. 771, 14 Lah. 749; *Kharag Narain v. Janaki Rai*, A.I.R. 1937 Pat. 546, 16 Pat. 230, 169 I.C. 906; *Ganga Prasad v. Dulari Saran*, A.I.R. 1937 Pat. 253, 170 I.C. 99; *Naubat v. Hira*, A.I.R. 1951 All. 654, 1951 A.L.J. 456; *Issaku v. Seetharamaraju*, A.I.R. 1948 Mad. 1 (F.B.), I.L.R. 1948 Mad. 454. Even if the mortgagee happens to be one of the co-sharers, the same principle applies—*Naubat v. Hira*, *supra*. In the case of such substituted security the mortgagee's right is however not in the nature of a mortgage, but of

a charge under sec. 100. Hence a bona fide transferee for value without notice of such substituted property would be protected against such a charge—*Issaku v. Seetharamaraju*, supra. Overruling *Ramanna v. Manickam*, A.I.R. 1935 Mad. 1011. The fact that the mortgagee was not made a party to the partition proceedings makes no difference—*Nirmal v. Sant Lal*, A.I.R. 1937 Pat. 563 (566), 16 Pat. 622, 171 I.C. 715; *Diwan Chand v. Manak Chand*, supra. The mortgagee can neither compel a partition nor claim to be a party to the partition proceedings as of right. But where the share of his mortgagor has not received a proper allotment and the partition was the result of a collusive or fraudulent arrangement between the mortgagor and his co-sharers, the mortgage is enforceable against the proportionate share of the mortgagor in every item of property specified in the mortgage-deed whether such property is in the hands of the mortgagor's transferee or any transferee from him—*Saradindu v. Jahar Lal*, A.I.R. 1942 Cal. 153 (163), 46 C.W.N. 73, 74 C.L.J. 61. The burden to prove that the partition was fair and equal lies upon the person relying upon the partition—*Ibid*, at p. 160. If the property as allotted to the mortgagor is subsequently transferred by him to third parties, that will make no difference as far as the mortgagee's rights are concerned—*Amar v. Bhagwan*, supra.

The mortgagee's main right is, after foreclosing or purchasing his mortgagor's rights, to get defined by partition what it is that is mortgaged. Any Court entertaining an application for partition would be bound to partition the joint property in accordance with justice and equity. The Court should, unless there are countervailing reasons, so divide the family property that the property mortgaged goes to the mortgaging co-parcener and the non-mortgaging co-parceners get other properties—*Atmaramsao v. Bhupendranath*, A.I.R. 1940 Nag. 149 (154), 1940 N.L.J. 365. Where in such a case the mortgaged property has been allotted to the non-mortgaging co-parceners, in the absence of fraud or collusion, the mortgagee has his substituted security on the property allotted to his mortgagor. But if the non-mortgaging co-parceners have, as part of the partition-agreement undertaken to pay the mortgage-debt, they have obtained an equity of redemption only and the mortgagee may sue them on the mortgage—*Ibid*. Then the mortgagee of a share of joint property is not a necessary party in the partition-suit—*Jadunath v. Parameshwar*, 67 I.A. 11, 44 C.W.N. 233, A.I.R. 1940 P.C. 11 (14). It is fundamental condition of this practice in partition cases in Bengal that the extent of the share should not be in dispute—*Ibid*.

Where there is a stipulation in the mortgage-deed that if the mortgagee was subsequently ousted from any portion of the land mortgaged, he would be entitled to make good the deficiency by appropriating an equal area to be chosen by him out of the other land belonging to the mortgagor, the mortgagee can choose any portion of the property coming to the mortgagor's share after partition as against the subsequent mortgagee. In such a case the question of notice is immaterial, for the subsequent mortgagee can take no wider rights than his mortgagor—*Mohan Lal v. Wadhwa Singh*, A.I.R. 1934 Lah. 660, 149 I.C. 1195. The only difference between a transfer of an undivided share and a transfer of specific items of joint property is, while in respect of the latter.

there is opportunity, available to the transferee to insist on that property being, without prejudice to the rights of the other members to the partition, assigned to the transferor's share, he has none in the case of a transfer of undefined undivided share—*Liladhar v. Shiwaji*, A.I.R. 1936 Nag. 125 (127), 165 I.C. 550. Where a person mortgages part of his property from his undivided share and after partition he is given other property, the mortgagee can follow that proportion of the property allotted to the mortgagor that would bear the same ratio to the property mortgaged and unmortgaged held by him before—*Bala Krishna v. Apurba Krishna*, A.I.R. 1938 Pat. 199, 175 I.C. 191.

As between two substituted security rights no question of priority arises—*Krishnaveni v. Subrahmanyam*, A.I.R. 1938 Mad. 547 (550), (1938) M.W.N. 235. See Note 212 under sec. 48.

Before a finding is recorded as to what the substituted security is, the parties should be given an opportunity of placing their contentions before the Court and any evidence which they may seek to adduce. After such inquiry the Court should come to the conclusion as to what is the substituted security—*Shyama Kant v. Ram Lal*, A.I.R. 1941 Pat. 399, 22 P.L.T. 267, 193 I.C. 748.

In the case of a mortgage of undivided share the owelty money ordered to be paid to the other members whose shares were not subject to the mortgage must be paid first out of the substituted property—*Rathnavelu v. Subramaniam*, A.I.R. 1938 Mad. 767 (769), 48 M.L.W. 215; see also *Md. Kazim v. Hills*, 35 Cal. 388 (F.B.), 12 C.W.N. 373.

Other cases of substituted security :—Where a zemindar, having mortgaged by way of usufructuary mortgage his zemindari together with his *sir* land, lost his zemindari rights and became an ex-proprietary tenant of the *sir*, it was held that the usufructuary mortgage did not become ineffectual, but took effect as a mortgage of the ex-proprietary rights—*Sham Das v. Batul Bibi*, 24 All. 538. If the mortgaged property is converted into money under circumstances which prevent the mortgagee from following such property, the security will attach to the purchase-money. As the security of the mortgage is indivisible, the charge would fasten upon the whole proceeds and not on any particular part—*Tapan Das v. Jeso Ram*, 17 P.R. 1907, 2 P.L.R. 1908. Thus, where a *patni taluq* had been sold for arrears of revenue and the mortgagee thereof claimed the surplus sale-proceeds, held that the sale-proceeds would be regarded as the shape into which the security was converted; and the mortgagee was entitled to realise his money out of the whole of it—*Gosto Behary v. Shibnath*, 20 Cal. 241. Two brothers K and T mortgaged their property to B. K again mortgaged his share to B. T's interest passed to other persons. B brought a suit for sale upon the first mortgage and obtained a decree. The sale of the property satisfied the first mortgage and left a balance. B applied for half the money so left as a second mortgagee of K's share. Held that B was so entitled—*Bakhtawar v. Baru Mal*, 4 A.L.J. 492.

After-acquired interests :—If the mortgagor professes to mortgage a property over which he has no title or has a defective title, then if he subsequently acquires title thereto, the mortgagee is entitled for the

purposes of his security to all such subsequently acquired interests. See this subject discussed in Note 198 under sec. 43.

393. Clause (b)—Covenant for defence of title :—The mortgagor must defend his own title, if he is himself in possession of the mortgaged property; if the mortgagee is entitled to possession, the mortgagor must give him quiet possession and help him in defending his possession by coming forward to vindicate his title against all intruders. The mortgagee is therefore entitled to be reimbursed the expenses incurred by him in defending the title—*Damodar v. Vamanrao*, 9 Bom. 435. Where the mortgagee is deprived of a part of the mortgaged property by the act of the mortgagor, he is entitled to recover the mortgage-money from the latter—*Haris Chandra v. Keshab Chandra*, 54 I.C. 785 (Cal.). See clause (e) of section 68.

394. Clause (c)—Payment of public charges :—The covenant under this clause is personal to the mortgagor, and is not one arising by virtue of his being in possession of the mortgaged property. Hence, if after the creation of a simple mortgage, a stranger acquires the equity of redemption by adverse possession against the mortgagor, the acquirer is under no duty towards the mortgagee to pay the revenue payable on the property; and therefore if after allowing it to be sold for arrears of revenue he buys it himself, he holds it free from the mortgage—*Subbiah v. Rami Reddi*, 39 Mad. 959 (963, 964). Similarly, the purchaser of the equity of redemption from the mortgagor is under no obligation to pay the public charges, though it may be to his interest to do so to avert a revenue sale—*Srinivasa v. Gnanaprakasa*, 30 Mad. 67 (71). In other words, the liability of the mortgagor to pay the Government revenue continues, even though he parts with his equity of redemption. But this implied covenant of the mortgagor to pay the revenue comes to an end with the extinction of the equity of redemption by *Court-sale*—*Balkrishna v. Vishwanath*, 19 Bom. 528. If, however, the mortgagor himself purchases the land at the revenue sale, the original mortgage is not extinguished and the liability to pay the revenue will continue—*Po Dwe v. K. M. T. S. Chetty*, 12 Bur. L.T. 41, 51 I.C. 574. The effect would be the same if the property is purchased at the revenue sale by the heir of the mortgagor instead of by the mortgagor himself—*Lakshmayya v. Bolla Reddi*, 26 Mad. 385.

If the rights of a purchaser at a revenue sale become vested in the person for whose default the sale took place, the obligations would again attach to the property for the defaulter cannot be allowed to take advantage of his own wrong—*Narayana v. Raghavan*, A.I.R. 1953 Tr.-Coch. 563; *Sankaran v. Narayan*, A.I.R. 1954 Tr.-Coch. 38.

395. Clause (d)—Payment of rent, etc. :—Where the mortgage is without possession, the mortgagor must pay the rent reserved by the lease and fulfil all other conditions necessary for its continuance so as not to impair the mortgagee's security. If the mortgagor makes any default to the prejudice of the mortgagee, the latter can maintain a suit for damages—*Singjee v. Tirvengadam*, 13 Mad. 192. But if the mortgagee enters into possession, his liability to pay rent to the mortgagor's lessor has to be determined with reference to sec. 108 cl. (j), and not with reference to

this clause, because this clause deals only with the rights and liabilities of the mortgagor and mortgagee *as between themselves*, and not with the rights and liabilities as between the mortgagor's lessor and the mortgagee—*Thethalan v. Eralpad*, 40 Mad. 1111 (1117). The mortgage of a leasehold gives rise to question of *privity of estate* between the lessor and the mortgagee. This subject has been fully dealt with in Note 580 under sec. 108, sub-heading "Privity of estate."

396. Clause (e)—Covenant for payment of prior incumbrances :—The breach of the covenant under this clause is a default within the meaning of clause (b) of sec. 68, and the mortgagee will be entitled to sue for a personal decree, although there was no personal covenant in the mortgage—*Singjee v. Tiruvengadam*, 13 Mad. 192. Where the mortgagor left a sum of money with the second mortgagee for redemption of a prior mortgage, but the mortgagee was compelled to pay a much larger sum for redeeming that mortgage and obtaining possession, *held* that on the principle underlying this clause the mortgagor was bound to bear the whole expense incurred by the second mortgagee in obtaining possession from the first mortgagee—*Gauri Shankar v. Bhairon*, 13 O.L.J. 289, A.I.R. 1926 Oudh 207, 92 I.C. 17.

396A. Last para—Covenants run with the land :—The last para declares that the rights conferred by this section are not personal to the mortgagee. Thus, in the case of an implied contract by the mortgagor under clause (c) to pay the public charges in respect of the mortgaged property, not only the mortgagee but any one claiming through him is entitled to the benefit of this covenant—*Srinivasa v. Gnanaprakasa*, 30 Mad. 67 (71). The covenant for title implied by clause (a) can be enforced not only by the mortgagee but also by a person purchasing the interest of the mortgagee—*Ma Gun v. Mg. Lu Gale*, A.I.R. 1925 Rang. 130, 3 Bur. L.J. 282, 85 I.C. 223.

65A. (1) Subject to the provisions of sub-section (2), a
Mortgagor's power to *mortgagor, while lawfully in possession of*
lease. *the mortgaged property shall have power to*
make leases thereof which shall be binding on the mortgagee.

- (2) (a) *Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage.*
- (b) *Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance.*
- (c) *No such lease shall contain a covenant for renewal.*
- (d) *Every such lease shall take effect from a date not later than six months from the date on which it is made.*

(e) *In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and a condition of reentry on the rent not being paid within a time therein specified.*

(3) *The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of sub-section (2) may be varied or extended by the mortgage-deed and, as so varied and extended, shall, as far as any be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub-section.*

397. This section has been inserted by sec. 30 of the T. P. Amendment Act (XX of 1929). The reasons have been thus stated:—

“In the absence of an express provision in the Act, a question is sometimes raised whether a mortgagor in possession is competent to grant a lease of the mortgaged property during the continuance of the mortgage and whether such a lease is binding on the mortgagee. In England, before the Conveyancing Act, 1881, was passed, a mortgagor could not grant leases which were binding on the mortgagee [*Keech v. Hall*, 1 Smith L. C., 12 Edn., 577; *Corbett v. Plowden*, 25 Ch. D. 678; *Robbins v. Whyte*, (1906) 1 K.B. 125]. This view was followed in the case of an English mortgage in Bombay (I.L.R. 30 Bom. 250) and it was observed as follows :—

‘If a mortgagor left in possession grants a lease without the concurrence of the mortgagee, the lessee has a precarious title, inasmuch as, although the lease is good as between himself and the mortgagor who granted it, the paramount title of the mortgagee may be asserted against both of them.’

“In Allahabad, it was held that a mortgagor ordinarily cannot, without the concurrence of his mortgagee, execute a lease which would be binding upon the mortgagee. He may execute a lease which may be binding upon himself and so long as the mortgagee does not interfere with the possession of the lessee, so long may the lessee enjoy the benefit of the lease; but ordinarily without the concurrence of the mortgagee the mortgagor cannot grant a lease which will be binding upon the mortgagee (2 A.L.J. 294). This view was not accepted in Calcutta. In 40 C.L.J. 500, following the observation in Ghose on Mortgage (Vol. I, p. 213), it was held that a mortgagor may make a lease conformable to usage and in the ordinary course of management, and the tenancy so created will be binding on the mortgagee. The Conveyancing Act, 1881, expressly authorises a mortgagor to grant leases of the mortgaged property for particular periods (section 18 of the Conveyancing Act, 1881, and section 99 of the Property Act 1925). In our opinion, it is necessary to provide expressly in the Transfer of Property Act that a mortgagor shall, sub-

ject to express conditions in the mortgage-deed, be entitled to grant a lease of the mortgaged property. In order, however, to protect the interests of the mortgagee, we propose to provide certain restrictions, mostly taken from section 99 of the Law of Property Act, 1925, with variations suitable to the conditions of this country."—*Report of the Special Committee.*

Clauses (a) and (b) of sub-section (2) of this section have been taken from *Kiran Chandra v. Dutt and Co.*, 40 C.L.J. 500, 29 C.W.N. 94, 85 I.C. 522, A.I.R. 1925 Cal. 251 (252, 253), in which the following observations have been made : "The powers of a mortgagor to grant leases after the execution of the mortgage are very limited. He may no doubt make a lease conformable to usage in the ordinary course of management ; for instance, he may create a tenancy from year to year in the case of agricultural lands or from month to month in the case of houses ; but it is well settled that a mortgagor cannot, after the date of the mortgage, and in the absence of an express power in that behalf or the concurrence of the mortgagee, create, except as stated above, a lease or a tenancy which will bind the mortgagee, and if he purports to create such a lease or tenancy, the mortgagee or his transferee may proceed to eject the lessee or tenant. If that is so, the payment of rent in advance by virtue of a lease granted by the mortgagor after the execution of the mortgage is not binding on the mortgagee." See also *M. P. M. S. Firm v. Ko Pyu*, 10 Rang. 210, A.I.R. 1932 Rang. 113 (114), 138 I.C. 213 ; *Ram Ratan v. Sew Kumari*, A.I.R. 1938 Cal. 823 (827) ; *Chettyar Firm v. Sein Htaung*, A.I.R. 1935 Rang. 420, 159 I.C. 1038. The law is also laid down by Mookerjee J. as follows : "It cannot be maintained that the mortgagor has anything like a general authority to deal with or affect the mortgaged property during his possession thereof. The true position thus is that the mortgagor in possession may make a lease conformable to usage in the ordinary course of management, for instance, he may create a tenancy from year to year in the case of agricultural lands or from month to month in the case of houses. But it is not competent to the mortgagor to grant a lease on unusual terms, or to authorise its use in a manner or for a purpose different from the mode in which he himself had used it before he granted the mortgagee"—*Madan Mohan v. Raj Kishori*, 21 C.W.N. 88 (92), 39 I.C. 182 ; followed in *Anand Ram v. Dhanpat*, 1 P.L.J. 563 (569), 38 I.C. 37, *Beni Prasad v. Gangoz*, 7 Pat. 349, A.I.R. 1928 Pat. 372 (374), 110 I.C. 287 ; and *Mathura v. Mandil*, 1 P.L.T. 392, 56 I.C. 805 (806). See also *Tulshi Ram v. Muna Kaur*, A.I.R. 1937 Oudh 146, 12 Luck. 161, 162 I.C. 225. A mortgagor cannot create a right in the tenant to hold the land rent-free—*Rup Narain v. Sheo Sagar*, A.I.R. 1939 Pat. 258, 180 I.C. 105, or a perpetual lease—*Ram Sahai v. Mahabir*, A.I.R. 1943 Oudh 407, (1943) O.W.N. 320. In order that a mortgagor may lease the mortgaged property, it is necessary that the mortgagor must be in possession and the lease must be the usual mode of management of the property—*Moidunni v. Poothari*, A.I.R. 1933 Mad. 876 (878), 65 M.L.J. 826.

This section would not apply if the mortgage took place before it was inserted into the Act, even if the lease was actually granted after the section was introduced—*Pundarikakshudu v. Kondayya*, (1940) 1 M.L.J. 601, A.I.R. 1940 Mad. 669, 51 M.L.W. 481.

Although a defendant mortgagor in a mortgage suit has power, so long as he retains possession to grant leases in the ordinary course of management of his property, he cannot make transfers to enure to the benefit of the mortgagee. Such a transfer, if made, can undoubtedly be avoided under sec. 52—*Niser v. Sunder*, A.I.R. 1927 All. 657, 25 A.L.J. 1025, 104 I.C. 292. A lease is void, unless it is one granted in the ordinary course of management—*Pundarikakshudu v. Kondayya*, supra.

Even when the mortgagee is an equitable mortgagee, a lessee from the mortgagor who takes a lease which is not granted in the usual course of management, is bound by the mortgage, even if he had no notice of it—*Ram Ratan v. Sew Kumari*, A.I.R. 1938 Cal. 823 (828).

Before the enactment of this section the question whether the mortgagor in possession had power to grant lease had to be determined with reference to the authority of the mortgagor as bailiff or agent of the mortgagee to deal with the mortgaged property in the usual course of management and not on the distinction between the English mortgage and a simple mortgage or on consideration germane to sec. 66—*Kamakshaya Narayan v. Chohan Ram*, A.I.R. 1952 S.C. 401. The burden of proof in such a case is however on the lessee—*ibid*. In this case the lessee did not allege that the permanent lease granted by the mortgagor was in his usual course of management; therefore it was held by the Supreme Court that the lease could not prevail against the mortgagee. See in this connection *Gobinda v. Sasadhar*, A.I.R. 1947 Cal. 73, 51 C.W.N. 323 and *Mallappa v. Shivappa*, A.I.R. 1950 Bom. 71, 51 Bom. L.R. 820. In the following cases it was held that, granting of a lease was not an act of waste within the meaning of sec. 66 and was valid—*Ramlal v. Muhammad Irshad*, 1890 A.W.N. 59; *Tana Peena v. Mamakkantakath*, 8 L.B.R. 413, 34 I.C. 24 (25); *Chotey Singh v. Baldeo*, 2 O.W.N. 457, 12 O.L.J. 527, A.I.R. 1925 Oudh 542 (544), 88 I.C. 947. In a case decided under secs. 66 and 68 it has been held by the Allahabad High Court that, a mortgagee in possession is entitled to lease the mortgaged property permanently irrespective of its effect on the mortgagee provided that it is not destructive or permanently injurious of the property so as to render the mortgagee's security insufficient and the purchaser of the property in execution of the mortgage-decree cannot turn the lessee out—*Niader Singh v. Ram Chander*, A.I.R. 1935 All. 511, 154 I.C. 1009. Thus, it appears that the right to lease given to the mortgagor by this section being hedged in by the restrictions imposed therein are narrower than what he enjoyed under sec. 66.

Clause (b) lays down that no rent shall be payable in advance; and the fact that the lessee paid rent for 3 years in advance is no answer to the mortgagee's suit for ejectment. See *M. P. M. S. Firm v. Ko Pyu*, 10 Rang. 210, A.I.R. 1932 Rang. 113 (114). The above Burma case (8 L.B.R. 413) and *Rowther v. Uma*, 34 I.C. 24 in which a grant of a lease with receipt of rent in advance for the whole period was upheld, are no longer good law.

Clause (c) prohibits the mortgagor from making a covenant for renewal. Even before the amendment, it was also held in a Madras

case that the mortgagor could not grant a renewal, as the effect of the renewal was to materially diminish the security—*Moidunni Haji v. Madhavan*, 65 M.L.J. 826, A.I.R. 1933 Mad. 876 (877).

Clause (e) lays down that in the case of buildings, the duration of the lease shall not exceed three years. In *Rustomji v. Keshavji*, 28 Bom. L.R. 1162, 98 I.C. 436, A.I.R. 1926 Bom. 567 (569), a lease of certain premises for 12 years was held to be invalid under sec 66. Similarly, a lease of a building for 20 years with a covenant for renewal was held to be not binding on the mortgagee—*Mangtula v. Upendra*, 57 Cal. 82, A.I.R. 1930 Cal. 335 (338), 125 I.C. 661. So also, it was held that a permanent lease of the mortgaged property rendered the security insufficient within the meaning of sec. 66—*Bank of Upper India v. Jaggan*, 4 O.W.N. 228, A.I.R. 1927 Oudh 148 (149), 100 I.C. 728; *Manthura v. Jagmohan*, 6 Luck. 546, A.I.R. 1931 Oudh 256, 132 I.C. 532. The lease of a house-site by the mortgagor is invalid when it is not granted in the ordinary course of management—*Chettyar Firm v. Sein Htaung*, A.I.R. 1935 Rang. 420, 159 I.C. 1038.

Where a mortgagor in possession acts in contravention of sub-sec. (2) the lease so created is not binding on the mortgagee. He can treat it as a nullity, there being nothing to set it aside as a condition precedent to his right of action—*Surya Kumar v. Girish Chandra*, A.I.R. 1951 Ass. 101.

But although a lease may be for a period of more than three years, still as between the mortgagor and his tenant, the tenancy will be valid until the mortgagee chooses to exercise his paramount rights. Until a suit for ejectment has been brought by the mortgagee, the tenant will be estopped from disputing his landlord's title on the ground of invalidity of the lease—*Rustomji v. Keshavji*, supra. But see *Kamakshya v. Ramzan*, A.I.R. 1945 Pat. 106, 23 Pat. 648, where it has been held that in such a case, it is not open to the mortgagee to eject the lessee. The mortgagee's right is merely to cause the mortgaged property sold for the mortgage-debt. A lease granted by a mortgagor under this section pending a suit by the mortgagee would be subject to the rules of *lis pendens*—*M. Sathianesan v. M. Sankaran*, A.I.R. 1957 Trav.-Co. 292. In the case of a lease granted by the mortgagor prior to the enactment of sec. 65A, out of the ordinary course of management, during the pendency of a suit for sale by the mortgagee, the lessee could apply for being joined as a party and ask for opportunity to redeem. But if he allowed the property to be sold in execution of the decree he lost his right of redemption—*Mangru Mahto v. Thakur Taraknathji Tarkeswar Math*, A.I.R. 1967 S.C. 1390.

This new section has no retrospective operation—*Dasain v. Ramdulari*, 10 Pat. 332, A.I.R. 1931 Pat. 210, 133 I.C. 169; *Korlapalli v. Sethraji*, A.I.R. 1936 Mad. 942, 71 M.L.J. 638, 165 I.C. 951. Thus a lease executed before the Amending Act of 1929 came into force (i.e., 1st April, 1930) is not governed by this section, but by sec. 66—*Tulshi Ram Mt. Muna Kuar*, A.I.R. 1937 Oudh 146, 12 Luck. 161, 162 I.C. 225.

66. A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate; but he must
 Waste by mortgagor in possession.

not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act.

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third or, if consisting of buildings, exceeds by one half, the amount for the time being due on the mortgage.

The equitable principle enunciated in this section is applicable to the Punjab—*Bhagwan Dei v. Secretary of State*, 124 P.L.R. 1902.

Scope :—This section has nothing to do with a mortgagor's power to lease. It is a statutory provision of the powers of the mortgagor in possession in regard to waste of the mortgaged property. The mortgagor under this section is not liable for what is called "permissive waste" in English law, *i.e.*, omission to repair or to prevent natural deterioration; but he is liable for destructive waste, *i.e.*, acts which are destructive or permanently injurious to the mortgaged property if the security was insufficient or would be rendered insufficient by such acts—*Kamakshaya v. Chohan Ram*, A.I.R. 1952 S.C. 401.

397A. Lease :—Before the enactment of sec 65A the power of a mortgagor to lease mortgaged property in his possession was limited by the rule that the mortgagor must not by his act render the security insufficient, or do anything that was not necessary for prudent management, and the burden of proving that the security was unimpaired by the lease was on the lessee—*Moiduni v. Poothari*, A.I.R. 1933 Mad. 876, 65 M.L.J. 826. A covenant against a lease in a mortgage-deed could not put the mortgagee in a better position as regards his rights which are laid down in secs. 66 and 68—*Naider Singh v. Ram Chander*, A.I.R. 1935 All. 511, 154 I.C. 1009. Where a mortgagor executed a lease of mortgaged property without any premium or reserving any rent and the lessees were to hold the land not only so long as a single tree stood on the land, but also for a further period of 5 years, the lease could not be said to be necessary or even expedient in the interests of proper management of the property and as such, it was invalid under this section as well as sec. 65A—*Tulshi Ram v. Muna Kuar*, A.I.R. 1937 Oudh 146, 12 Luck. 161, 162 I.C. 225. Where a mortgagor executed a *Zuripeshgi* lease for 30 years prior to the Amending Act of 1929 it was governed by this section and not by sec. 65A. So it could not be enforced against the mortgagee auction-purchaser as the mortgage-security was rendered insufficient—*Ibid* at p. 149.

398. Security rendered insufficient :—This section is intended to apply generally to all cases where a mortgagor has done some acts which either destroy or injure the property in his possession and by such act the security is rendered insufficient—*Ramasray v. Atkins*, A.I.R. 1938 Pat. 189 (192), 175 I.C. 279. The onus is not on the lessee—*Ibid*. The only test is to see whether the mortgagor's act impairs the security so as to render it insufficient. If it does not, the act is within the mortgagor's competence and is binding on the mortgage, even if it amounts to a des-

tructive or permanently injurious act—*Mallappa v. Shivappa*, A.I.R. 1950 Bom. 71, 51 Bom. L.R. 820.

A mortgagor in possession can *prima facie* exercise the ordinary rights of an owner in possession, save that he should not commit any act which will be destructive or permanently injurious to the property, and which will thereby render the security insufficient—*Tana Peena v. Mamakkantakakath*, 8 L.B.R. 413, 34 I.C. 24 (25). Therefore, the mortgagee is entitled to maintain an action for damages for any act done by the mortgagor, such as cutting timber, tearing down houses, fixtures and the like, although such fixtures may have been placed on the premises by the mortgagor after the making of the mortgage, and likewise against strangers whose wrongful acts affect injuriously the mortgage-security—*Aiyappa Reddi v. Kuppusami Reddi*, 28 Mad. 208. The mortgagor may also be restrained by *injunction* if he attempts to remove valuable fixtures where such removal is likely to reduce the value of the security—*Ackroyd v. Mitchell*, (1860) 3 L.T. (N.S.) 236.

B was both a mortgagee and lessee of a glass factory with its fixtures, fittings and tools belonging to A. C for satisfying a decree obtained against A attached the factory and removed and sold part of its roofing: held, that B's rights as mortgagee and lessee were infringed by the action of C which resulted in diminution of the value of the premises. B was therefore entitled to damages against C measured by the loss of value of the mortgaged premises—*Ratti Ram v. Moti Lal*, A.I.R. 1949 P.C. 68, 75 I.A. 160, I.L.R. 1948 All. 343.

399. Acts of waste :—The following have been held to be acts of waste which permanently impair the value of the security:—

(a) Minings under buildings so as to endanger their stability—*Dugdale v. Robertson*, 3 Jur. (N.S.) 627.

(b) Removal of valuable fixtures—*Ackroyd v. Mitchell*, 3 L.T. (N.S.) 236.

(c) The cutting of timber—*Usborne v. Usborne*, 1 Dick. 75; *Aiyappa v. Kuppusami*, 28 Mad. 208. (cited above); even though the timber be ripe for cutting and may deteriorate if left standing, still the cutting of such timber is an act of waste—*Harper v. Aplin*, (1886) 54 L.T. 483.

(d) Working new mines—*Clavering v. Clavering*, 2 Eq. Cas. Abr. 757.

(e) Pulling down buildings and appropriating the materials or their price—*Punnayya v. Chilakalapudi*, A.I.R. 1926 Mad. 343; 91 I.C. 754.

Acquiescence :—If a mortgagee does not take steps in time, say for two years, calling upon the mortgagor to furnish additional security, the mortgagee would be deemed to have acquiesced in the diminished security—*Prosanna v. Girish*, A.I.R. 1934 Cal. 149, 37 C.W.N. 1162, 149 I.C. 667.

Onus of proof :—When the mortgagor does any act which is likely to prove destructive or permanently injurious to the mortgaged property, the *onus* lies on the mortgagor or his representative to prove that the act is lawful and valid and that the security has not been rendered insufficient—*Bhagwan Dei v. Secretary of State*, 85 P.R. 1902, 124 P.L.R. 1902.

400. Explanation :—The Explanation is the same as that appended to sec. 10 of the Indian Easements Act. It follows an old distinction made in England between land and houses. See *King v. Smith*, 2 Hare 239; *Usborne v. Usborne*, 1 Dick. 75. "This Explanation lays down an authoritative rule for the purpose of determining the sufficiency of a security, based on the practice of the prudent man of business not to lend money on mortgage unless the property is worth at least one-third more than the amount of the loan. If the property consists of houses which are subject to many casualties from which land is free, the ideally prudent mortgagee would seldom lend more than half the value of the building"—Ghose's *Law of Mortgage*, 5th Edn., p. 217.

Rights and Liabilities of Mortgagee.

67. In the absence of a contract to the contrary, the mortgagee has at any time after the mortgage-money has become *due* to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court a decree that the mortgagor shall be absolutely debarred of his right to redeem the property, or a decree that the property be sold.

A suit to obtain a decree that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed—

- (a) to authorise any mortgagee, other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or an usufructuary mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale ; or
- (b) to authorize a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure ; or
- (c) to authorize the mortgagee of a railway, canal, or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale ; or
- (d) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

Amendment :—The following changes have been made by sec. 31 of the Transfer of Property Amendment Act (XX of 1929) :—

(1) The word 'due' has been substituted for 'payable'. For the reasons stated in the notes under sec. 60, the word 'payable' should be replaced by the word 'due'—*Report of the Special Committee*. See Note 359 under section 60.

(2) The word 'decree' has been substituted for 'order' in several places, as the old practice of passing an *order absolute* has been abolished by the enactment of O. 34, C. P. Code, under which a final *decree* is now passed in a mortgage-suit. See Note 373 under sec. 60.

(3) Clause (a) has been redrafted. The old clause stood as follows :—

“(a) to authorize a simple mortgagee as such, to institute a suit for foreclosure, or a usufructuary mortgagee, as such, to institute a suit for foreclosure or sale, or a mortgagee by conditional sale, as such, to institute a suit for sale ;”

The present clause (a) gives the following remedies to the mortgagees in respect of the several classes of mortgages :—

(a) Simple mortgage :—Remedy by sale, and not by foreclosure. This was so under the old section.

(b) Mortgage by conditional sale :—Foreclosure, and not sale. The remedy was the same under the old section.

(c) Usufructuary mortgage :—No foreclosure or sale. Under the old section the law was the same.

(d) English mortgage :—Sale only, and *not foreclosure*. Under the old section the remedy was both by foreclosure and sale.

(e) Equitable mortgage :—Sale only and *not foreclosure*. There was no express provision under the old section 59.

(f) Anomalous mortgage :—Ordinarily, sale ; foreclosure allowed, if it is provided by the terms of the mortgage.

402. Mortgage-suit :—The person who has a right to sue on a mortgage is the mortgagee named in the mortgage-deed whether the fund used is his own or of some other person—*Subramanian v. Shivalker*, A.I.R. 1937 Rang. 508 (510).

A mortgage is indivisible and if all the parties entitled to a share in the money due on the mortgage are not upon the record, the suit must be dismissed in its entirety—*Girdhar v. Motilal*, A.I.R. 1941 Nag. 5, 1941 N.L.J. 151 ; see also *Girwar Narain v. Mt. Makbunnessa*, 1 Pat. L.J. 468, 36 I.C. 542, A.I.R. 1916 Pat. 310 ; *Gangaram v. Balbhadrasai*, I.L.R. 1938 Nag. 370, A.I.R. 1938 Nag. 42, 173 I.C. 44 ; *Gobinda Chandra v. Jamaluddin*, 60 Cal. 777, 37 C.W.N. 478, A.I.R. 1933 Cal. 621. Similarly in a mortgage-suit it is the manifest duty of the mortgagee to bring on record persons representing the equity of redemption, and if he fails to do so, the decree obtained by him is a nullity as against those who represent the equity of redemption—*Matinuzzaman v. Hunter*, 14 Luck. 548, A.I.R. 1939

Oudh 161, 1939 O.W.N. 420 relying on *Khiraajmal v. Daim*, 32 I.A. 23, 32 Cal. 296, 9 C.W.N. 201.

Where in a mortgage suit instituted by one co-mortgagee impleading the other co-mortgagee as defendant as the latter was not willing to join as plaintiff, his right is not extinguished automatically on the passing of a decree irrespective of whether or not his right was the subject of adjudication—*Gopalaswami v. Nataraja*, A.I.R. 1948 Mad. 17, I.L.R. 1948 Mad. 190. Where the prior and the subsequent mortgagees have in their respective suits obtained decree and purchased the mortgaged property in Court sale, the remedy of the subsequent mortgagee who is a later purchaser is to redeem the prior mortgagee who however will have the right to redeem the subsequent mortgagee retaining possession of the mortgaged property—*Pyli v. Varkki*, A.I.R. 1951 Tr.-Coch. 36. If a puisne mortgagee impleaded in a suit on a prior mortgage, fails to redeem that mortgage and allows his property to be sold, his security ceases and he can no longer claim to redeem the prior mortgage—*Shamsher v. Lal Batuk*, A.I.R. 1953 All. 147.

Where in a suit by a co-mortgagee for his share of the mortgage-money other co-mortgagees are impleaded as defendants and in execution of his mortgage decree sells the entire mortgaged property, whether the co-mortgagee defendants would be entitled to withdraw their shares in the surplus sale proceeds or be compelled to institute a separate suit for the purpose, there is a divergence of opinion (see *Lachmi Narain v. Babu Ram*, A.I.R. 1935 All. 391 and *Bansiram v. Gunia*, A.I.R. 1930 Mad. 985)—*Mati Lal v. Bejoy Lal*, A.I.R. 1943 Cal. 455, I.L.R. (1943) 1 Cal. 59.

The circumstances that the mortgagee filed a suit against a wrong person does not affect the rights of the real owners of the equity of redemption. So the latter cannot be heard to say that a second suit is not maintainable against them. But a decree in the first suit not being binding against the owners of the equity of redemption, the mortgagee in the second suit would not be entitled to recover possession on the footing of that decree—*Chandramma v. Guna Sethan*, A.I.R. 1931 Mad. 542 (548, 459), 133 I.C. 497. If a mortgagee takes no steps for the execution of his mortgage decree but files another suit within the period of limitation for the sale of the mortgaged property, the subsequent suit is maintainable—*Somasundaram Pillai v. Raman Pillai*, A.I.R. 1966 Ker. 273. Likewise a second suit for redemption in the absence of a final decree in the first suit is not barred by *res judicata*—*Ghaithu Mohamed v. Ennasi*, I.L.R. (1967) 2 Mad. 124.

One co-mortgagee can sue to recover his share of the mortgage-money if he makes the other co-mortgagees defendants when they refuse to join as plaintiffs, and if he values the suit according to the full amount due under the mortgage and pays court-fees thereon. The same principle applies to charges also—*Kailas v. Sundaram*, A.I.R. 1942 Mad. 438.

Where the claim for a mortgage-decree fails, the mortgagee cannot be allowed to set up an alternative claim for a decree against the representatives of the deceased mortgagor for the moneys advanced under the mortgage, for the first time in the Privy Council appeal—*Bank of Khulna v. Joti Prakash*, 67 I.A. 317, 45 C.W.N. 259, A.I.R. 1940 P.C. 147 (150).

In a suit for foreclosure or sale a personal representative of a deceased mortgagor, as much as the mortgagor himself, is estopped from denying the mortgagor's right to mortgage the property, and this is so although the personal representative has a right independent of such capacity but has been sued only in his representative capacity—*Champabati v. Md. Yakub*, 39 C.W.N. 1100.

As a general principle the mortgagee can relinquish the security and can sue on the personal covenant to pay—*Moti Ram v. Basheshwar*, A.I.R. 1939 Pesh. 34, 1939 Pesh.L.J. 42, 183 I.C. 833; see also *Sukhdiv v. Lachman*, 24 All. 456, *Candu v. Narayana*, A.I.R. 1925 Mad. 1083, 87 I.C. 557; *Ramaswami v. Subbaraya*, 49 M.L.J. 490, A.I.R. 1925 Mad. 1101, 88 I.C. 648. The mere recital in the plaint that the plaintiff had entered into a contract with the mortgagors that the defendants should sell their property to the mortgagees is not tantamount to an admission that the mortgage is no longer in existence—*Satyanarayanamurthy v. Krishnamoorthy*, (1940) 2 M.L.J. 346, 1940 M.W.N. 896, A.I.R. 1940 Mad. 884.

Onus:—In a suit on a mortgage executed by the members of a joint Hindu family on behalf of themselves and their minor sons for paying their antecedent debts, the burden remains heavily upon the mortgagee to establish compliance with the conditions under which the Hindu law permits the interests of the minor members to be taken from them—*Kishori Lal v. Bhawani Shankar*, 44 C.W.N. 1013, 1940 A.L.J. 667, A.I.R. 1940 P.C. 145, 189 I.C. 443.

Limitation:—There is no legal presumption that a mortgage was executed on any particular day within the month in which it is proved to have been executed. There must be positive proof of the actual starting point, when a suit is challenged as barred by limitation—*Shankara v. Kuttani* A.I.R. 1940 Mad. 639, 1940 M.W.N. 446.

An acknowledgment made by a mortgagor after he has transferred the mortgaged property, though made before the expiry of the period of limitation, will not bind the transferee, and the suit against the latter instituted after the period prescribed by Art. 132, Limitation Act will be barred—*Bank of Upper India v. Skinner*, 47 C.W.N. 43 (P.C.).

Contract to the contrary:—For the meaning of this expression see *Mohamedali Jaffer Karachiwalla v. Noorally Rathansi Ranjan Nanji*, (1958) 3 W.L.R. 572.

Paramount title:—As a general rule, the ordinary scope of a mortgage-suit is to cut off the equity of redemption and bar the rights of the mortgagor and those who derive title from him. A stranger who sets up a title independent of the mortgage and paramount or adverse to it is not a proper party to the mortgage-suit—*Suraj Chandra v. Behari Lal*, I.L.R. 1939, 2 Cal. 551, 43 C.W.N. 1126, A.I.R. 1939 Cal. 692; *Jajneshwar v. Bhuban Mohan*, 33 Cal. 425. Where there is an allegation in the plaint derogatory to the title of the prior mortgagee and if he consents to have the title decided, then he will be bound by the decision in that suit. But if the paramount title is in conflict with the title of the mortgagor as well as the mortgagee, that is a matter which should not ordinarily be decided in a mortgage-suit—*Rameshwar v. Harakhilal*, 20 Pat. 841. A person

claiming a paramount title is bound to be discharged from the suit—*Shakuntalabai v. Roshanlal*, A.I.R. 1941 Nag. 133, 1941 N.L.J. 81; see also *Devidas v. Nilkanthrao*, I.L.R. 1936 Nag. 157, A.I.R. 1936 Nag. 73. But the rule is not an absolute one. Questions of title may be investigated in a mortgage-suit, if it is necessary to give complete relief to the plaintiff or to secure to him, as a result of the decree in the mortgage-suit, a quiet unobstructed possession—*Laxmanrao v. Madho Prasad*, A.I.R. 1932 Nag. 60, 1942 N.L.J. 156. In proceedings for a final mortgage-decree when the person claiming paramount title is in possession, it is convenient to make him a party and decide the rights of the parties *inter se*—*Ibid.*

Ordinarily, the title of persons who set up a claim adverse to the mortgagor and mortgagee should not be investigated in a suit on a mortgage. The joinder of such persons, as stated by the Privy Council in *Radha v. Reoti* (38 All. 488, 43 I.A. 187, 35 I.C. 939) is irregular and leads to confusion. But when such question of paramount title has been gone into by the trial Court, the appellate Court should not reverse the decision on that ground alone unless the decision has affected the jurisdiction of the Court or caused a prejudice to the parties by the trial on the merits—*Veeraraghavalu v. Suryanarayana*, A.I.R. 1936 Mad. 338 (340), 43 M.L.W. 525, 163 I.C. 303. The question whether issues of title paramount should or should not be decided in a mortgage-suit depends on each particular case. Where in a mortgage-suit against the legal representatives of the deceased mortgagor the former contested the suit saying that the mortgagor had no right to mortgage the property which was the self-acquired property of the defendant's father (brother of the mortgagor), it was held that it was an eminently fit case where the question of paramount title should be tried and decided before the mortgage-security was brought to sale—*Kasi Chettier v. Ramasami*, A.I.R. 1937 Mad. 176, 44 M.L.W. 706, 165 I.C. 1006. Where the auction-purchaser of the mortgaged property in a rent-sale was made a party in a suit on the mortgage and he claimed a discharge on the ground of paramount title, it was held that as the auction-purchaser was in possession, the mortgagee would merely get a paper-decree if the respective rights of the mortgagee and the auction-purchaser was not settled. It was quite allowable, instead of driving the mortgagee to another suit, to combine two reliefs and two causes of action in such a suit and to pass a decree in the special form as provided in Form No. 10, C. P. Code—*Gauba v. Ganpatrao*, A.I.R. 1937 Nag. 376 (377, 378), I.L.R. (1937) Nag. 498. Where a lessee is added as a party to the mortgage-suit as purchaser of the equity of redemption, and there is nothing in the plaint to suggest that his title, if any, as tenant was challenged, it is not incumbent on him to set up his tenancy right in the mortgage-suit and as such he is not precluded from raising this question in a subsequent suit—*Suraj Chandra v. Behari Lal*, *supra*, relying on *Radha Kishan v. Khurshed Hossein*, 47 I.A. 11, Cal. 662, A.I.R. 1920 P.C. 81.

Composition:—A mortgagee having once accepted a trust-deed by which a composition of debt was made between the debtor and the creditor, cannot fall back on any remedy on the footing of the original mortgage—*Nath Mal v. Gokul Chand*, A.I.R. 1938 Lah. 768 (776).

403. Mortgage-money:—'Mortgage-money' does not mean the whole of the mortgage-money; if a mortgage is payable by instalments, it is open

to a mortgagee to bring a suit for foreclosure for an instalment of the principal and interest—*Karnidan v. Meghraj*, 11 N.L.R. 153, 30 I.C. 981. Where a subsequent loan is taken by the mortgagor on a promissory note with a stipulation not to redeem the mortgage before discharge of the subsequent loan, the mortgage debt is not thereby augmented and the mortgagee cannot ask for a mortgage decree for that loan—*Radhaswami Satsang Sabha, Dayalbag v. Hanskumar*, A.I.R. 1959 Madh. Pra. 172.

Where a usufructuary mortgagee granted a lease of the property to the mortgagor, the amount of rent payable under the lease being exactly the amount of interest payable under the mortgage, and the mortgage-deed contained a covenant to the effect that any arrears due by the lessee would be a charge on the mortgaged property, held that the arrears of rent were included in the mortgage-money—*Altaf Ali v. Lalta Prasad*, 19 All. 496 (498, 409); Cf. *Imdad Hasan v. Badri Prasad*, 20 All. 401 (407) cited in Note 369 under sec. 60. See also *Jafar Husen v. Ranjit*, 21 All. 4 (9), and *Ramarayaningar v. Maharaja*, 50 Mad. 180 (P.C.). But see 27 All. 313.

404. When mortgage-money becomes due :—Neither sec. 67 nor any other section in this Act lays down any provision in regard to the time when the mortgage-money is to become due. It is to be determined in each case upon the terms of the contract between the parties—*Raghibir v. Kumwar Rajendra*, 8 Luck. 488, 144 I.C. 279, A.I.R. 1933 Oudh 237 (238). The mortgagee is not entitled to foreclose (or to bring a suit for sale) before the mortgage-money becomes due. When a mortgage contains a covenant not to redeem for a fixed period, the mortgagee cannot foreclose before the expiration of the term—*In re Hone's Estate*, (1875) Ir. R. 8 Eq. 65. See Note 359 under sec. 60.

Where no time is fixed for payment, the mortgage-money becomes payable on the date of execution—*Nilcomal v. Kamini Kumar*, 20 Cal. 269 (272). Where a mortgage is payable 'on demand', and fixes no time for payment, the mortgage-money is deemed to be payable forthwith from the date of execution of the mortgage, no previous demand by the mortgagee being necessary—*Barkatunnissa v. Mahboob Ali*, 42 All. 70 (73). But it is equitable that the mortgagee must give reasonable notice to the mortgagor to enable him to find the money—*Toms v. Wilson*, (1862) 4 B. & S. 442; *Brightly v. Norton*, (1862) 32 L.J.Q.B. 38; *Fitzgeralds' Trustee v. Mellersh*, (1892) 1 Ch. 385 (390); *Moore v. Shelley*, (1883) 8 App. Cas. 285.

A hypothecation bond stipulated that the principal was to be paid in two years and the interest in the meantime monthly; it further provided that on default in the payment of interest, the principal with interest would become payable 'on demand'. Held that as soon as default was made in the payment of interest in any month, the money became due forthwith, and no actual demand was necessary to complete the plaintiff's cause of action—*Perumal v. Alagirisami*, 20 Mad. 245 (248). But if the bond provided that in default of payment of interest, the principal would become due with interest at an enhanced rate on demand by the obligee, the cause of action did not arise until a demand was actually made by the plaintiff—*Nellakaruppa v. Kumarasami*, 22 Mad. 20 (22).

It has been held in two cases that if a mortgagee, who is entitled to obtain possession, fails to get possession of the mortgaged property, he has a right to sue for the mortgage-money under sec. 68; that is, the mortgage-money 'becomes payable'; and he is entitled to sue under this section, either for foreclosure or for sale, as the case may be—*Sita Nath v. Thakurdas*, 46 Cal. 448 (454); *Subbamma v. Narayya*, 41 Mad. 259 (264) (F.B.). But this is no longer good law; because clause (d) of sec. 58, as now amended, makes it clear that a usufructuary mortgagee does not cease to be a usufructuary mortgagee by reason of the fact that possession has not been delivered to him by the mortgagor; consequently, he is not entitled to the remedy either of foreclosure or of sale, by virtue of clause (a) of this section. See Note 342 under sec. 58.

When mortgagee may sue before expiry of the term:—Where a mortgage-deed provided that if two instalments of six-monthly interest be not paid in full, the mortgagee would have the option, before the expiry of the period fixed, to recover the whole of the amount due through Court, held that the mortgagee could exercise his option when the mortgagor committed default—*Raghubir v. Kunwar Rajendra*, 8 Luck. 488, 144 I.C. 279, A.I.R. 1933 Oudh 237 (238, 239). Where a deed of mortgage by conditional sale provided that the mortgage-amount would be paid in two instalments, that if the mortgagor failed to pay at the stipulated time, he would pay compound interest, and that if the amount was not paid as stipulated the mortgage would be foreclosed, held that the parties intended that there should be foreclosure only after failure to pay the whole amount due in the manner stipulated, i.e., on failure to pay the whole amount on the due date of payment of the *second* instalment.—*Karindan v. Maghraj*, 11 N.L.R. 153, 30 I.C. 981 (982). Compare *Kannu v. Natesa*, *infra*. But if a mortgage-bond contains a stipulation that "if the property be found to have been mortgaged or transferred to any one or if there should arise any case which might be considered likely to cause total or partial loss of this principal money and interest, the mortgagee shall have power to realise the entire mortgage-money from the mortgagor and from his property without waiting for the expiration of the term," held that such a covenant would enable mortgagee to recover his mortgage-debt before the expiry of the term in the event of the discovery of a prior mortgage or of anything which may be considered likely to cause loss of the debt—*Bhawani v. Sheodihal*, 26 All. 479 (481). Where by a deed of mortgage a mortgagor covenanted to repay the principal within one year and the interest every month, and on default in paying interest, to pay both at once, held that as soon as default was made in the payment of interest, both the principal and interest became payable at once and the suit could be instituted forthwith without waiting for the expiry of the year—*Yeo Htean v. Abuzaffar*, 27 Cal. 938 (P.C.).

Where the mortgagee found that some of the properties mortgaged did not belong to the mortgagor and the latter failed to furnish additional security, the mortgagee could sue under this section even before the mortgage-money became due—*Venkat Rao v. Mahableshwar*, 26 Bom. 241 (245).

Suit for interest before principal money is due:—Where a mortgage-document provided for payment of interest every month and for enhanced

interest on default, *held* that there was a 'contract' to the contrary' within the meaning of this section, and a suit for interest was maintainable even before the principal money became due. Failure to pay interest at the stipulated time would, in a mortgage prepared in the most ordinary form, release the mortgagee from the necessity of waiting for the expiry of the term—*Seaton v. Twyford*, (1870) L.R. 11 Eq. 591. Where a deed provided that the mortgage-debt was to become payable at the expiration of 15 years, and that in the meantime interest was to be paid yearly, *held* that the failure on the part of the mortgagor to pay the stipulated interest as agreed upon would entitle the mortgagee to bring the mortgaged property to sale before the expiry of the term of the mortgage—*Venkatarao v. Mahableshwar*, 26 Bom. 241 (245), following *Seaton v. Twyford*, (1870) L.R. 11 Eq. 591. But where the mortgage-bond provided that in default of payment of interest at 8 per cent. on the due dates interest at 9 per cent. should be charged on the interest in arrears as well as on the principal, it was held that the true intention of the parties was to postpone the sale of the mortgaged property until the principal became due, and to give the mortgagee, on default of payment of interest, only a right to the enhanced rate of interest—*Kannu v. Natesa*, 14 Mad. 477.

"Before mortgage-money has been deposited":—Where the mortgage-money was deposited by the mortgagor and a notice was issued under sec. 83, but before it was served on the mortgagee, he filed a suit: *held* that the mortgagee would not be debarred from obtaining a decree with costs—*Sitaramayya v. Venkataramanna*, 11 Mad. 371. See this subject discussed in Note 504 under sec. 83.

405. Instalment mortgage-bond:—In the absence of an express stipulation, a mortgagee is not bound to receive payment by instalments—*Behari v. Ram Gholam*, 24 All. 461.

Where the amount is stipulated as payable in instalments, and the mortgagor personally covenants to pay each instalment as it falls due, the mortgagee is clearly entitled to sue him for the recovery of each instalment remaining unpaid by sale of the mortgaged property and personally from the mortgagor. This right is not curtailed by the fact that there is a further provision in the mortgage-deed entitling the mortgagee to take possession of the mortgaged property if at the end of the date fixed for the last instalment the debt remains wholly unsatisfied—*Ramayya v. Venkatarama*, 13 M.L.J. 2.

If the mortgagee has accepted irregular payments of instalments without objection, he must be taken to have waived his right to enforce the payment of the whole amount, which he had an option to enforce under the deed—*Sakhawat v. Gajadhar*, 28 All. 622.

405A. Security bond:—The relationship between a decree-holder and a judgment-debtor who has executed a security bond under sec. 545, cl. (c) (now O.41, r. 5), C. P. C., mortgaging certain properties for the due performance of the decree or order that may ultimately be passed by the appellate Court, is not that of mortgagee and mortgagor and in the event of the appeal being dismissed, the decree-holder is entitled to realize his decretal money by the sale of the properties given in security without instituting a suit under this section—*Shyant Sundar v. Bajpai*, 30 Cal. 1060 ;

Jyoti Prakash v. Mukti Prakash, A.I.R. 1924 Cal. 485, 51 Cal. 150, 81 I.C. 734. A security bond executed by a judgment-debtor for the purpose of removing an attachment before judgment can also be enforced in the course of execution and a suit under this section is not necessary—*Rajendra v. Bipin*, A.I.R. 1934 Cal. 64, 37 C.W.N. 973, 60 Cal. 1298. So, where a money-decree is ordered to be paid by instalments on the judgment-debtor executing a security bond hypothecating immoveable property for the satisfaction of the decree and default is committed in payment of the instalments, the hypothecated property can be sold in execution of the decree and a fresh suit is not necessary—*Narottam v. Krishna Prasad*, A.I.R. 1936 Pat. 289 (291), 15 Pat. 545, 162 I.C. 830.

406. Money-decree—Execution against mortgaged property :—A mortgagee can obtain a simple money-decree on his mortgage; but he cannot by virtue of sec. 99 (now O. XXXIV, r. 14 of the C. P. Code) bring the mortgaged property to sale except by instituting a suit under this section—*Ram Keshab v. Sonatan*, 2 C.W.N. 320; *Madho Prasad v. Baij Nath*, 2 A.L.J. 356; *Shib Das v. Kali Kumar*, 30 Cal. 463; *Babu Lal Sahu v. Ram Parshad*, 7 O.C. 314; *Ram Prashad v. Ram Prashad*, 4 O.C. 231; *Kaveri v. Ananthayya*, 10 Mad. 129. In this respect the law before and after the passing of the C. P. Code (1908) is the same.

But if the mortgagee obtains a money-decree on a claim not arising under the mortgage, can the mortgagee bring the mortgaged property to sale in execution of the decree, without instituting a regular suit under this section? In this respect the law has undergone a change after the passing of the C. P. Code of 1908 and the re-enactment of sec. 99 of the T. P. Act as O. XXXIV, r. 14 of the Code. Under the previous law, a mortgaged property could not be sold in execution of such a decree (though it could be attached) except by instituting a suit under this section—*Jadub Lal v. Madhab Lal*, 21 Cal. 34; *Chundra Nath v. Burroda Shoon-dury*, 22 Cal. 813; *Durgayya v. Anantha*, 14 Mad. 74; *Sethuvayyan v. Muthusami*, 12 Mad. 325; *Kaveri v. Ananthayya*, 10 Mad. 129; *Azimullah v. Naimunnessa*, 16 All. 415. But now as sec. 99 has undergone certain amendments in O. XXXIV, r. 14, the above prohibition will no longer attach to the procedure, and there will be no longer any impediment in the way of the mortgagee bringing the mortgaged property to sale in execution of a decree obtained otherwise than under his mortgage. (See this subject fully discussed under O. XXXIV, r. 14 in the Appendix.)

407. Decree creating charge on property—Execution against the property :—Where a decree creates a charge on a property, the property cannot be sold solely in pursuance of that decree. It will be necessary to bring a fresh suit for sale under this section before the property can be brought to sale—*Rameshar v. Subbakaran*, 8 A.L.J. 418. Where a consent decree orders payment of the decretal amount by instalments and creates a charge on the estate of the judgment-debtor, the judgment-creditor is precluded from selling the properties in execution proceedings. He is bound to file a fresh suit under this section for bringing the properties to sale—*Aubhoyessury v. Gouri Sunkur*, 22 Cal. 859. When a charge is created by a decree for maintenance, the enforcement of the same can only be effected by instituting a suit under this section—*Matanguni v. Chooneymoney*, 22 Cal. 903. Where a suit for sale upon a mortgage

instituted under this section is compromised and a simple money-decree is passed, the decretal amount being made a charge upon the property, held that sec. 99 (O. 34, r. 14) will prevent the property from being brought to sale in execution of such a decree, but the mortgagee must institute a second suit upon his decree under this section—*Hem Ban v. Behari Gir*, 28 All. 58.

407A. Different kinds of mortgages :—It is the intention of the parties which determines the nature of a mortgage. The incidents of mortgages of various kinds which are laid down in this section are the normal incidents that may be deemed to be included in the intentions of the parties where there is no indication to the contrary. The Amending Act of 1929 did not import any new principle—*Bishan Das v. Nand Ram*, A.I.R. 1936 Pesh. 48, 161 I.C. 155.

408. Clause (a) Rights of simple mortgagee :—In a simple mortgage, there being no transfer of ownership, the simple mortgagee can bring the mortgaged property to sale only through Court—*Papamma v. Vira Pratapa*, 19 Mad. 249 (252) (P.C.). He cannot sue to obtain possession of the property; he can only sue for sale. If the Court erroneously gives him possession, that possession does not amount to foreclosure, and the mortgagor can subsequently redeem the mortgage—*Ibid* (at pp. 252, 253).

Under this section a simple mortgagee is entitled to institute a suit for sale subject only to the conditions prescribed therein. Such a suit is not barred by *res judicata* by reason of a decree for sale passed on the same mortgage in a previous suit. The same principle applies to a charge under sec. 100—*Ammenumma v. Chelampiriyarath*, A.I.R. 1953 Mad. 32. If in a suit to enforce a simple mortgage a receiver is appointed to collect rents and profits of the mortgaged property and the rents collected are deposited to the credit of the suit the mortgagee decree holder cannot claim any right over such deposit unless there is an order of appropriation towards the mortgage debt and a crown debt on account of income tax due from the mortgagor is to be paid out of such deposit in preference to the claim of the mortgagee—*Collector of Tiruchirapalli v. Trinity Bank Ltd.*, A.I.R. 1962 Mad. 59 (F.B.)

The mortgagee is entitled to bring the mortgaged properties to sale in any order he chooses. The Court cannot scrutinize his motives—*Subba Rao v. Lakshminarayana*, 22 L.W. 389, A.I.R. 1925 Mad. 1214, 92 I.C. 593.

Where in a simple mortgage it was provided that if the mortgagor failed to pay the interest in any year (the interest being payable annually) or any instalment of principal (in case of an instalment mortgage-bond), the mortgagee would be entitled to take possession of the property, held that the mortgagee would be able either to bring a suit for sale or to sue for possession, on default of payment by the mortgagor; his remedy was not limited to a suit for possession—See *Lingam Krishna v. Sri Mirza*, 21 M.L.J. 1147 (P.C.), 15 C.W.N. 441 and other cases cited in Note 336 under sec. 58.

A mortgagee's suit for sale may comprise two reliefs, one by way of sale of the properties mortgaged and the other by way of a personal decree, against the mortgagor for what may remain due after the mortgaged

properties have been sold—*Palaniappa v. Narayanan*, A.I.R. 1936 Mad. 34 (37) (F.B.), 59 Mad. 188, 160 I.C. 270.

Where the mortgagee in his suit on the mortgage asks for a repayment of the amount due on the mortgage and a sale in default of it and also for such further and other reliefs as the Court might think fit and the suit for sale is dismissed, the Court has power to make order of repayment under sec. 65 of the Contract Act—*Nisar Ahmad v. Mohan Manucha*, 67 I.A. 431, A.I.R. 1940 O.L.R. 714, A.I.R. 1940 P.C. 204 (207) I.L.R. 1940 Kar. 419. In the circumstance of the case 8 per cent. compound interest on the mortgage-loan with half-yearly rests was held not to be unreasonable—*Ibid.*

As regards a mortgage-suit for sale, the rights of the second mortgagees are very limited. He has his rights to redeem the prior mortgagee or to receive his mortgage-money out of the surplus sale-proceeds after satisfaction of the prior mortgage, treating the suit as one for his benefit. But he cannot ask for a sale of the property, if the prior mortgagee's claim is satisfied before the sale, nor can he ask for the sale of some other property included in his own mortgage, and for either of these purposes he might bring a separate suit for sale on his own mortgage—*Wan Taik v. Chettyar Firm*, A.I.R. 1935 Rang. 26 (29), 155 I.C. 954. At a sale in execution of a mortgage-decree the interests of both the mortgagor and the mortgagee pass to purchasers—*Ma Kin v. R. C. Dey*, A.I.R. 1926 Rang. 183, 4 Rang. 96, 97 I.C. 243. Where in the suit on the prior mortgage the subsequent mortgagee was not made a party and *vice versa*, in a contest between the two auction purchasers in execution of the two mortgage-decrees, the first purchaser can retain possession and obtain a decree for perpetual injunction restraining the second purchaser from getting delivery of possession—*Bogi Arijisup v. Kannappa*, A.I.R. 1954 Mad. 266.

Where during the pendency of a suit on a simple mortgage one of the mortgagors dies and no legal representative of the deceased mortgagor is brought on the record by the mortgagee within the period of limitation, the whole suit does not abate, though it may have abated against the deceased mortgagor. The mortgagee is entitled to a decree for sale of the remaining mortgaged property (*i.e.*, excluding the deceased mortgagor's share), and is entitled to sell the same to recover a proportionate amount of the mortgage-money—*Haibat v. Tara Chand*, A.I.R. 1931 All. 235 (236), 132 I.C. 31.

Certain property of an idol was mortgaged by its mutwali. The property was ordered to be sold in execution of a mortgage-decree against the idol, and in order to save it from sale the mutwali borrowed a sum of money from the plaintiff and executed a mortgage-deed in his favour in respect of the property along with his brother and nephew in their personal capacities and as owners of the property : held that the property belonging to the idol could not be sold in a suit on the mortgage as it was not binding on the idol—*Thakurdwara v. Man Mohan*, I.L.R. 1939 All. 24, A.I.R. 1939 All. 141 (151, 153), 1939 A.L.J. 1199.

Limitation:—The period of limitation for a suit on a simple mortgage is, under Art. 132 of the Limitation Act, 1908, twelve years from the date

when the mortgage-money becomes due. Where an earlier mortgage is kept alive by a subsequent mortgage which is stated to be subject to the earlier mortgage, limitation runs from the due date of the subsequent mortgage—*Singheshwar v. Medni Prasad*, A.I.R. 1940 Pat. 65, 187 I.C. 339.

Appointment of Receiver:—The Patna High Court has held that a simple mortgagee has merely the right to sue upon the personal covenant or to bring the mortgaged property to sale; he cannot satisfy his claim out of the rents and profits of the property; he has no right to possession and no right to apply for the appointment of a Receiver—*Nrisingha v. Rajniti*, 13 P.L.T. 525, A.I.R. 1932 Pat. 360 (362). The same view has been taken by the Allahabad High Court in *Ram Swarup v. Anandi Lal*, 58 All. 949 F.B., 1916 A.L.J. 605, A.I.R. 1936 All. 495 (F.B.). But the Calcutta High Court is of opinion that though a mortgagee under a simple mortgage is not entitled to possession, still he may invite the Court to appoint a Receiver, if the demands of justice require that the mortgagor should be deprived of possession—*Rameshwar v. Chuni Lal*, 47 Cal. 418 (424); *Ram Kumar v. Chartered Bank*, A.I.R. 1925 Cal. 664 (666), 41 C.L.J. 203, 87 I.C. 357. The same view has been taken by the Bombay Court in *Damodar v. Radhabai*, I.L.R. 1939 Bom. 82, A.I.R. 1939 Bom. 54, 40 Bom.L.R. 1266 where it has been held that the Court has jurisdiction to appoint a Receiver in the case of a simple mortgage whether before or after a preliminary decree. See also *Gobind Singh v. Punjab National Bank*, 16 Lah. 366, 37 P.L.R. 529, A.I.R. 1935 Lah. 17. Where a mortgage-bond provides that on breach of its covenants a Receiver would be appointed, in a suit on the bond if it is established *prima facie* that some covenants have been broken, a Receiver should be appointed in the absence of circumstances showing that such a course would not be "convenient"—*Badin v. Upendra*, 39 C.W.N. 155. In a mortgage-suit when interest is in arrear the Court will normally appoint a Receiver as, of course, whether or not the property appears to be of sufficient value to cover the mortgage-debt and interest, and whether or not the right of the mortgagee to obtain a personal decree subsists or has been lost—*Ally Ramzan v. Balthazar & Sons, Ltd.*, A.I.R. 1936 Rang. 290 (292), 14 Rang. 292, 163 I.C. 850. A Full Court of the Rangoon High Court has held that the Court has jurisdiction to appoint a Receiver in a simple mortgage-suit.—*Ma Hnin Yeik v. Chettyar Firm*, A.I.R. 1939 Rang. 321 (F.B.), 1939 R.L.R. 403, 183 I.C. 728. If the mortgagee is a mortgagee by conditional sale and he obtains a decree for foreclosure, a Receiver cannot be appointed at his instance. But if it is a simple mortgage and the decree is one for sale, and it is established that the security is not sufficient to satisfy the judgment-debt, a Receiver will be appointed as a matter of course, specially if there had been a default in the payment of interest. See *Rameshwar v. Chuni Lal*, supra; *Khubsurat v. Saroda*, 14 C.L.J. 526, 12 I.C. 165. The Madras High Court was previously opposed to the appointment of a Receiver—*Venkata Rajagopala v. Basivi Reddy*, 1914 M.W.N. 771, 26 I.C. 986; but in a recent case it has expressed the opinion that where a mortgagor is personally bound to pay the debt as in a simple mortgage, and either he has defaulted to pay the interest while enjoying the property or the property has diminished in value so as not to be sufficient to satisfy the whole debt, the mortgagee may in a suit on the mortgage obtain a Receiver for the taking of the rents and profits of the mortgaged property

and paying them into Court for the benefit of the mortgagee. The same would be the case if the mortgagor is damaging or wasting or not taking proper care of the property. A simple mortgagee is not disentitled to obtain the appointment of a Receiver, if other circumstances are such as to justify it, merely on the ground that no personal remedy subsists to proceed against the other properties of the mortgagor. The appointment of a Receiver is only a mode of execution to be used with caution and sound judicial discretion—*Paramasivan v. Ramasami*, A.I.R. 1933 Mad. 570 (575, 576) (F.B.), 56 Mad. 915; *Subramanian v. Ethirajulu*, A.I.R. 1938 Mad. 325, (1938) M.L.J. 249.

A Receiver appointed for the benefit of the mortgagee and at his instance, cannot be removed by the Insolvency Court, the insolvent not having the present right to remove him. It is, however, to the interest of the mortgagee decree-holder to make the Receiver in Insolvency a party to the pending proceedings, it is also required of the Receiver in Insolvency to have himself added as a party to the same, as the person in whom the equity of redemption has vested by operation of law—*Nrishingha v. Deb Prosanno*, A.I.R. 1935 Cal. 460, 62 Cal. 483, 39 C.W.N. 384.

It is the necessary concomitant of the office of a Receiver that he should be able to lease the property and that if he is obstructed by the mortgagor he can seek the aid of the Court. Where in a previous application the Court did not see fit to eject the mortgagor from possession, the mortgagee could not be held to be estopped by the principle of constructive *res judicata* from again applying to the Court for that relief—*Subramanyam v. Ethirajulu*, supra. at p. 426.

A preliminary decree was passed in a suit ordering the sale of the premises by public auction or by a private sale by the Receiver in the mortgage-suit. The Receiver made an application to the Court for a direction as to whether he was bound to insure the mortgaged property with P. company as provided in cl. (3) of the mortgage-deed: held that cl. (3) was still a part of the contract which P. company could resort to when they so chose at the end of any particular period of insurance. The order appointing the Receiver only meant that the property was in the custody of the Court and the parties were still governed by the contract—*Galstain v. Prudential Assurance Co.*, A.I.R. 1932 Cal. 366, 54 C.L.J. 566, 137 I.C. 523.

The Court will not appoint a Receiver in execution of a mortgage-decree unless the circumstances are such as to make the sale of the properties a matter of serious difficulty—*In re Renula Bose*, A.I.R. 1938 Cal. 93 (96), 42 C.W.N. 266, 175 I.C. 908.

409. Rights of usufructuary mortgagee:—The primary feature of a usufructuary mortgage is the possession of the property by the mortgagee with the right to retain the usufruct. Where a mortgagor binds himself to repay the mortgage-money, the mortgage cannot fail within the definition of usufructuary mortgage—*Bishan Das v. Nandram*, A.I.R. 1936 Pesh. 48 (50; 51), 161 I.C. 155. A pure usufructuary mortgagee can sue neither for foreclosure nor for sale, since his contract is to realise his money out of the usufruct of the property—*Subbamma v. Narayya*, 41

Mad. 259 (263) (F.B.) ; *Subbaraya v. Subramanyam*, A.I.R. 1952 Mad. 856. Sec. 68 only confers a right on the mortgagee to sue for the mortgage-money in case the mortgagor fails to deliver possession of the property or where a superior title is claimed by any person—*ibid*. As there is no covenant or agreement for payment in a usufructuary mortgage, the mortgagee cannot compel payment of the mortgage-money by a suit for sale—*Chathu v. Kunjan*, 12 Mad. 109 (110) ; *Luchmeswar v. Dookh Mochan*, 24 Cal. 677 (681). The principle underlying the statutory prohibition of sale by a usufructuary mortgagee is that the mortgagee looks to the rents and profits for satisfaction of his advance, and in as much as no time is fixed for payment, there is no forfeiture. It is the forfeiture that gives rise to the remedies of foreclosure and sale and in its absence the mortgagee is not entitled to the remedies that spring out of it—*Mohan Devi v. Talib Mehdi*, A.I.R. 1938 Lah. 145 (146). [In the old clause (a) it was provided that a usufructuary mortgagee was not entitled to bring a suit for "foreclosure or sale" ; and in an early Madras case, these words were interpreted to mean that this clause prohibited a usufructuary mortgagee from bringing a suit in which he prayed alternatively for a decree for foreclosure or for sale ; but that there was nothing to prevent him from bringing a suit for foreclosure or from bringing a suit for sale—*Venkatasami v. Subramanya*, 11 Mad. 88 (90). The language of the present clause is perfectly clear and does not admit of such ingenious interpretation.] It has recently been held by the Patna High Court, however, that it is not a proper construction of this section to say that a usufructuary mortgagee is excluded entirely from the operation of the section—*Raikumar v. Surajdeo*, A.I.R. 1938 Pat. 585, 19 P.L.T. 787, 177 I.C. 533.

But where the mortgagor makes a *personal covenant* to pay the money on a certain date, the transaction ceases to be a purely usufructuary mortgage, and becomes what is known as *simple mortgage usufructuary*, i.e., a combination of a simple and a usufructuary mortgage, and the mortgagee is entitled to bring a suit for sale—*Ramayya v. Guruva*, 14 Mad. 232 (234) ; *Sivakami v. Gopala*, 17 Mad. 131 (133) (F.B.) ; *Chathu v. Kunjan*, 12 Mad. 109 (112) ; *Udayana v. Senthivela*, 19 Mad. 411 ; *Kangayya v. Kalimuthu*, 27 Mad. 526 (527) (F.B.) ; *Rangappa v. Thammayappa*, 26 M.L.J. 514, 24 I.C. 372 ; *Mahadaji v. Joti*, 17 Bom. 425 ; *Umda v. Umra Begum*, 11 All. 367 ; *Jafar Hussain v. Ranjit Singh*, 21 All. 4 (8) ; *Parashram v. Putlajirao*, 34 Bom. 132 (135) ; *Dattambhat v. Krishnabhat*, 34 Bom. 462 (466) ; *Jag Sahu v. Ram Sakhi*, 1 Pat. 350 (355), A.I.R. 1922 Pat. 167 ; *Sardar Singh v. Collector*, 10 O.C. 14 ; *Ram Khilawan v. Ghulam*, 8 Luck. 190, A.I.R. 1933 Oudh 35 (36), 141 I.C. 464 ; *Pargan Panday v. Mahatam Mahto*, 6 C.L.J. 143 ; *Fida Ali v. Ismailji*, 6 N.L.R. 20, 5 I.C. 701 ; *Bhabani v. Kadambini*, A.I.R. 1929 Cal. 304, 33 C.W.N. 279, 119 I.C. 292 ; *Ramachandra v. Sarvajanavardhini Co.*, A.I.R. 1952 Mys. 125 ; *Ramakammal v. Sabbarathnam*, A.I.R. 1953 Mad. 13. In *Kashi Ram v. Sardar Singh*, 28 All. 157 and *Krishna v. Hari*, 10 Bom. L.R. 615, it has, however, been held that in order to entitle a usufructuary mortgagee to sue for sale of the property, there must be not only a personal covenant to pay the money but also express stipulation in the deed entitling the mortgagee to recover the money by sale of the property. This proposition has been re-affirmed in the recent Full Bench case of *Kanhaiya v. Mt. Hamidan*, A.I.R. 1938 All. 418, 176 I.C. 492. If the terms do not provide for sale,

a suit for sale is not maintainable. See also *Lal Narsingh v. Yakub*, 4 Luck. 363 (P.C.), 56 I.A. 299, 33 C.W.N. 693, commented on in Note 415 under sec. 68.

Where in a usufructuary mortgage there is no stipulation for recovery of the mortgage money by sale of the mortgaged property, and the mortgagee was merely given the right to sue for his money in certain circumstances, the mortgagee can get a simple money decree only and not a decree for sale—*Ram Lal v. Mt. Genda*, A.I.R. 1942 All. 326, 1942 A.L.J. 411. Where a usufructuary mortgagee leases back the mortgaged property to the mortgagor, gets a decree for rent against him and thereafter sues him on a covenant of repayment, the mortgagee can get a money decree only after deducting the amount of the rent-decree—*ibid*. If a usufructuary mortgage contains a covenant to pay on a certain date, coupled with a further stipulation that "if the money be not paid by the executant in due time, then this bond will remain in force and intact (i.e., the mortgagee will continue in possession) till the repayment of the money, with all conditions set forth herein," held that this stipulation did not amount to an absolute covenant to repay; consequently, the mortgagee was not entitled to sue for sale, upon the mortgagor's failure to pay on the date fixed—*Kamal Nayan v. Ram Nayan*, 11 P.L.T. 74, 120 I.C. 308, A.I.R. 1930 Pat. 152; *Damodar v. Chandapur Pujari*, A.I.R. 1933 Mad. 613, 56 Mad. 892. A mere insertion of a personal covenant to pay the mortgage-debt on demand would not alter the character of the mortgage and give the mortgagee a right to sell the mortgaged property in the event of non-payment. The test in such cases is the remedy provided in the deed for the satisfaction of the mortgage-debt—*Md. Abdullah v. Md. Iasin*, A.I.R. 1933 Lah. 151, 141 I.C. 377. It has been held in Peshwar that where the mortgagee was to remain in possession of the mortgaged property for a fixed period only, it necessarily implies a personal covenant—*Saifulla v. Chaman Lal*, A.I.R. 1936 Pesh. 43, 160 I.C. 986.

The right of the puisne usufructuary mortgagee unaffected by the auction sale in execution of the prior mortgagee's decree (he not being impleaded in that suit) is determined by the date of such suit and not by the date of sale. Where the prior mortgagee is not impleaded in the puisne mortgagee's suit and the latter purchases the mortgaged property in execution of his decree, the priority of the right to redeem is in the prior mortgagee—*Sheikh Bikala v. Sheik Ali*, A.I.R. 1950 Or. 210, I.L.R. 1950 Cut. 486.

In a Madras Full Bench case it was held that a usufructuary mortgagee was entitled to sue for sale of the property mortgaged to him, when the mortgagor failed to deliver possession of the said property to him—*Subbamma v. Narayya*, 41 Mad. 359 (F.B.) (overruling *Samayya v. Nagalingam*, 15 Mad. 274 and *Arunachalam v. Ayyavayan*, 21 Mad. 476). (See also *Ram Khelwan v. Ghulam Husain*, 8 Luck. 190, A.I.R. 1933 Oudh 35, 141 I.C. 464). The reason for the above decision was that a mortgagee could not be called a usufructuary mortgagee if the mortgagor had not given him possession of the mortgaged property so as to enable him to realise his security out of the rents and profits; and consequently proviso (a) of this section did not apply and he could sue for sale or foreclosure—*Ibid*. But this decision is no longer good law by reason of the addition of the

words "or expressly or by implication binds himself to deliver possession" in clause (d) of sec. 58. The effect of this amendment is that a usufructuary mortgagee, notwithstanding that possession has not been given to him, does not cease to be a usufructuary mortgagee. See Note 342 under sec. 58. A usufructuary mortgagee who has been dispossessed of the mortgaged property has no remedy either by foreclosure or by sale, but his remedy is confined only to a money-decree against the mortgagor (under sec. 68)—*Lazarannessa v. Mahomed Jafar*, 13 I.C. 336 (Cal.); *Aghore Nath v. Natabar*, 41 I.C. 406 (Cal.); if, however, the usufructuary mortgage-deed expressly provides that upon failure to get possession, the mortgagee should be entitled to recover the amount due by sale of the mortgaged property, then of course, the Court will grant a decree for sale of the property, if the mortgagee is dispossessed—*Bhabani Charan v. Kadambini*, 33 C.W.N. 279 (280), 119 I.C. 292, A.I.R. 1929 Cal. 304; *Narpat v. Ram Saran*, 30 All. 162.

If a usufructuary mortgagee retains his right to sue on his previous simple mortgage he does so in accordance with the rule of limitation applicable to that bond. He does not get a fresh right to sue from the date of the usufructuary bond or from his date of dispossession after that—*Mt. Anpurna v. Ram*, A.I.R. 1927 All. 417, 49 All. 430, 100 I.C. 670.

410. Rights of mortgagee by conditional sale :—In a mortgage by conditional sale the mortgagor's interest in the mortgaged property passes at the date of the mortgage and is lost on failure to pay on the due date. But the law steps in and allows a further period of grace. In such a case the mortgagee is to take steps to perfect his title to the mortgaged property by instituting a suit for foreclosure—*Dau Baluwantsingh v. Mt. Bindabai*, A.I.R. 1942 Nag. 88, I.L.R. 1942 Nag. 357.

Where the mortgage is by conditional sale, the only decree that can be made is for foreclosure—*Venkatasami v. Subramanya*, 11 Mad. 88 (89); *Kalika v. Ajudhia*, 51 All. 780, 1929 A.L.J. 448, A.I.R. 1929 All. 421 (428), 121 I.C. 211; *Kunwarlal v. Rekhlal*, A.I.R. 1950 Nag. 83, I.L.R. 1950 Nag. 321. In the case of a mortgage by conditional sale the right conferred on the mortgagee is not to sue for money but to take steps to perfect his title to the property—*Dau Balwant Singh v. Mt. Bindabai*, A.I.R. 1942 Nag. 88 (90); I.L.R. 1942 Nag. 357, 1942 N.L.J. 303, 200 I.C. 709. In such a mortgage a mere promise to pay the money within a certain fixed period does not *per se* import a personal liability, for such a covenant is entered into in every form of mortgage, and the test in each case is the remedy provided in the deed for satisfaction of the mortgage-debt—*Bhikam Lal v. Janak Dulari*, A.I.R. 1937 Oudh 517 (519), 171 I.C. 296.

In the case of a *lahangahan* mortgage the Court can, however, pass a decree either for sale or for foreclosure. High rate of interest is one of the grounds on which the Court can exercise its discretion in favour of allowing a sale in place of foreclosure—*Sitaram v. Krishnarao*, A.I.R. 1940 Nag. 156, 1940 N.L.J. 179, 190 I.C. 641 following *Haji Mohammad v. Ramappa*, A.I.R. 1929 Nag. 254 (F.B.), 119 I.C. 684.

Where a mortgagee was in possession and liable for the rent of the mortgaged property for a certain period, in a suit upon the mortgage the purchaser of the mortgaged property was not entitled to claim a set off

in respect of the amount due as rent, though it could have been claimed by the mortgagor—*Gulab Chand v. Ram Kumar*, A.I.R. 1941 Pat. 296, 22 P.L.T. 230, 193 I.C. 533.

A mortgagee of intangible property is entitled to foreclose the mortgage quite as much as a mortgagee of chattels—*Mahamaya v. Haridas*, 42 Cal. 455.

410A. Anomalous mortgage :—The remedy of foreclosure is not exclusive to a mortgage by conditional sale. It is equally applicable to an anomalous mortgage *Ujagar Lal v. Lokendra Singh*, A.I.R. 1941 All. 169, 1941 A.L.J. 111.

411. English mortgage :—A decree for sale may be made in favour of the mortgagee when the mortgage is an English mortgage—*Askaran v. Gobordhan*, 26 C.W.N. 318, A.I.R. 1922 Cal. 52, 70 I.C. 158. Under the old section the mortgagee was entitled to a decree for foreclosure. This remedy has now been taken away. But English mortgages executed prior to 1st April, 1930 are outside the scope of the amendment made by substitution of the new cl. (a) in this section—*Saradindu v. Jahar Lal*, 46 C.W.N. 33 (41), 74 C.L.J. 61, A.I.R. 1942 Cal. 153. Consequently a suit to enforce such a mortgage is governed by Art. 147 of the Limitation Act—*Ibid.*

Where in a suit to enforce an English mortgage the mortgagor makes default in paying the mortgage dues on the date fixed for redemption by the preliminary decree for foreclosure, the rents collected by the mortgagor or the Receiver after the date of default will go to the mortgagee—*Imperial Bank, Petitioner in Prudential Assurance Co. v. Galstam*, I.L.R. (1940) 1 Cal. 197, A.I.R. 1940 Cal. 429, 191 I.C. 559.

The Receiver in a mortgage-suit holds the property for the person who can eventually make out title thereto. His appointment *prima facie* is for the benefit of the mortgagee. When a decree for foreclosure is passed and any money in the hands of the Receiver representing the rents of the mortgaged property would belong to the mortgagee—*Ibid.*

411A. Equitable mortgage :—Clause (a) now provides that the remedy of a mortgagee by deposit of title-deeds is to bring a suit for sale and not for foreclosure. See also *Sreenath v. Gadadhar*, 24 Cal. 348; *Oo Nong v. Maung*, 13 Cal. 322 (326); *Badiar Rahman v. Chetty Firm*, 8 L.B.R. 450, 35 I.C. 288; see also *Marcar v. Sigg*, 2 Mad. 239 (255) (P.C.). In Bombay, a decree for foreclosure was allowed—*Manekji v. Rustomji*, 14 Bom. 269. But this is no longer good law. An equitable mortgage stands on the same footing as a simple mortgage. Cf. sec. 96.

Appointment of a Receiver :—A mortgage by deposit of title-deeds has all the incidents of a simple mortgage including that of the appointment of a Receiver—*Chettyar Firm v. Vyaravan*, A.I.R. 1936 Rang. 400, 164 I.C. 751; *Nrisingha v. Rajniti*, 13 P.L.T. 525, A.I.R. 1932 Pat. 360 (362); *Venkata Kumara v. Gokuldoss*, 54 Mad. 565, 133 I.C. 504, A.I.R. 1931 Mad. 626. A Receiver may be appointed on an interlocutory application but it is incumbent on the plaintiff to prove that interest is in fact in arrear—*V. M. R. P. Firm v. Nagoor Ganny*, A.I.R. 1937 Rang. 399 (400); *Venkanna v. Mangammal*, A.I.R. 1936 Rang. 296, 163 I.C. 856. Where in a suit on

a mortgage by deposit of title-deeds a Receiver is appointed at the instance of the mortgagee, the latter is entitled, in the event of his suit being decreed, to the rents and profits in the hands of the Receiver.—*Ally Ramzan v. Balthazar & Son, Ltd.*, A.I.R. 1936 Rang. 290 (291), 14 Rang. 292, 163 I.C. 850. See also *Chettyar Firm v. Vyaravan Chettyar*, supra. For other cases see Note 408, ante. Where a Receiver has been appointed at the instance of a holder of a money-decree in execution of the decree against certain mortgaged property of the judgment-debtor, and the same person has also been appointed to act as Receiver in a suit instituted by the equitable mortgagee to enforce his mortgage against the judgment-debtor, then if the mortgaged properties are insufficient to satisfy the mortgage-debt, the equitable mortgagee has preferential rights as against the holder of the money-decree in respect of profits of the mortgaged property in the hands of the Receiver. The fact, whether the mortgaged property is insufficient to discharge the mortgage-debt, must however, be ascertained with certainty before any order for payment out is made—*Khader Mohideen v. Nagu Bas*, I.L.R. 1939 Mad. 496, A.I.R. 1939 Mad. 402 (404), (1939) 1 M.L.J. 730.

412. Clause (c) :—*No foreclosure or sale in respect of mortgage of railway, etc.* :—The exemption in this clause is founded on a consideration of the inconvenience which would be caused to the public by the sale or foreclosure of a work constructed and maintained for the convenience of the public—*Furness v. Caterham Ry. Co.*, 25 Beav. 614.

The remedy of the mortgagee in these cases would be to have a Receiver appointed. See Select Committee's Report, 2nd Feb. 1878, para 25.

413. Clause (d)—No foreclosure or sale as to portion of mortgaged property :—This clause, like para. 5 of sec. 60, is an illustration of the rule of indivisibility of mortgage. It is an established principle that the whole of the mortgaged property is liable for any and every portion of the mortgage-debt, however small—*Arunachalam v. Ramasamy*, 30 L.W. 723, 112 I.C. 501, A.I.R. 1928 Mad. 933 (935). One of the mortgagees cannot maintain the suit without impleading his co-mortgagees either as plaintiffs, or, where they refuse, as defendants—*Rameshwar v. Ganga Bux*, A.I.R. 1950 All. 598 (F.B.), 1950 A.L.J. 632. In the absence of a covenant in the mortgage-deed for payment of separate amounts or fractions of the mortgage-money to the mortgagees separately, a suit by one of several co-mortgagees for his share of the mortgage-money is not maintainable—*Ramchandra v. Sivarama*, A.I.R. 1936 Mad. 895 (897), 44 M.L.W. 502. The mere fact that a portion of the mortgaged property happens to be excluded from the mortgage security by operation of law cannot affect the mortgagee's right to enforce his whole charge against the rest—*Daulatram v. Panna*, A.I.R. 1938 Nag. 79, 172 I.C. 565 ; *Mati Lal v. Bejoy Lal*, A.I.R. 1943 Cal. 455, I.L.R. (1943) 1 Cal. 59 ; *Seth Bansiram v. Naga Ayyar*, infra and *Kailasa v. Sundaram*, infra. This section does not, however, prohibit a person interested in part only of the mortgage-money from instituting a suit to recover his share of the mortgage-money, provided he frames his suit in such a way as to relate to the whole of the mortgaged property and not to a corresponding part of the property. All that this section prohibits is his bringing a suit relating only to a part of the

mortgaged property. If he frames his suit (for recovery of his share of the mortgage-money) praying his relief for foreclosure or sale so as to operate upon the *whole* of the property, the obstacle of this section disappears. A person interested in part of the mortgage-money may sue for the whole of the mortgage-money or for his portion of the money, but he must take care to see that he proceeds against the whole of the mortgaged property—*Seth Bansiram v. Naga Ayyar*, 59 M.L.J. 928, A.I.R. 1930 Mad. 985, 129 I.C. 45; *Kailasa Ayyar v. Sundaram Pattar*, A.I.R. 1942 Mad. 205 (207), (1941) 2 M.L.J. 986, 1941 M.W.N. 1055. In the case of purchase by one co-mortgagee, without the consent of the other co-mortgagees, of the equity of redemption, the former for the purpose of recovering his share of the mortgage money can bring the entire mortgaged property to sale and not merely his proportionate part of the mortgaged property—*Sadasiv v. Govind*, A.I.R. 1945 Bom. 351, I.L.R. 1945 Bom. 390. A co-mortgagee suing to recover his individual share of the mortgage must ask the Court to decide what is due on the mortgage as a whole and to fix a period of redemption of the mortgaged property in its entirety. He must ask for a preliminary decree in respect of the entire debt. There can be no redemption in part. Therefore the plaintiff cannot get his share until the mortgagor has paid into Court what he owes on the mortgage or the mortgaged properties have been sold—*Ibid.* As to the Court-fee to be paid by the plaintiff in such a case, see this case.—*Mati Lal v. Bara Buri*, 46 C.W.N. 1015, *per* Mitter and Biswas, JJ. In this case their Lordships have laid down what is to be stated in the preliminary and final decrees as well as the procedure to be followed in sale of the mortgaged properties, and the provision for a personal decree under O. 34, r. 6 of the C. P. Code. After sale the purchaser will get the property free from the mortgage and the rights of the co-mortgagees defendants would necessarily be transferred to the surplus sale-proceeds—*Ibid.*

By enacting this rule, the Legislature has intended to protect the mortgagor from being harassed by a multiplicity of suits where the severance of the interests of the mortgagees has taken place without the consent of the mortgagor—*Vijayabhushanammal v. Evalappa*, 39 Mad. 17 (20). But there is nothing to prevent a *sole* mortgagee from foreclosing the mortgage as a whole by proceeding against a part only of the mortgaged property, and abandoning the remainder of his security—*Sheo Tahal v. Sheo Dam*, 28 All. 173 (F.B.). So also, it is competent for a sole mortgagee to abandon a part of his security and sue for the sale of the remainder—*Sheo Prasad v. Behari Lal*, 25 All. 79. Where portions of the mortgaged property have, subsequently to the mortgage, passed to different owners, the mortgagee, provided that he himself has not been a party to the destroying of the integrity of the mortgage, is entitled to realise his whole debt from any portion of the mortgaged property—*Sati Suraj Mal v. Than Singh*, 41 All. 146 (150), 19 A.L.J. 917.

So also, a *purchaser* of the mortgage-right of one of the joint mortgagees cannot bring a suit for sale of a portion of the mortgaged property in respect of his share of the mortgage-debt—*Parshotum v. Mulu*, 9 All. 68; *Laljee v. Jangjal*, 1887 A.W.N. 233.

Severance of interest provided by this clause is nothing but a special application of the ordinary law of novation, and requires as a pre-requisite

the consent of all parties concerned, and unless a co-mortgagee consents to such severance or does some act which under the law effects a severance, the usual rule about the integrity of the mortgage must be observed—*Sadasheo v. Roopchand*, A.I.R. 1939 Nag. 136, 1939 N.L.J. 142, 184 I.C. 719. Omission to reply to a notice does not amount to consent—*Ibid*. Where there has been a severance of the interests of the mortgagees with the consent of the mortgagor, one of several mortgagees is entitled to enforce by suit the payment of his portion of the mortgage-money—*Vijayabhushanammal v. Evalappa*, 39 Mad. 17 (19). This section is unhappily worded, because it refers only to severance of the interests of the mortgagees with *the consent of the mortgagor*. But this principle can be extended. Thus, a mortgage-debt can be said to be severed under this clause where in a suit brought by one of the co-mortgagees for his share of the debt the Court passed a decree for sale to recover his share of the debt, though the mortgagor did not give his consent to the passing of the decree. On the basis of such severance, another co-mortgagee can legally maintain a suit to recover his share of the mortgage-debt—*Vijayabhushanammal v. Evalappa*, 39 Mad. 17 (20), 25 I.C. 91. Where one of two mortgagees, each having a half share in two simple mortgages, took a usufructuary mortgage of the whole of the mortgaged property from the mortgagors, the consideration being the amount of his share in the two simple mortgages, held that there was a severance of interests, and the other mortgagee was entitled to recover his share of the amount due under the simple mortgages—*Jauhari Singh v. Ganga Sahai*, 41 All. 631 (634), 17 A.L.J. 731, 51 I.C. 107. See also *Narayansao v. Chattibai*, A.I.R. 1937 Nag. 262 (263, 264), I.L.R. (1937) Nag. 503, 171 I.C. 978 and *Mohan Lal v. Prasadi Lal*, A.I.R. 1924 All 11, 45 All. 46, 74 I.C. 999. Similarly, where the co-mortgagors made a partition of the mortgaged property by mutual consent and agreed with one another that each would be responsible only for his share and that the portion of the mortgaged property allotted to each should bear that much only of the debt, it would be competent to the mortgagee, should he be so minded, to accept this arrangement as between the co-mortgagors, and validly release each mortgagor on payment of his quota of the debt, and proceed against such of them as might make default for what is due by them according to the arrangement—*Venkatashella v. Srinivasa*, 28 Mad. 255; *Mahadaji v. Ganpatshet*, 15 Bom. 257. But the mere acceptance by the mortgagee from one of the mortgagors of payment of his portion of the debt does not sever the mortgage, and the mortgagee cannot be allowed to foreclose the shares of the remaining mortgagors for the remaining portion of the debt—*Chandika v. Pohkar*, 2 All. 906.

Where a mortgage is split up, by the sale to the mortgagee of the equity of redemption of a portion of the property mortgaged, the mortgagee can foreclose, in respect of the portion not sold to him for a proportionate amount of the mortgage-money—*Bisheshar v. Laik Singh*, 5 All. 257 (258). But where there are two mortgagees, and the mortgagor has conveyed the property to one of them without the consent of the other mortgagee, held that though the debt due to one mortgagee has been satisfied as the result of the conveyance, still the mortgage has not been split up, and the other mortgagee is entitled to enforce his portion of the debt against the *whole* of the mortgaged property—*Arunachalam v. Ramasamy*,

30 L.W. 723, 1928 M.W.N. 518, A.I.R. 1928 Mad. 933 (935, 939), 112 I.C. 501.

Where there are two mortgagees, and one of them desires to realise the debt, then if the consent of the co-mortgagee cannot be obtained, he may be added as a defendant, and the mortgage-decree will provide for all the necessary accounts and payments, excepting that there can be no judgment for a sum of money entered as between the co-mortgagee-defendant and the mortgagor—*Sunitibala v. Dhara Sundari*, 47 Cal. 175 (179, 180) (P.C.), 24 C.W.N. 297, 53 I.C. 131, A.I.R. 1919 P.C. 24, followed in *Arunachalam v. Ramasamy*, supra. Where a prior mortgagee files a suit impleading the puisne mortgagee and the claim of the prior mortgagee is satisfied by the mortgagor before sale, the puisne mortgagee is entitled to institute a separate suit, because the earlier suit was not for his benefit—*Soli Restonji v. Gangadha Khemka*, A.I.R. 1969 S.C. 100.

67A. *A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree under section 67, and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage-money has become due.*

Mortgagee when bound to bring one suit on several mortgages.

414. This section has been inserted by sec. 32 of the Transfer of Property Amendment Act (XX of 1929). It compels a mortgagee, who holds several mortgages of different dates executed by the same mortgagor to bring a consolidated suit on all the mortgages at one and the same time. His omission to do so precludes him from filing a second suit—*Gadiram v. Punamchand*, A.I.R. 1933 Nag. 171.

Prior to the enactment of this section, there was a conflict of opinion. Thus, it was held in some cases that a mortgagee holding several mortgages over the same property could not sue on one mortgage to obtain an order for sale of the property subject to the other mortgage—*Keshavram v. Ranchhod*, 30 Bom. 156 (163); *Dorasami v. Venkateshchayyar*, 25 Mad. 108 (115). He must either enforce both the securities in one suit, or sue on one giving up his rights under the other. If he sued on the first mortgage without mentioning the existence of the second mortgage, and obtained a decree, he was precluded from enforcing the second mortgage in another suit—*Krishnamachaiar v. Annongarachaiar*, 30 Mad. 353 (355). But in *Sundar Singh v. Bholu*, 20 All. 332, *Nilu Ray v. Asirbad*, 25 C.W.N. 129, 60 I.C. 809, *Tabarak Ali v. Dilip Narain* 8 P.L.T. 255, A.I.R. 1927 Pat. 117 (120), 98 I.C. 968, and *Dwarka Nath v. Mritnjoy*, 3 I.C. 175 (176) (Cal.), it was held that a holder of two mortgages over the same property who had obtained a decree for sale in a suit on the prior mortgage was not precluded from instituting a fresh suit on the second mortgage, but he could not sell the property twice over nor sell it under the second decree subject to the first. See also *Subramania v. Balasubramama*, 38 Mad. 927 (939, 940) (F.B.), where it is held that it is open to a mortgagee to bring a suit on a puisne mortgage for sale of the

mortgaged property subject to a prior mortgage in his favour, since a mortgagee holding separate mortgages is entitled to treat them as separate causes of action (following *Radhakrishna v. Muthusaamy*, 31 Mad. 530). In *Raghunath v. Jamna Prasad*, 29 All. 233, it was held that a mortgagee holding two deeds of mortgage could institute a suit on one mortgage and bring a portion of the mortgaged property to sale in execution of the decree, and then institute another suit on the other mortgage for sale of the remaining portion of the property. See also *Laxmibai v. Kondba*, A.I.R. 1935 Nag. 226, 159 I.C. 758 (F.B.); *Narayan-asami v. Vellayya*, 47 Mad. 688; *Lasa Din v. Md. Abdul Shakoor*, 15 Luck. 399, A.I.R. 1740 Oudh 235, (1940) O.L.R. 127.

To avoid this divergence of views the present section has been enacted.

Where a person executes two mortgages, one after the other, in favour of the same mortgagee then unless there is something in the second deed to show a contrary intention, the creditor must be presumed to have intended to keep the earlier security alive for his own protection, and *prima facie* this section is applicable in such a case—*Dau Kin v. Ko Ba Tin*, A.I.R. 1939 Rang. 247, 1939 R.L.R. 207, 184 I.C. 284. But if in such a case a suit on both the mortgages cannot be brought in the same Court, this section does not apply—*Ibid* following *Premisuch v. Mangal Chand*, 41 C.W.N. 854. Where objection is taken to the suit on the ground that it was on only one of two mortgages held by the plaintiff an amendment of the plaint may be allowed—*Prabhulal v. Godawari Bai*, A.I.R. 1953 Aj. 50 (2).

Where a mortgagor after mortgaging certain property, mortgages the same property along with some other property in favour of the same mortgagee by way of second mortgage and the property is sold in execution of the second mortgage subject to the decree in the first mortgage, what is sold is the equity of redemption and the mortgagee is not precluded from selling the same property in execution of a decree on the first mortgage—*Munna Lal v. Komal Chandra*, A.I.R. 1941 Nag. 3, 1940 N.L.J. 568. The principle of this section does not apply to the case of a mortgage-loan payable in instalments—*Subbayya v. Venkatasubbayya*, A.I.R. 1940 Mad. 296, (1939) 2 M.L.J. 924, 1939 M.W.N. 1239.

As this section restricts the rights of mortgagees, it must be construed strictly—*Corporation of Calcutta v. Arun Chandra*, A.I.R. 1934 Cal. 862, 61 Cal. 1047, 38 C.W.N. 917, 60 C.L.J. 312. This section does not apply to securities created by operation of law and in particular to statutory charges created by sec. 205 of the Calcutta Municipal Act (Beng. Act III of 1923)—*Ibid*.

The principle of consolidation applied by this section has no bearing upon the interpretation of sec. 17 of the Court Fees Act. The very basis of sec. 67A is that there is more than one subject; hence where a suit is filed on two mortgages over the same property the suit relates to two subjects and not merely to one subject for the purposes of sec. 17 of the Court Fees Act—*Pollachi Town Bank v. Krishna Ayyar*, A.I.R. 1935 Mad. 262, 68 M.L.J. 316, 156 I.C. 435.

This section has no retrospective effect. It does not apply to mortgages created before the 1st April 1930—*V. R. S. Chettiar Firm v. Ya Ya*, A.I.R. 1933 Rang. 377 (378); *Ko Aung v. Ko Po*, A.I.R. 1931 Rang. 208, 131 I.C. 725; *Laxmibai v. Kondba*, A.I.R. 1935 Nag. 226, 159 I.C. 758 (F.B.); *Mt. Fazal v. Hukam Singh*, A.I.R. 1936 Lah. 1020; *Bhau Nana v. Ravappa*, A.I.R. 1938 Bom. 196, 40 Bom. L.R. 109, 174 I.C. 474; *Lasa Din v. Md. Abdul Shakoar*, 15 Luck. 399, A.I.R. 1940 Oudh 235, (1940) O.L.R. 127; *Corporation of Calcutta v. Arun Chandra*, 60 Cal. 1470, 38 C.W.N. 153, A.I.R. 1934 Cal. 325; *Singheshwar v. Medni Parsad*, A.I.R. 1940 Pat. 65, 187 I.C. 339.

The rule of this section is not applicable where the parties in the two mortgage-deeds are not the same—*Ko Aung v. Ko Po*, supra; *The Bank of Karaikudi v. Karaikudi*, A.I.R. 1965 Mad. 537. In fact, a mortgagee cannot bring one suit in respect of mortgages of the same property executed by two different persons. Such mortgages can not be joined under Or. 1, r. 3, C. P. Code, as the right to relief arises out of different acts. They cannot even be joined under Or. 1, r. 3, C. P. Code, as the right to relief arises out of different acts. They cannot even be joined under Or. 2, r. 3, as they are not jointly liable on each mortgage—*Bhaiyalal v. Ramchandra*, A.I.R. 1937 Nag. 99 (100), I.L.R. (1937) Nag. 349, 170 I.C. 106. In this case the property belonged to one B and after his death one mortgage in respect of the property was executed by a person who claimed to be his adopted son and the other mortgage by B's widow.

Upon the strict wording of the section its operation cannot perhaps be confined only to mortgages upon the same property—see *Bhau Nana v. Revappa*, supra.

If due to the failure of the mortgagor to take the objection at the proper time the mortgagee proceeded in the belief that the objection had been waived, the mortgagor cannot be heard to say that a subsequent suit by the mortgagee on the second mortgage should be dismissed in limine—*Moolha Mohonraj Sowcar v. Manicka Goundar*, A.I.R. 1958 Mad. 467. The section imposes no prohibition against institution of suit on one of the mortgages in a case where no objection to the form of the suit was taken on earlier occasion—*Puttamadamma v. Puttappa*, A.I.R. 1969 Mys. 20; *Har Sharan Lal v. Surajmal Kundanmal*, A.I.R. 1959 Madh. Pra. 426.

68. The mortgagee has a right to sue the mortgagor for the mortgage-money in the following cases only—

(a) where the mortgagor binds himself to repay the same;

(b) where the mortgagee is deprived of the whole or part

68. (1) The mortgagee has a right to sue for the mortgage-money in the following cases and no others, namely:—

(a) where the mortgagor binds himself to repay the same;

(b) where, by any cause other than the wrongful act or

of his security by, or in consequence of, the wrongful act or default of the mortgagor ;

(c) where, the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person.

Where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property has been wholly or partially destroyed or the security is rendered insufficient as defined in section 66, the mortgagee may require the mortgagor to give him, within a reasonable time, another sufficient security for his debt, and, if the mortgagor fails so to do, may sue him for the mortgage-money.

default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed or the security is rendered insufficient within the meaning of section 66, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient, and the mortgagor has failed to do so ;

(c) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor :

(d) where, the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person *claiming under a title superior to that of the mortgagor* :

Provided that, in the case referred to in clause (a), a transferee from the mortgagor or from his legal representative shall not be liable to be sued or the mortgage-money.

(2) *Where a suit is brought under clause (a) or clause (b) of sub-section (1), the Court may, at its discretion, stay the suit and all proceedings therein, notwithstanding any contract to the contrary, until the mortgagee has exhausted all his available remedies against the mortgaged property or what remains of it, unless the mort-*

gagee abandons his security and, if necessary, re-transfers the mortgaged property.

Amendment :—This section has been redrafted by sec. 33 of the T. P. Amendment Act (XX of 1929), but the actual changes are very few. The words “the mortgagor” have been omitted; the last para of the old section is now enacted as clause (b) with certain verbal alterations; clauses (c) and (d) of the new section correspond to clauses (b) and (c) of the old section; the italicised words in clause (d), the proviso and sub-section (2) are new. The reasons are stated below in proper places.

415. Scope of section :—The provisions of this section apply only to mortgages, and not to a charge—*Fatick Chunder v. Foley*, 15 Cal. 492.

The remedy provided by this section is alternative and additional to any to which the mortgagee may be entitled. Thus, if the mortgagor fails to deliver possession to the mortgagee, the latter is not bound to sue under clause (d) of this section but is at liberty to bring a suit for possession—*Sankata v. Jagat Narain*, 2 O.C. 24. The usufructuary mortgagee, who is entitled to possession but does not get possession, may sue at once for the money under sec. 68 instead of suing for possession—*Linga Reddi v. Sama Rau*, 17 Mad. 469 (471). If a mortgagee by conditional sale who is entitled to obtain possession fails to get possession of the mortgaged property, he is not obliged to sue at once for the mortgage-money under sec. 68, but it is open to him to sue for foreclosure under sec. 67—*Sita Nath v. Thakurdas*, 46 Cal. 448 (454). See also sub-section (2).

A Full Bench of the Madras High Court has laid down that the words “sue for the mortgage-money” mean and include a suit for foreclosure or sale under sec. 67. When the mortgagee has become entitled to sue for the mortgage-money under any clause of sec. 68, it means that the mortgage-money has become “payable”; and consequently there can be no reason for refusing to give effect to sec. 67 which allows of a suit for foreclosure or sale at any time after the mortgage-money has become payable—*Subbamma v. Narayana*, 41 Mad. 259 (264) (F.B.). But this proposition does not apply to a *usufructuary mortgage*. See this case under Note 409 in sec. 67. But if the mortgage is a *combination of a simple and usufructuary mortgage*, and the mortgagor fails to deliver possession to the mortgagee, the latter can sue for the money under sec. 68, i.e., the money becomes payable; and if the money becomes payable, a decree for sale can be made under sec. 67—*Lal Narsingh v. Yakub*, 4 Luck. 363 (P.C.), 33 C.W.N. 693 (699), 116 I.C. 414, A.I.R. 1929 P.C. 139; following in *Ram Khilawan v. Ghulam*, 8 Luck. 1190, 141 I.C. 464, A.I.R. 1933 Oudh 35 (36). But it is submitted that under the new clause (g) of sec. 58, such a mortgage would be treated as an anomalous mortgage, and the rights and liabilities of the parties would be determined by the terms of the mortgage (sec. 98). This section does not apply to a case of combination of three mortgages—usufructuary, simple and mortgage by conditional sale—*Ramsarup v. Gaya Prasad*, A.I.R. 1932 Oudh 178,

139 I.C. 61. Thus, where according to one clause of the mortgage-deed the mortgagor had power to repay the mortgage-money during the period of five years following the execution of the deed and according to another clause the mortgagees had the right to recall the mortgage-money and to sue for foreclosure only in the event of the mortgagor's default in redeeming the mortgage on the expiry of five years: *held* that the combined effect of the two clauses was that the mortgagor had neither the right to repay the mortgage-money nor to redeem the mortgaged property and the mortgagees had no right to call the mortgage-money and to sue for foreclosure before the expiry of the five years—*Ibid*.

Section 68 applies only where the claim is based on a valid mortgage—*Bhikhan Lal v. Janak Dulari*, A.I.R. 1937 Oudh 517, 171 I.C. 296; *Jowand v. Sawan*, A.I.R. 1933 Lah. 836.

A mortgage-bond contained the following terms: "As we have received Rs. 500, you will, in lieu of the said amount and interest, enjoy the said property for three years, and we have executed this *Arakattu otti* on condition that on the expiry of the said three years, we should redeem the land without paying either principal or interest. You will, on the expiry of the said three years, deliver possession of the said property without raising any objection." The mortgagee obtained possession of only a part of the land, and when the mortgagor sued to recover possession on the expiry of three years, the mortgagee claimed that as possession of the whole property had not been delivered he was entitled to get back the money under clause (c) of this section before the mortgagor could redeem. *Held* that sec. 68 did not apply. The only right the mortgagee had was to recover damages for the breach of the contract by the mortgagor, in not delivering possession of the whole of the land to him—*Visvalinga v. Palaniappa*, 21 Mad. 1 (3).

This section enumerates cases in which a usufructuary mortgagee is entitled to sue for the mortgage-money, but there is nothing in the section to show that the mortgagee can only get a simple money-decree and not a mortgage-decree. By instituting a suit for mortgage-money under this section a mortgagee does not lose his right to proceed against the security—*Jamna Das v. Mani Ram*, A.I.R. 1936 Pat. 439 (441), 162 I.C. 15.

The position of a usufructuary mortgagee would not be better under this section where the nature and terms of the mortgage-deed were such as to show that it was not originally intended that the mortgagor should be personally liable—*Ram Narayan v. Adhindra*, 44 Cal. 388 (P.C.); *Mon Koch v. Dhaniram Bora*, A.I.R. 1968 Assam 10.

The word "mortgagor" in this section is not limited to the actual mortgagor himself. The section applies equally to the heirs or assignees of the equity of redemption—*Janki v. Md. Ismail*, A.I.R. 1932 Pat. 273 (274), 139 I.C. 525.

416. Clause (a)—Personal covenant to pay :—A personal covenant to pay the mortgage-debt is the usual incident of a *simple mortgage*. Such a covenant is implied by the very definition of the simple mortgage as given in section 58 (b). See also *Wahidunnissa v. Gobardhan*, 22 All. 453

(461) (F.B.); *Jangi Singh v. Chander*, 30 All. 388; *Abbakke v. Kunhi-amma*, 29 Mad. 491; *Bhugwan v. Parmeshwari*, 5 C.L.J. 287; *Sochet v. Hadayatullah*, 13 Lah. 508, A.I.R. 1932 Lah. 630 (632). Such is also the case with an *English mortgage* where according to the definition in sec. 58 (e), the mortgagor "binds himself to repay the mortgage-money" in order to effectively safeguard his right of redemption. But in a *mortgage by conditional sale*, all that the mortgagor says is that if he pays, he will recover his property, but if he does not, the sale shall become absolute; but that does not imply a covenant to pay and does not confer on the mortgagee any right to personal relief—*Balkrishna v. Legge*, 22 All. 149 (P.C.); *Nazim v. Mahabir*, 30 I.C. 224. In arriving at a determination whether the mortgagor is personally liable, a mere determination that a mortgage is a usufructuary mortgage or an anomalous mortgage does not bring the matter to an end; but the nature of the transaction and the terms of the deed must be considered—*U San v. Maung Sein*, A.I.R. 1937 Rang. 151, 14 Rang. 685, 69 I.C. 295. The test is not how the mortgage is described but what it is in fact and is law—*Narayan v. Surendra*, A.I.R. 1934 Pat. 624 (625), 152 I.C. 897. An action claiming the mortgage-money *simpliciter* must be made under this clause—Ibid at p. 626.

It has been broadly stated in a number of cases that every loan implies a promise to pay, and that an unqualified admission of indebtedness is equivalent to an express covenant and creates a personal obligation and that therefore in every mortgage there is a personal covenant to pay the mortgage-debt, unless the contrary is expressly stated or appear by implication—*Kali Pershad v. Raye Kishori*, 19 W.R. 281; *Musahab Zaman Khan v. Inayetullah*, 14 All. 513; *Miller v. Runganath*, 12 Cal. 389; *Parbati v. Govind*, 4 C.L.J. 246; *Bhugwan v. Parmeshwari*, 5 C.L.J. 287; *Jivañdas v. Janki*, 18 N.L.R. 145, A.I.R. 1922 Nag. 98; *Seth Gopikishen v. Mankuerbai*, 20 N.L.R. 46, A.I.R. 1924 Nag. 97. A personal covenant is presumed in all mortgages of whatever form. The only difference that can arise would be that in certain forms of mortgages (e.g., usufructuary mortgages) the Court might, in the absence of an express covenant, demand a much more clearly implied covenant than it might require in other cases—*Parashram v. Brij Mohan*, 13 Lah. 250, A.I.R. 1932 Lah. 164, 135 I.C. 33; *Qudir v. Mehr Nur*, A.I.R. 1935 Lah. 103, 16 Lah. 612, 158 I.C. 206. This view is taken from the English law, under which a personal covenant to repay the money is implied and presumed in law from the very fact of accepting the loan—*Sutton v. Sutton*, 22 Ch. D. 511. But, it is submitted, this is too general a view. It may apply to the case of a *simple mortgage* as well as to an *English mortgage*, where a personal liability is imposed by the very language of clause (b) and (e) of sec. 58; but to apply the rule to all classes of mortgage would be to make too wide an assertion. So also, in a *mortgage by conditional sale* the mere promise to pay the money within a fixed period does not import a personal liability—*Nazim Hussain v. Mahabir Prosad*, 30 I.C. 224 (Oudh); *Mohamed Haji v. Ramappa*, 25 N.L.R. 187 (F.B.), A.I.R. 1929 Nag. 254 (255), 119 I.C. 684; *Govind v. Jagannath*, 12 N.L.R. 19, 33 I.C. 753; *Bhikam Lal v. Janak Dulari*, A.I.R. 1937 Oudh 517, 171 I.C. 296. And in a case of *usufructuary mortgage* their Lordships of the Judicial Committee have expressed the

opinion that 'although a loan *prima facie* involves a personal liability, and although such liability is not displaced by the mere fact that security is given for the repayment of the loan, still the nature and terms of such security may *negative any personal liability* on the part of the borrower's—*Ram Narayan v. Adhindra*, 44 Cal. 388 (400, 401) (P.C.). But if in a usufructuary mortgage there is expressly a personal covenant to pay, then the mortgage ceases to be a pure usufructuary mortgage and becomes a combination of a simple and a usufructuary mortgage; and the mortgagee would be entitled to a decree for the money under this clause as well as to a decree for sale under sec. 67—*Kangayya v. Kalimuthu*, 27 Mad. 526 (528). See also Note 409 under sec. 67. The personal covenant should be clear and unconditional in the undertaking to pay; otherwise it cannot entitle the mortgagee to sue for sale of the property—*Damodara v. Chandapur*, 56 Mad. 892, A.I.R. 1933 Mad. 613 (615). If a usufructuary mortgage-bond expressly states that the mortgage is for a *definite term* of years, and that the mortgagee is to retain possession for that period, the bond cannot be treated as a usufructuary mortgage; and a personal covenant to repay the loan is *implied* in such a transaction. Consequently the mortgagee is entitled to sue for the mortgage-money on the implied contract, after the expiry of the term—*Chhathi v. Bindeshwari*, 8 Pat. 16, A.I.R. 1929 Pat. 605 (608), 120 I.C. 32, 11 P.L.T. 68; *Rajkumar v. Surajdeo*, A.I.R. 1938 Pat. 585 (588), 19 P.L.T. 787, 177 I.C. 533.

This is an enabling section. Ordinarily a mortgagee has no right to sue for the mortgage money, in the absence of a personal covenant. This section provides under what circumstances the mortgagee is entitled to exercise this right—*Parbati v. Durga Prasad*, A.I.R. 1949 Pat. 487. This right is very much restricted by the present section. Where the personal liability to repay the loan is conditioned by the provision of the mortgaged property being insufficient for the purpose, the mortgagee cannot get a personal decree where no sale has taken place at all. Sub-section (2) makes it clear that the remedy given by this section is by way of a suit—*Mt. Sukra v. Ram Harakh*, A.I.R. 1951 All. 195 (F.B.), 1951 A.L.J. 241 overruling *Bisheshwar v. Chandu Lal*, A.I.R. 1928 All. 71, 50 All. 321. A usufructuary mortgagee is entitled to remain in possession even after his right to execute a decree for sale obtained by him has become barred by limitation—*Gangaram Madhav v. Dwarkibai*, A.I.R. 1960 Madh. Pra. 44.

In an equitable mortgage the mortgagee is entitled under this section to sue for the mortgage-money and the mortgagor binds himself to repay the mortgage-money—*Nityananda v. Rajpur C. B. Cinema Ltd.*, A.I.R. 1953 Cal. 208, 90 C.L.J. 123. The mere fact that the mortgagee acquires the mortgaged property would not disentitle him to recover the debt under the personal covenant unless the acquisition had the effect of extinguishing the debt—*Ramgopal v. Ramchandra*, A.I.R. 1949 Nag. 354, I.L.R. 1949 Nag. 284. This right of recovering the mortgage-money by sale of the mortgaged property is not affected by a decree obtained by a stranger against the mortgagor declaring that he is not the owner of the property—*Doddarangappa v. Kenchegowda*, A.I.R. 1953 Mys. 111, I.L.R. 1953 Mys. 98. After the expiry of the term of a usu-

fructuary mortgage, the mortgagee's remedy under this section is a suit for recovery of the mortgage-money and not a suit for possession or for recovery of rent in lieu of interest—*Bishun v. Anup*, A.I.R. 1949 Pat. 166, 20 P.L.T. 132. See also *Ramakkammal v. Subbarathnam*, A.I.R. 1953 Mad. 13. See also in this connection *Gopiram v. Shankar*, A.I.R. 1950 M.B. 72. A mortgagor cannot avoid his liability to pay interest on mortgage-amount on the ground that his suit for redemption was earlier—*Puttananjamma v. P. M. Channabasavanna*, A.I.R. 1967 Mys. 41.

A charge-holder is not entitled to avail himself of the privilege conferred by this section to sue for the mortgage-money, in execution proceedings without bringing a suit for the purpose even if the security is impaired by the conduct of the person creating the charge—*Kesar Chand v. Uttam Chand*, A.I.R. 1945 P.C. 91, 49 C.W.N. 685, I.L.R. 1945 Lah. 411.

Even if the mortgagor be in the first instance under no personal liability, such liability may arise under clause (b) or (c) [now cl. (c) or (d)] of this section—*Ram Narayan v. Adhindra*, 44 Cal. 388 (400) (P.C.).

The personal covenant can be enforced against the mortgagor as well as against his legal representatives, but not against the transferees from the mortgagor nor against the transferees from the legal representatives of the mortgagor. See the proviso and Note 424, *infra*.

417. Instances of personal covenants:—The question whether a mortgagor binds himself personally to repay the loan or not must depend upon the construction of the mortgage-bond in each case and the intention of the parties as evidenced by the circumstances—*Rajagopalachariar v. Thiagaraja*, A.I.R. 1925 Mad. 991, 86 I.C. 481; see also *Jamuna v. Sheonandan*, A.I.R. 1941 Pat. 486, 22 P.L.T. 529, 194 I.C. 392. There is a personal covenant if the deed contains the words "On the expiry of the term I shall pay the said Rs..... and redeem the lands"—*Udayana v. Senthivelu*, 19 Mad. 411; or "It is settled that I shall pay the principal amount to you in three instalments within the aforesaid period"—*Ramaya v. Guruva*, 14 Mad. 232; or "the mortgagees shall be competent to recover the amount in any way they like"—*Parashram v. Brij Mohan*, 13 Lah. 259, A.I.R. 1932 Lah. 164, 135 I.C. 33. A usufructuary mortgage-deed ran as follows: "I shall pay you the said mortgage-amount in the *Chittrai Kalavadi* of year 1883 and take back this deed of mortgage. If I fail to pay the mortgage amount in the said *Kalavadi*, then you shall receive the money in the *Chittrai Kalavadi* of whatever year I may pay it, deliver the said lands to my possession and also give back the bond," held that there was a sufficient covenant to pay in the first clause, and that the second clause did not limit the discretion of the mortgagor—*Sivakami v. Gopala*, 17 Mad. 131 (133) (F.B.); *Rangappa v. Thammayappa*, 26 M.L.J. 514, 24 I.C. 372 (*per* Seshagiri Iyer J.). But where a usufructuary mortgage contained the clause: "Having paid the principal money in the month of Chait 1297 we shall take back the bond and the land," held that these words did not imply a personal covenant to pay the money. It was merely a provision for redemption—*Luchmeswar v. Dookh Mochan*, 24 Cal. 677 (679); *Damodara v. Chandapur*, 56 Mad. 892, A.I.R. 1933 Mad. 613 (615); see also *Jamuna v. Sheonandan*,

supra. Similarly under the terms of a mortgage-bond the mortgagors covenanted to repay the principal and interest within 3 years from the date of execution and in default the mortgagee would be entitled to sue for foreclosure and the mortgage-bond would be regarded as a deed of sale, the consideration whereof would be the unpaid portion of the money advanced under the mortgage: *held* that there was no personal covenant to pay the mortgage-debt—*Bishan Datt v. Mathura Prasad*, I.L.R. 1939 All. 313, A.I.R. 1939 All. 260 (262), 1939 A.L.J. 362. Where the mortgagor first covenants to transfer the hypothecated properties indefeasibly to the mortgagees (under an English mortgage) and this is followed by the redemption clause, and then the mortgagor further covenants to pay the mortgagee at a certain date the mortgage-debt or any portion thereof then remaining due, with interest, the mortgagee is entitled to a personal decree—*Askaran v. Gobardhan*, 26 C.W.N. 318, A.I.R. 1922 Cal. 52 (53), 70 I.C. 158. But where under a mortgage the mortgagor agrees to pay the mortgage-money within a fixed period, and provides that in default of payment within that period the mortgagee would be entitled to foreclose, *held* that the agreement for payment cannot be construed into a personal covenant on the part of the mortgagor, and the remedy of the mortgagee is by foreclosure—*Harlal v. Sheik Rahim*, 70 I.C. 224, A.I.R. 1924 Nag. 53. Where it was provided in a deed of usufructuary mortgage that in case of default in the payment of the mortgage-money on the due date, the mortgagee should continue in possession and enjoyment of the mortgaged property till realisation of the mortgage-money, *held* that there was nothing in the deed in the nature of a personal covenant—*Damodara v. Chandapur*, 56 Mad. 892, A.I.R. 1933 Mad. 613 (616); *Ganeshram v. Gajraj Singh*, A.I.R. 1959 Madh. Pra. 178.

Where a promise to pay is made contingent on the happening of a certain event, *e.g.*, sale of the mortgaged property for arrears of revenue, no personal decree can be passed if the contingency does not happen—*Bunseedhur v. Sujaat Ali*, 16 Cal. 540.

Where the mortgagee has the right to realise the rents of the mortgaged properties to satisfy interest and part of the principal and in case of difficulty in realization to sell the mortgaged properties he may either sue the tenants or sue for the sale of the mortgaged properties—*Buttokristo v. Gobindaram*, A.I.R. 1939 Pat. 540, 182 I.C. 132; *Ramchandra Naidu v. Hassina Bai*, (1968) 1 Mad. L.J. 139. Where in a mortgage-deed there is a promise to repay and it is executed not for payment of the principal but to secure payment of interest, there is no objection to giving the plaintiff a money-decree for the amount of the principal—*Mathura Singh v. Palakdhari Raj*, A.I.R. 1940 Pat. 512, 21 P.L.T. 770, 187 I.C. 484.

418. Invalid mortgages :—Where a simple mortgage is invalid for non-registration, it will be ineffectual as a mortgage but will take effect as a *personal covenant* to pay, and will enable the mortgagee to get a simple money-decree against the mortgagor. See Note 349 to sec. 59 under heading "Effect of non-registration."

So also, where a mortgage is invalid for want of attestation, it will

still be admissible as evidence of personal covenant to repay the loan, and a simple money-decree can be passed on such covenant—*Mahadeo Prosad v. Gajraj Singh*, 3 O.L.J. 164, 34 I.C. 397; *Mathura Prosad v. Cheddi Lal*, 13 A.L.J. 553, 29 I.C. 363. If a mortgagee is induced by the fraud of the mortgagor to enter into a mortgage-transaction, the mortgage is invalid, but the mortgagee will be entitled to recover the money, by virtue of the personal covenant contained in the mortgage. See *Shahzad v. Narain*, 25 A.L.J. 37, A.I.R. 1927 All. 190 (191).

Where a mortgage is void in its entirety, the personal covenant contained in the mortgage is also void—*Har Prasad v. Sheo Gobind*, 44 All. 486, A.I.R. 1922 All. 134, 57 I.C. 792; *Kanhai v. Tilak*, 16 I.C. 42 (All.).

419. Clause (b)—Alternative security:—This clause provides for accidents such as flood, fire, diluvion or other *vis major* destroying the property wholly or partially, without any fault on the part of the mortgagor or mortgagee. A creditor in whose hands a pledge has perished by accident and without negligence on his part is entitled to proceed against his debtor personally for recovery of the debt—*Vithoba v. Chotalal*, 7 B.H.C.R. A.C., 116. Thus, the mortgagee would be entitled to call for his money if he were deprived of the possession of the property by diluvion—*Ram Sewak v. Sheo Naik*, 45 All. 388 (390), A.I.R. 1923 All. 433; *Bhawani v. Jang Bahadur*, 7 A.L.J. 391, 6 I.C. 569; or by accidental fire—*Venkateswara v. Kesava*, 2 Mad. 187. Where a portion of the mortgaged property is sold in revenue sale by reason of the mortgagor's default and the mortgagee brings a suit for money-decree on the personal covenant, the Court has no power to insist upon his filing a mortgage-suit even when he does not wish to have a mortgage-decree—*Chinnaswami v. Kannia*, A.I.R. 1938 Mad. 132, 46 M.L.W. 728, 175 I.C. 593.

This clause applies to an anomalous mortgage as well when the mortgaged property is wholly destroyed—*Hundaldas v. Balukhan*, A.I.R. 1943 Sind 59, I.L.R. 1942 Kar. 452.

This clause would not apply if the property is destroyed owing to the negligence of the mortgagee, or if he is under an obligation to restore it in case of such destruction, for his statutory right would then merge in the contractual obligation to repair or restore the property—*Venkateswara v. Kesava*, 2 Mad. 187.

Under this clause, the mortgagee must, prior to suit, call upon the mortgagor to furnish other security. He cannot, without demanding an additional security, sue at once for the mortgage-money—*Kruppier v. Peria Karuppa*, 42 Mad. 578, 36 M.L.J. 286; *Kamalambal v. Purushottam*, A.I.R. 1934 Mad. 644 (645), 152 I.C. 437. A usufructuary mortgagee, if he does not take steps in time (in this case for 21 years) calling upon the mortgagor to furnish additional security, cannot claim interest on the mortgage-money on account of dispossession from a portion of the mortgaged premises—*Parosanna v. Girish*, A.I.R. 1934 Cal. 149, 37 C.W.N. 1162, 149 I.C. 667.

A suit for return of mortgage-money on the ground of failure of security is barred under O. 2, r. 2, C. P. Code if the mortgagee first sues for possession and, having failed there, institutes the second suit for money—*Laiqa Ram v. Gokal Chand*, A.I.R. 1936 Pesh. 86, 161 I.C. 698.

420. Clause (c)—Wrongful act or default of the mortgagor :—This clause as well as clause (d) provides for relief, where the mortgagee is deprived of his security otherwise than by his own default. Where, therefore, the property mortgaged is lost owing to the default of the mortgagee himself, he cannot sue for the mortgage-money—*Chitkali v. Mathura*, 3 C.L.J. 220 ; *Hamadyar Khan v. Shankar*, A.I.R. 1923 Lah. 357, 85 I.C. 802. Thus, where the mortgaged property is sold away for arrears of revenue, owing to the default of the mortgagee-in-possession, he cannot bring a suit for the mortgage-money—*Kashi Lal v. Nural Huq*, 8 Pat. 569, A.I.R. 1929 Pat. 209 (210), 121 I.C. 466. But where the mortgagee is deprived of his security in consequence of the default of the mortgagor in paying the land-revenue due on the land, time would not begin to run against the mortgagee until the default in payment of land-revenue which resulted in sale of the land took place. Inability of the mortgagor is a default within this clause—*Alagan v. Maung Po*, A.I.R. 1934 Rang. 227, 151 I.C. 426. See also *Rai Mohan v. Comilla Union Bank*, A.I.R. 1949 Cal. 530, (a case of rent-sale). The suit for mortgage-money in such cases can be brought against any person liable to repay it and it is not limited to the mortgagor—*Ibid*. The suit is governed by Art. 120 Limitation Act and the right to sue accrued from the date on which the rent sale took place—*Ibid*. A purchaser from the mortgagor is personally liable under this clause if the mortgagee is deprived of his security by his wrongful act—*Gajadhar v. Rishabhumar*, A.I.R. 1949 Nag. 319, I.L.R. 1949 Nag. 122.

Mortgage security will be considered diminished in value within the meaning of this section if its letting value is decreased. When the value of the security has diminished, it amounts to a deprivation of part of the security—*Mathura Devi v. Mohan Lal*, A.I.R. 1938 Oudh 210 (211), (1938) O.W.N. 806. A usufructuary mortgagee has no remedy either by foreclosure or sale. If he is deprived of the security in whole or in part he can only get a simple money-decree for the mortgage-money—*Ibid*.

Although this clause does not specifically provide for a case in which the mortgagee of an undivided share is deprived of it in consequence of a subsequent partition, yet the provisions of this clause are sufficient to cover such a case—*Nand Bahadur v. Sita Ram*, A.I.R. 1936 Oudh 174, 160 I.C. 27. It is not obligatory on the mortgagee to claim possession of the land allotted to the mortgagor, by way of substituted security—*Ibid*.

The right of personal recovery conferred by clauses (c) and (d) exists independently of and is not taken away by any personal covenant to repay contained in the mortgage-deed. The mortgagee is entitled to sue the mortgagor whenever he is deprived of his security, in spite of the fact that a suit under a personal covenant contained in the mortgage-deed is barred at that time—*Appasami v. Virappa*, 29 Mad. 362.

If it is implicit in the mortgage-deed that the mortgagee shall get possession, and the mortgagee does not get possession he may sue either for possession or for the mortgage-money—*Ram Padarath v. Nimar Singh*, A.I.R. 1942 Oudh 172 (174), 197 I.C. 164.

Under this section a mortgagor is liable to the extent to which the

security has been rendered insufficient by him. The cost of materials removed by the mortgagor resulting in depreciation of the security is not the criterion—*Haridas v. Jagannath*, I.L.R. 1939 Nag. 63, A.I.R. 1939 Nag. 256 (258), 1939 N.L.J. 338.

Where after it was found that the mortgagor had no title to one of the mortgaged properties which were leased back to the mortgagor, the mortgagee recovered actual possession of the other properties and continued in possession for 30 years without any complaint against the diminution of security. Held that the mortgagee was not entitled to any relief on account of diminution because he must be deemed to have acquiesced in the diminution—*L. C. Pais v. Mapanna*, A.I.R. 1956 Mad. 128.

Instances of mortgagor's wrongful act of default:—If the mortgagor conceals that the property mortgaged to him is subject to a prior incumbrance, the mortgagee may sue for the return of the money without waiting for the expiry of the stipulated period—*Bhugwan Acharjee v. Govind*, 9 Cal. 234; *Ahmadulla v. Salar Baksh*, 27 All. 488. Where a mortgagor must have known that the property he was mortgaging was non-transferable, while the mortgagee believed that it was transferable, the act of the former was a default within the meaning of this section—*Ganesh v. Sujhari*, 10 All. 47. Where an unregistered mortgage was effected in favour of the mortgagee, and afterwards the property was sold by a registered deed the mortgagee was held to be deprived of his security—*Appasami v. Virappa*, 29 Mad. 362. A breach of the duty imposed by section 65 on the mortgagor is a 'default'. Sec. 65 implies a covenant by the mortgagor to pay off the prior mortgage. If he allows the first mortgagee to bring the property to sale, the second mortgagee can sue for the mortgage money—*Singjee v. Tiruvengadam*, 13 Mad. 192. The obligation of a mortgagee-in-possession to pay the revenue does not extend beyond the portion mortgaged to him; therefore, if the mortgagor fails to pay the revenue in respect of a portion not mortgaged, and in consequence the whole mortgaged property is sold, the mortgagee can enforce his claim against the mortgagor personally, having also under sec. 73 a claim on the sale-proceeds—*Sawaba v. Abaji*, 11 Bom. 475; *Jhabhu Ram v. Girdhari*, 6 All. 298. A defect of title of the mortgagor entitles the mortgagee to sue for the mortgage-money—*Amirullah v. Rasulkaksh*, 17 A.L.J. 474, 50 I.C. 744. An act of waste committed by the mortgagor makes him liable to be sued for the mortgage-money under this clause—*Ramakrishnama v. Chengu Aiyar*, 27 M.L.J. 494, 33 I.C. 321. Where, in a case of usufructuary mortgage, the mortgagor prevented the mortgagee from realising the full rents and profits, and realised certain rents himself, held that the mortgagee was deprived of a part of his security—*Ram Narayan v. Adhindra*, 44 Cal. 388 (402) (P.C.).

421. What is not a 'wrongful act or default':—If the mortgagor sells his equity of redemption and the usufructuary mortgagee is deprived of the possession of a part of the property in consequence, he cannot sue for the mortgage-money; the sale of the equity of redemption is not a wrongful act under this section—*Jhabhu Ram v. Girdhari*, 6 All. 298; *Gokul v. Shrimal*, 6 Bom. L.R. 288. When a property mortgaged with possession is attached and sold in execution of a money decree and

the mortgagee is dispossessed by the auction purchaser, the mortgagee cannot sue for the mortgage money, because the mortgagor by allowing his equity of redemption to be sold did not commit a wrongful act—*Gopalasami v. Arunachella*, 15 Mad. 304 (305). Where in a usufructuary mortgage the mortgagor holds part of the property as tenant of the mortgagee, mere non-payment or reduction of rent by the mortgagor-tenant is not a wrongful act of depriving the mortgagee of possession of the land so as to attract the provisions of this clause—*Ram Kumar v. Mahapal*, A.I.R. 1938 All. 188, (1938) A.L.J. 18, I.L.R. (1938) All. 218, 174 I.C. 292; *Boochi v. Nathi Ram*, A.I.R. 1932 All. 51, 133 I.C. 402. Where in a suit against the mortgagor by a third party it was declared that the mortgagor was not entitled to any of the mortgaged properties, a subsequent compromise by which the mortgagor obtained certain rights could not be considered a wrongful act—*Gajanand v. Prayog Kumari*, A.I.R. 1938 Cal. 48 (51)—*per* Lord Williams, J. The co-sharer mortgagors could not be made liable under this clause for diminution of the mortgage security caused by the wrongful act of the *lambardar* who is appointed and removable by a revenue officer—*Gajadhar v. Rishabhkumar*, A.I.R. 1949 Nag. 319, I.L.R. 1949 Nag. 122. If the security is rendered insufficient as a result of the reduction of the jama on the application of the mortgagee who is also the tenant for the commutation of the excessive *bhooli* rent to money rent, the insufficiency is not due to any misconduct on the part of the mortgagee—*Chand Bihari Gope v. Shyam Nandan*, A.I.R. 1959 Pat. 235. The right to sue under this section can be enforced in a separate suit, as well as in a suit to enforce the mortgage—*ibid.*

422. Clause (d)—Failure to deliver or secure possession to mortgagee :

—Under this clause, if the mortgagor fails to give possession of the property or to secure to a usufructuary mortgagee quiet possession thereof, he is entitled to sue the mortgagor for the mortgage-money—*Abdul Iasalam v. Rafiat*, 2 C.L.J. 493; *Pinto v. Narayan*, A.I.R. 1932 Bom. 558, 34 Bom. L.R. 984; *Ranba v. Bansilal*, A.I.R. 1953 Hyd. 231. Where the mortgage-bond contained an express stipulation that the mortgagee would be entitled to sue for the mortgage-money upon being dispossessed, and the mortgagee was dispossessed by the mortgagor before the due date of payment, *held* that the mortgagee was entitled to sue for the mortgage-money both under the stipulation in the bond and under the provision of this section—*Afiruddin v. Joy Chandra*, 35 C.W.N. 103 (104). In a Madras Full Bench case it was held that a usufructuary mortgagee, who was not given possession by the mortgagor, ceased to be a usufructuary mortgagee, and was entitled to sue for foreclosure or sale—*Subbamma v. Narayya*, 41 Mad. 259 (263) (F.B.). But this decision is no longer correct in view of the amendment of clause (d) of sec. 58. See Note 342 under that section. But the new clause (d) of sec. 58 would not apply to a mortgage executed before the Amendment Act of 1929, and, if such a mortgage-deed contained a personal covenant to repay the mortgage-money in the event of the mortgagor failing to secure the mortgagee in possession of the property, the mortgage was not a purely usufructuary one, and the mortgagee was entitled to sue for the sale—*Ram Khilawan v. Ghulam*, 8 Luck. 1190, 141 I.C. 464, A.I.R. 1933 Oudh 35 (36), following 41 Mad. 259 (F.B.). In a mortgage by conditional sale

after the expiry of the stipulated period it is not the duty of the mortgagor to put the mortgagee in possession and the latter is not entitled to sue for the mortgage-money for the mortgagor's failure to do so—*Badri v. Besu*, A.I.R. 1933 Lah. 174, 145 I.C. 159. But where a mortgage comprises the features of simple and usufructuary mortgages and the mortgagor deprives the mortgagee of part of his security by failing to deliver up possession, the mortgagee has a right under this section to sue for mortgage-money or to sue under sec. 67 for a decree for sale of the mortgaged property—*Kanhaiya v. Mt. Hamidan*, A.I.R. 1938 All. 418 (F.B.), 176 I.C. 492; *Lal Narshingh v. Md. Yakub*, A.I.R. 1929 P.C. 139, 4 Luck. 363, 33 C.W.N. 693, 56 I.A. 299, 116 I.C. 414.

In the case of a combination of a usufructuary and simple mortgage, if the mortgagee is dispossessed he can sue as a usufructuary mortgagee under cl. (d). He may also as a simple mortgagee sue on the covenant to repay—*Hundaldas v. Balukhan*, A.I.R. 1943 Sind 59, I.L.R. 1949 Kar. 452; *M. Ramnath Pillai v. K. V. Annamali Chettiar*, A.I.R. 1963 Mad. 342. Where the prior usufructuary mortgagee is not made a party in the suit of a subsequent simple mortgagee and the latter dispossesses him in execution of the decree, the usufructuary mortgagee has a right to sue for recovery of possession—*Sarju v. Parbhu*, A.I.R. 1950 Pat. 34. A mortgagee of an undivided share of coparcenary property, not being entitled to joint possession under the Hindu law cannot recover mortgage money under this clause—*Kanailal v. Dhanji*, A.I.R. 1952 Kutch 18.

In the case of a usufructuary mortgage of occupancy rights which is void from its inception if the mortgagee is dispossessed by the landlord through the intervention of the Court, he can have no claim against the mortgagor under this section—*Sana Ullah v. Jai Narain*, A.I.R. 1942 All. 409, 1942 A.L.J. 390.

Where the mortgagor fails to deliver possession to the mortgagee, the right to sue for the mortgage money accrues under this clause immediately, that is, on the date of the mortgage, and a suit by the mortgagee filed after 12 years from that date will be barred by limitation though it may be within 12 years of the due date—*Gangaram v. Balappa*, A.I.R. 1947 Bom. 152, 48 Bom. L.R. 629; *Puttamadamma v. Puttappa*, A.I.R. 1969 Mys. 20.

Before a mortgagee brings an action under this clause for the mortgage-money he must prove his mortgage. If it cannot be tendered in evidence for want of valid registration, then the mortgagee cannot succeed—*Kesari v. Musafir*, A.I.R. 1937 All. 711, (1937) A.L.J. 815, 171 I.C. 825.

Where a usufructuary mortgage has been put in possession by the mortgagor but is afterwards dispossessed of a portion by a third party claiming under a purchase from the mortgagor, the mortgagee's right is only to sue to recover possession. He cannot sue for the mortgage-money unless the dispossession was owing to the wrongful act or default of the mortgagor—*Ma Pwa v. Ma Me*, A.I.R. 1936 Rang. 80 (81), 161 I.C. 461. But see *Contra Parbati v. Durga Prasad*, A.I.R. 1949 Pat. 487.

If it is found that the mortgagee is not in possession, the Court will

give him a money-decree, and it is not necessary to find out on what particular date he was dispossessed, or whether he was or was not dispossessed on the particular date alleged in the plaint—*Sadhu Saran v. Barhamdeo*, 8 P.L.T. 355, A.I.R. 1927 Pat. 230, 103 I.C. 592. The failure of the mortgagor to deliver possession will not deprive the mortgagee of his right to interest merely because he takes no steps to enforce his right of possession—*G. Joseph Mottom v. Free India Bank*, A.I.R. 1966 Ker. 234.

But the mortgagee cannot sue for the money unless he is *actually* out of possession. Thus, the mere Court-sale of the property in execution of a decree against the mortgagor cannot give the mortgagee a right to sue (assuming such to exist) unless the purchaser dispossessed him—*Janki v. Sheomangal*, 1881 A.W.N. 59. So also, the mortgagee cannot sue for the money where the dispossession is due to his *own* default. Thus, a usufructuary mortgagee who fails to make a defence to a suit by a subsequent mortgagee which would have preserved the security, is not entitled to sue for the mortgage-money—*Dunnia Lal v. Nowratan*, 2 P.L.J. 490, 41 I.C. 806; *Chitkali v. Mathura*, 3 C.L.J. 220.

The remedy provided in this clause is an *alternative* remedy and does not debar the mortgagee from bringing a *suit for possession*—*Sankata v. Jagat Narain*, 2 O.C. 24; *Linga Reddi v. Shama Rao*, 17 Mad. 469; *Thakur Chowdhury v. Manup Mahton*, 16 I.C. 735. The Allahabad High Court has held that if the mortgagor fails to give possession of a portion of the mortgaged property, the remedy of the mortgagee is to sue for possession and mesne profits—*Gouri Singh v. Bechu Singh*, 1932 A.L.J. 1092, A.I.R. 1933 All. 97 (98), 142 I.C. 779.

Claim to interest by usufructuary mortgagee:—If a usufructuary mortgagee, who under the terms of the mortgage-deed is entitled to receive interest out of the profits of the property mortgaged, has not succeeded in obtaining possession he cannot claim interest on his money at the time of redemption unless the claim for interest is provided for in the deed—*Dubri v. Ram Naresh*, 3 O.W.N. 176, A.I.R. 1926 Oudh 224, 93 I.C. 297; *Bhawani Prasad v. Saheb Din*, 9 O.C. 144; *Mahadeo v. Sittla Baksh*, A.I.R. 1922 Oudh 102, 65 I.C. 408; *Mahadaji v. Joti*, 17 Bom. 425. (But see *Sitanath v. Thakurdas*, 46 Cal. 448 (453) where under such circumstances, the mortgagee was held to be entitled to interest.) A usufructuary mortgagee cannot claim interest in lieu of rents and profits owing to the failure of the mortgagor to deliver possession of a portion of the property mortgaged. If the mortgagee does not sue for additional security in time he shall be deemed to have acquiesced in the diminished security—*Dubri v. Ram Naresh*, (supra); *Sheo Shankar v. Raj Jas*, 2 Luck. 676, 4 O.W.N. 744, A.I.R. 1927 Oudh 594 (595), 105 I.C. 164, following *Partab v. Gajadhar*, 24 All. 521 (P.C.); *Prasanna v. Girish*, 37 C.W.N. 1162. But see *Subramania v. Panchananda*, A.I.R. 1932 Mad. 175 (176), 136 I.C. 785 where it has been held that if the mortgagor is guilty of a breach of covenant to deliver possession, the mortgagee can claim interest by way of damages so long as the claim for the principal is not barred—*Ibid*, at p. 177.

Where a subsequent usufructuary mortgagee sues for redemption

against a prior usufructuary mortgagee, the former can be made liable for reasonable interest also along with the principal amount only if the latter can claim interest in a suit under sec. 68 coupled with sec. 67—*Kumarappa v. Suppan*, A.I.R. 1933 Mad. 672, 145 I.C. 744.

Instances of failure to deliver or secure possession:—The inclusion in the mortgage-deed of plots not belonging to the mortgagor entitles the mortgagee to sue for his money—*Fateh Din v. Kishen Lal*, 73 I.C. 902, A.I.R. 1923 All. 584. Where a mortgage-deed provided that on default of payment of interest the mortgagee would be given possession, then the failure of the mortgagor to give possession, on the interest falling into arrears, would entitle the mortgagee to sue for the amount due—*Saravana v. Chinnammal*, 15 Mad. 65. This clause is wide enough to include every instance of failure by a mortgagor to secure a mortgagee in undisturbed possession, at any time during the period for which the mortgagee was entitled to remain in possession. The subsequent dispossession of the mortgagee after possession has been delivered to him is a failure on the part of the mortgagor to secure him in undisturbed possession—*Hiralal v. Ghasita*, 16 All. 318 (F.B.); *Jainandan v. Baijnath*, 2 P.L.T. 229, 63 I.C. 297 (300); *Pargan Panday v. Mahatam*, 6 C.L.J. 143. Where the mortgagee granted a lease for a fixed term to his mortgagor with an option to renew on fulfilment of certain conditions, but the mortgagor, on the expiry of the term failed to fulfil such conditions and also refused to give up possession, the mortgagee was held entitled to a money-decree for the amount due under the mortgage—*Hiralal v. Ghasita*, 16 All. 318. Where a usufructuary mortgagee in possession comes to know of a decree on a prior unregistered mortgage for the sale of the mortgaged property the mortgagee can sue for money even after himself purchasing the property in execution—*Ahmadullah v. Salar Baksh*, 27 All. 488 (491). A usufructuary mortgagee can sue for the mortgage-money on dispossession by a co-sharer of the mortgagor who obtained the mortgaged property on partition—*Tilak Singh v. Jalai Singh*, 11 C.L.J. 136, 5 I.C. 130. The mortgagee has a cause of action under this clause when the mortgagor, on being called upon to give additional or substituted security, entered into occupation and deprived the mortgagee of the possession—*Pargan Pandey v. Mahatam Mahto*, 6 C.L.J. 143. Where the mortgagee is dispossessed by a stranger claiming adversely to the mortgagor, who fails to defend his title and restore the mortgagee to possession, the latter is entitled to recover the mortgage-money—*Maung Po v. Maung Kyauk*, 2 Bur. L.J. 47, A.I.R. 1924 Rang. 143, 79 I.C. 815.

423. Disturbance of possession:—*By the mortgagor:*—The mortgagee is entitled to sue for the mortgage-money if he is disturbed in his possession by the mortgagor or by a person in collusion with the mortgagor—*Nakchedi v. Ramcharitar*, 19 All. 191 (193). If the usufructuary mortgagee leases back to the mortgagor on his agreeing to pay monthly rent in lieu of interest and the mortgagor not only fails to pay rent but continues in possession after the expiry of the lease against wishes of the mortgagee the mortgagee will be entitled to sue the mortgagor for recovery of possession and such a suit will not be barred by a previous suit to recover the rent in arrears—*Shivajee Prosad v. Mohant Darsan Das*, A.I.R. 1967 Pat. 87. But cl. (d) has no application to a case where the dispossession

is due to the mortgagee's own default—*Bharat Ram v. Beni Dutt*, A.I.R. 1936 Oudh 263, 161 I.C. 821. A provision in a mortgage-deed making the mortgagor liable to pay in the event of the mortgagee being dispossessed applies only when the mortgagee's possession is interfered with and is not applicable to the case where the mortgagor has failed to deliver possession initially—*Kesari v. Musafir*, A.I.R. 1937 All. 711 (713), (1937) A.L.J. 815, 171 I.C. 825.

By person claiming superior title:—The provisions of this clause apply to the case of dispossession of the mortgagee by a person holding a *better title* than the mortgagor, and so where a mortgagee is thus dispossessed and deprived of his mortgage-security, he is entitled to recover the mortgage-money personally from the mortgagor—*Ram Surat v. Gur Prasad*, 43 All. 484, 19 A.L.J. 357, 63 I.C. 998. This is now made clear by the italicised words added to this clause. Before the amendment it was held in *Labh Singh v. Jamnum*, A.I.R. 1931 Lah. 694, 134 I.C. 116, following *Kulla Mal v. Umra*, 61 I.C. 604 that where an occupancy holding is resumed by the landlord after it had been mortgaged the mortgagee had no right to obtain compensation. But this seems to be no longer good law.

By other persons:—This clause applies when the disturbance of the mortgagee's possession is caused by a person having some title and not by third parties—*Gopalasami v. Arunachella*, 15 Mad. 304 (306); *Nakchedi Ram v. Ram Charitar*, 19 All. 191 (193); *Jhabbu v. Girdhari*, 6 All. 298 (302).

Thus, if the tenants of the mortgaged property who had to pay rent to the mortgagee wrongfully refused to do so, and if any one of them with whom the mortgagor was not in collusion disturbed the possession of the mortgagee, the mortgagor could not be made liable for the acts of such third persons—*Nakchedi Ram v. Ram Charitar*, 19 All. 191 (193). Therefore, where the possession of the mortgagee has been disturbed by a person without title, the mortgagee is entitled to sue the trespasser for declaration of title and recovery of possession without suing the mortgagor for the mortgage-money—*Bechu Sahu v. Arjun*, 3 P.L.J. 162, 43 I.C. 917. Where the usufructuary mortgagee is deprived of the mortgaged property by a third party claiming under a purchase from the mortgagor, the mortgagee's right is only to bring a suit against that person to recover the possession of which he has been deprived. He cannot sue the mortgagor for the mortgage-money, for the mortgagor is at perfect liberty to sell his equity of redemption—*Jhabbu v. Girdhari*, 6 All. 298 (302); *Gokul v. Shrimal*, 6 Bom.L.R. 288. Similarly, if the mortgagee is deprived of the possession of the mortgaged property by reason of a creditor of the mortgagor obtaining a decree against the mortgagor and bringing to sale the mortgagor's equity of redemption in execution of that decree, the mortgagee is not entitled to sue the mortgagor for the mortgage-money—*Gopalasami v. Arunachella*, 15 Mad. 304 (306). But a person claiming adversely to the mortgagor is not a person claiming without title; and therefore if the mortgagee is dispossessed by such person, the mortgagor is bound to defend the mortgagee's possession. If he fails to do so, he must repay the mortgage-money—*Maung Po Kin v. Maung Kyaukye*, 2 Bur.L.J. 47, A.I.R. 1924 Rang. 193, 79 I.C. 815. Where a mortgagee

entitled to possession under a usufructuary mortgage has been put in possession by the mortgagor, but is afterwards dispossessed of a portion of the property by a third party claiming under a purchaser from the mortgagor, the mortgagee's right is only to sue to recover possession from him. He cannot sue for the mortgage-money unless the dispossession was owing to the wrongful act or default of the mortgagor—*Ma Pwa v. Ma Me*, A.I.R. 1936 Rang. 80 (81), 161 I.C. 461.

A usufructuary mortgagee or a mortgagee who is entitled to retain possession until the discharge of the debt under an anomalous mortgage can also sue for recovery of possession instead of suing for the mortgage-money—*Kiran Swaroop v. Raghunath Prasad*, A.I.R. 1956 Madh. B. 110.

424. Proviso—Suit against mortgagor's transferees and legal representatives :—The words "the mortgagor" have been omitted from sub-section (1), and the proviso has been added, to make it clear that in case of clause (a) the liability of the mortgagor to be sued for the mortgage-money can be enforced only against the mortgagor (or against his legal representative) but not against a transferee from the mortgagor nor against a transferee from the legal representative of the mortgagor; whereas under the other clauses the suit for recovery of the money may or may not be brought against the transferees according to the circumstances of each particular case.

Leaving clause (a) out of consideration, the general rule is that the liability of the mortgagor to be sued for the mortgage-money under the circumstances mentioned in this section attaches to the mortgagor's representatives also. Therefore, clause (c) of this section applies also to the heir of the mortgagor; and such heir is liable to pay the mortgage-money under clause (c) when he commits waste to the prejudice of the security—*Ramkrishna v. Chengu Aiyer*, 27 M.L.J. 494, 33 I.C. 321. But where a mortgagee bringing a suit under sec. 67 for sale of the mortgaged property impleading not only the sons of the mortgagor but also the subsequent transferee from them, entered into a compromise with the latter under which after accepting a certain sum of money from him, the mortgagee discharged him from the suit and agreed to give up the remedy against the mortgaged property, he could not after realizing the amount turn round and claim the balance personally from the mortgagor's sons relying on the personal covenant—*Mt. Boota v. Gur Prasad*, A.I.R. 1937 Oudh 20 (23, 25), 12 Luck. 313, 164 I.C. 817.

A personal covenant does not run with the land, no personal decree can be passed against a purchaser of the equity of redemption—*Ibid*, at p. 23.

425. Sub-section (2) :—For the purpose of a stay of the proceedings under sub-section (2) the suit must be a suit by the mortgagee for the mortgage-money in his capacity as a mortgagee. If the mortgagor creates a personal liability by an independent transaction such as a promissory note or other independent transaction completely dissociated from the mortgage, then he does not come within the scope of sub-section (1) (a) of this section and the defendant cannot pray for stay of suit under sub-section (2)—*Nityananda*

v. *Rajpur C. B. Cinema Ltd.*, A.I.R. 1953 Cal. 208, 90 C.L.J. 123. A mortgagor cannot deny the mortgage and at the same time invoke the discretionary relief under sub-section (2)—*ibid.*

Relative scope of sec. 68 and 98:—Section 68 not being subject to a contract to the contrary sec. 98 must be read subject to sec. 68—*Chand Behari v. Shyam Nandan*, A.I.R. 1959 Pat. 235.

69. A power conferred by the mortgage-deed on the mortgagee, or on any person on his behalf, to sell or concur in selling, in default of payment of the mortgage-money, the mortgaged property or any part thereof, without the intervention of the Court, is valid in the following cases, and in no others, (namely)—

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan, or Buddhist, or a member of any other race, sect, tribe, or class from time to time specified in this behalf by the Local Government with the previous sanction of the Governor-General in Council, in the local official Gazette ;

(b) where the mortgagee is the Secretary of state for India in Council :

(c) where the mortgaged property or any part thereof is situate within the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein, Akyab or in any other town which the Governor-General in council may,

69. (1) * * * A mortgagee, or any person acting on his behalf, shall subject to the provisions of this section, have power to sell or concur in selling the mortgaged property or any part thereof, in default of payment of the mortgage-money, without the intervention of the Court, in the following cases and in no others, namely :—

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist or a member of any other race, sect, tribe or class from time to time specified in this behalf by the "State Government", in the "Official Gazette" ;

(b) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and the mortgagee is the "Government" ;

(c) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and the mortgaged property or any part thereof was on the date of the execution of the mortgage-deed,

by notification in the *Gazette of India*, specify in this behalf.

stuate within the towns of Calcutta, Madras, Bombay, * * *, or in any other town or area which the "State Government" may; by notification in the "*Official Gazette*", specify in this behalf.

(2) No such power shall be exercised unless and until—

(a) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several martgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service ; or

(b) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

(3) When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised ; but any person damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(4) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into Court under section 57 of a sum to meet any prior incumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale ; and, secondly in discharge of the mortgage-money and costs and other money, if any, due under the mortgage ; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

Nothing in the former part of this section applies to powers conferred before this Act comes into force.

(5) *Nothing in this section or in section 69A applies to powers conferred before the first day of July, 1882.*

The powers and provisions contained in sections 6 to 19 (both inclusive) of the Trus-

tees' and Mortgages' Powers Act, 1866 shall be deemed to apply to English mortgages wherever in British India the mortgaged property may be situate, when neither the mortgagor nor the mortgagee is a Hindu, Muhammadan, or Buddhist, or a member of any other race, sect, tribe, or class from time to time specified in this behalf by the Local Government with the previous sanction of the Governor-General in Council in the local official Gazette.

* * *

* * *

Amendment :—This section has been amended by sec. 34 of the T. P. Amendment Act (XX of 1929).

This section has been adapted from time to time by the Government of India (Adaptation of Indian Laws) Order, 1937 by A.L.O. 1948 and by A.L.O. 1950.

In the beginning of sub-sec. (1) the words "Notwithstanding anything contained in the Trustees' and Mortgagees' Powers Act 1866" have been omitted by the Repealing and Amending Act XLVIII of 1952.

425A. Application :—This Act does not apply to the Punjab, and therefore in that province there is nothing to prevent the parties from making a stipulation in a mortgage-deed allowing sale without the intervention of Court, and such stipulation is unfettered by the restrictions of this section—*Kanhaiya Lal v. National Bank of India Ltd.*, 4 Lah. 284 (P.C.), 75 I.C. 7, A.I.R. 1923 P.C. 114.

"Town of Bombay" :—Property situate at Mahim within the island of Bombay, and within the local limits of the Bombay High Court's original civil jurisdiction falls under this section—*Trimbuk v. Bhagwandas*, 23 Bom. 348.

426. Object and scope of section :—This section has been enacted to set at rest the conflict of decisions which existed prior to the passing of this Act regarding the mortgagee's power to sell the mortgaged property without the intervention of the Court.

427. Power of sale :—The power of sale contemplated by this section is a power to sell privately, *i.e.*, without the intervention of the Court; whereas the power conferred by sec. 58 (b) in a simple mortgage is a power to 'cause the mortgaged property to be sold' *i.e.*, to have the property sold through the intervention of the Court—*Kishanlal v. Gangaram*, 13 All. 28. A simple mortgagee cannot sell the mortgaged property privately, unless the mortgage-deed expressly empowers him to do so, and even then he can sell only under the circumstances enumerated

in clause (b) or (c) of this section. So is the case with usufructuary, conditional, equitable and anomalous mortgages. In an English mortgage, the power need not be expressly conferred, but it cannot be exercised unless the parties are Europeans.

A managing member of an undivided Hindu family can create a mortgage for family necessity and can give power of sale under cl. (c) to the mortgagee in places where this clause applies—*Parmanand v. Nannulal*, I.L.R. 1942 Mad. 287.

In a simple mortgage, the power of sale must be actually conferred by the mortgage-deed. A mere provision that the mortgagee "shall have all the rights conferred upon a mortgagee by the Transfer of Property Act" is not sufficient to confer such a power, and a private sale by the mortgagee is invalid and gives no title to the purchaser—*Mataprasad v. Kunnon*, 6 Rang. 134, A.I.R. 1928 Rang. 128, 110 I.C. 698.

There is nothing in this section to prevent a mortgagor giving to a second mortgagee a power of sale, even when he has not given one to the first mortgagee—*Paramanand v. Nannulal*, A.I.R. 1942 Mad. 232 (236), (1941) 2 M.L.J. 923, 54 M.L.W. 656.

The power of sale given to the mortgagee under the mortgage-deed cannot be taken away without some substantive legislation. Where the mortgagor has not exercised his right of redemption and the mortgagee has option to ask for sale after a mortgage decree has been passed, the latter cannot under sec. 15D, Deccan Agriculturists' Relief Act be debarred from exercising his power of sale—*Govindram v. Official Assignee*, A.I.R. 1950 Bom. 49, 51 Bom.L.R. 828. A mortgagee who has entered into a contract of sale of the mortgaged property in exercise of his power of sale under this section is not an agent of the mortgagor—*Mansoor v. Usman*, A.I.R. 1944 Bom. 156, 46 Bom.L.R. 159. Such a mortgagee is not at liberty to purchase the mortgaged property himself even if there is a contract to that effect between the mortgagor and the mortgagee—*Damodara v. Aburupammal*, A.I.R. 1943 Mad. 301, (1943) 1 M.L.J. 92; *Sree Yallamma Cotton etc. Mills Co. Ltd., In the matter of*, A.I.R. 1969 Mys. 280.

A mortgagor must file a suit for redemption and offer to pay the mortgage-debt after the due date has expired, if he wants the relief of injunction restraining the mortgagee from exercising the power of sale—*Mulraj v. Nainmal*, A.I.R. 1942 Bom. 46 (48), 43 Bom.L.R. 1034. He cannot get this relief unless he pays the mortgage amount to the mortgagee or tenders the same to him—*Babamiya v. Jehangir*, A.I.R. 1941 Bom. 339 (341), 43 Bom.L.R. 553. But if the mortgagee exercised the power of sale in a wrong and improper manner contrary to the terms of the contract, the mortgagor can bring a suit for such injunction—*Ibid.* The equitable relief by way of injunction cannot be refused merely because the mortgagor was unable to pay in the past and might be unable to pay in the future.—*Ibid* at p. 344.

A mortgagee who has contracted to sell in exercise of his power of sale, and who (the land not having become vested in the purchaser) rescinds the contract, is not accountable to the mortgagor—*Wright v. New Zealand F. C. Association*, A.I.R. 1939 P.C. 181, 183 I.C. 18.

A mortgagee with power of sale is, strictly speaking, not a trustee of the power of sale, which is for his own benefit to enable him the better to realize his mortgage-debt. If he exercises it *bona fide* the Court will not interfere unless the price is so low as in itself to be evidence of fraud—*Pichai Moideen v. Chatturbhuj*, A.I.R. 1933 Mad. 736 (741), 65 M.L.J. 491, 145 I.C. 1023; *Haddington Island Quarry Co. v. Aiden Wesley*, (1941) A.C. 722.

When power can be exercised:—The power of sale can be exercised when there has been a "default of payment of the mortgage-money". Where nothing is stated as to when it is to be repaid, there can be no default in payment of the principal sum due until it is demanded.—*Purasawalkam H. J. S. Ltd. v. Kuddas*, 23 L.W. 476, A.I.R. 1926 Mad. 841, 94 I.C. 860.

Power on assignment:—The power of sale passes with the assignment of the mortgage, so that it can be exercised by the assignee. If the mortgagee sub-mortgages his interest, transferring his power of sale, the sub-mortgagee can exercise that power—*Ram Krishna v. Official Assignee*, 45 Mad. 774, A.I.R. 1922 Mad. 390, 69 I.C. 407. In fact, in such a case the proper person to exercise the power is the sub-mortgagee and not the original mortgagee—*Stevens v. Theatres Ltd.*, [1903] 1 Ch. 857. Similarly, if the mortgagor transfers his interest, the power may be exercised against the transferee—*Exchange and Hop Warehouse Ltd. v. Association of Land Financiers*, 34 Ch. D. 195.

Cl. (b) of sub-sec. (1):—The clause, before the amendment, conferred a power of private sale where the mortgagee was the Secretary of State. A Local Government was therefore not within the scope of this clause as it originally stood—*Muthu Karuppan v. Sinnappa*, A.I.R. 1948 Mad. 130, (1947) 2 M.L.J. 157.

Clause (c) of sub-section (1):—The words "power of sale" in this clause refer to a clause to be expressly included in the mortgage. It would be wrong for the Court to find out its meaning as judicially interpreted. A power of sale must include all steps which are necessary to be taken in that connection. This power cannot be exercised if there are words making it invalid.—*Mulraj v. Nainmal*, supra at pp. 48, 49. A power of sale necessarily includes a power to postpone a sale. The power to buy or rescind or vary any contract of sale is not bad. The mortgagee cannot buy the property for himself—*Ibid* at p. 49. The mortgagee has express power to sell when the deed says that the "mortgagee shall be entitled to cause mortgaged property to be sold as a defaulter by revenue sale"—*State of Mysore v. Basappa Naidu*, (1968) 1 Mys. L. J. 69.

This section does not offend Article 14 of the Constitution nor does it offend Art. 19(1)(f)—*Narasimhachariar v. Egmore Benefit Society*, A.I.R. 1955 Mad. 135.

428. Notice:—Clause (a) of sub-section (2) providing for service of notice is taken almost word for word from sec. 20 (i) of the English Coveyancing Act, 1881 (44 & 45 Vict., c. 41).

The mortgagee must give three month's notice before sale, and this period cannot be curtailed by agreement—*Babamiya v. Jehangir*, A.I.R.

1941 Bom. 339, 43 Bom.L.R. 553. Therefore, if a deed of mortgage provides that the power of sale may be exercised after 15 days' notice, the condition as to notice is invalid—*Madras Deposit and Benefit Society v. Passanha*, 11 Mad. 201. But if the property is sold before the expiry of three months from the notice, the sale is not necessarily invalid, but it only affords a ground for damages—*Ibid.* So also, a sale is not invalid even if due notice was not given ; see sub-section (3).

The mortgage-money can only become due and payable as soon as the option is exercised upon an intimation to the mortgagor. He should also know which of the rights under the mortgage the mortgagee wishes to exercise. The advertisement of the sale of the mortgaged property in the newspaper is not a sufficient intimation to the mortgagor—*Babamiya v. Jehangir*, *supra*.

Although the money is due and should be claimed within the period of limitation which commences on the date of the bond, the power of sale is not to be exercised unless and until the statutory notice has been given—*Kamalambal v. Purushattam*, A.I.R. 1934 Mad. 644, 152 I.C. 437.

The mere fact of a long delay having taken place between the maturity of the notice and the actual sale does not make a fresh notice necessary even when the delay is nearly two, three or four years—*Major v. Ward*, 5 Hare 598 ; *Muncherji v. Noor Mahomedbhoy*, 17 Bom. 711 ; *Metters v. Brown*, 33 L.J. Ch. 97.

Where the mortgagor has assigned his interest of which the mortgagee is aware, the notice must be served on the assignee ; but if the assignment has taken place after a notice has already been served on the mortgagor, no fresh notice on the assignee is necessary—*Muncherji v. Noor Mahomedbhoy*, *supra*.

A first mortgagee exercising power of sale under sec. 69 is not required to give any notice of the sale to the second mortgagee, though under sec. 59-A the second mortgagee may be regarded as a person deriving title from the mortgagor—*Guruswamiah v. Ramakrishna*, I.L.R. (1964) 1 Mad. 735.

429. Sale for arrears of interest :—Under clause (b) the power of sale can be exercised even if there is no default of payment of principal money—*Firm of A. C. Kundu v. Rookanand*, 11 Bur.L.T. 147, 43 I.C. 921. [This view does not, however, appear to be correct as the power of sale arises “in default of payment of the mortgage-money”—see sub-section (1) ; Clause (a) or (b) of sub-section (2) seems to be an additional condition precedent.] But if there is a covenant in the mortgage-deed that the power of sale is not to be exercised unless default is made in the payment of the principal sum or any part thereof on the day appointed for payment, the power cannot be exercised unless there has been a default in the payment of the principal, and the fact that interest has remained unpaid for 3 months will not entitle the mortgagee to sell the property—*Jerup Teza & Co. v. Peerbhoy*, 23 Bom.L.R. 1241, 64 I.C. 634, A.I.R. 1921 Bom. 421.

A stipulation for payment of interest on arrears of interest at a higher rate is not penal. It is an independent and secondary contract which is

enforceable—*Damodara v. Aburupammal*, A.I.R. 1943 Mad. 301, (1943) 1 M.L.J. 92.

430. Conduct of sale :—A mortgagee exercising a power of sale must take as much care as an owner would reasonably take in the sale of his own property—*Chabildas v. Dayal Mowji*, 6 Bom.L.R. 557. A mortgagee having a power of sale, provided he acts *bona fide* and takes reasonable precautions to obtain a proper price, can realise his security by sale in such manner as he thinks most conducive to his own benefit—*Farrar v. Farrars*, 40 Ch. D. 395. But he must not look after his own interests alone, nor should he recklessly sacrifice his mortgagor's property—*Chabildas v. Dayal Mowji*, 5 Bom.L.R. 247; *Kennedy v. De Trafford*, (1896) 1 Ch. 762 (772). The property may be sold privately or by public auction; if it is sold publicly, the mortgagee must give reasonable publicity to the sale—*Chabildas v. Dayal Mowji*, 6 Bom.L.R. 557. He must not impose depreciatory condition on the sale which are likely to shy off intending purchasers. If the auction-purchaser fails to pay the balance of the purchase price within the stipulated time, time being the essence of the contract, the mortgagee has a right to resell the property, and the auction-purchaser cannot get a decree either for specific performance or for damages—*P. S. Duraihanoo v. M. Saravana Chettiar*, A.I.R. 1963 Mad. 468.

431. Suspension of sale :—The mortgagee under an English mortgage cannot be restrained by an injunction from exercising his power of sale, merely because a suit for redemption has been filed against him by the mortgagor—*Jagjivan v. Shridhar*, 2 Bom. 252; the sale though held during the pendency of the redemption suit is not affected by the doctrine of *lis pendens* embodied in sec. 52—*Rama Krishna v. Official Assignee*, 45 Mad. 774, A.I.R. 1922 Mad. 390, 69 I.C. 407. Such a sale *pendente lite* can be stayed only by the mortgagor paying into Court the amount due, or by giving *prima facie* evidence that the power of sale is being exercised in a fraudulent or improper manner—*Jagjivan v. Shridhar*, 2 Bom. 252. So also, a sale can be stayed where it is proved that the mortgagee is selling the property in contravention of the terms of the mortgage-deed; and the sale can be stayed not only at the suit of the mortgagor but also at the suit of a subsequent mortgagee—*Jerup Teja & Co. v. Peerbhoy*, 23 Bom.L.R. 1241, 64 I.C. 634, A.I.R. 1921 Bom. 421.

432. Grounds for impeaching the sale :—If the property is purchased by the mortgagee himself *benami*, the sale is void—*Vallabhdas v. Pranshankar*, 30 Bom.L.R. 1519, A.I.R. 1929 Bom. 24 (26), 113 I.C. 313. Where a mortgagee puts up the mortgaged property to sale, under a power given him by the mortgage-deed, he cannot sell it to himself, either alone or with others, nor to a trustee for himself—Halsbury's *Laws of England*, Vol. 21, p. 257. If a sale is held before the expiry of the three months from the date of notice as provided in clause (a) of sub-section (2), the sale is not liable to be set aside, but the mortgagor's remedy lies only by way of damages—*Madras Deposit and Benefit Society v. Passanha*, 11 Mad. 201. A mortgage was executed in favour of M to secure a loan of Rs. 1,500, and it conferred a power of sale on the mortgagee. M transferred the mortgage to D. Afterwards D made a new advance of Rs. 800 to the mortgagor and secured it by an equitable mortgage by deposit of

title-deeds of the same property. As D could get no repayment of the money after repeated demands, he sub-mortgaged the property to X, who purporting to act in exercise of the power of sale conferred by the original mortgage, sold the property to Y, not only for the original debt of Rs. 1,500 but also for the subsequent advance of Rs. 800 (with interest in both cases). *Held* that X could exercise the power of sale only in respect of Rs. 1,500. But the mortgagor is not entitled to have the sale set aside; he can only bring a suit for damages under this para, if he can show that he has been in any way damnified by the improper exercise of the power of sale—*Ramkrishna v. Official Assignee*, 45 Mad. 774, 43 M.L.J. 506, A.I.R. 1922 Mad. 390, 69 I.C. 407. Where there is *absolutely no power* of sale a private sale of the property is absolutely void. This clause is intended to protect the purchaser in the event of an unauthorised exercise of a power of sale, but it does not apply to a case of purported exercise of a non-existent power—*Mataprasad v. Kunnon*, 6 Rang. 134, A.I.R. 1928 Rang. 128, 110 I.C. 698.

A sale is, however, impeachable where the purchaser had notice of the improper exercise of the power prior to the sale of the property—*Chibaldas v. Dayal Mowji*, 6 Bom.L.R. 557; or where the power of sale was exercised in a *fraudulent* or improper manner contrary to the terms of the mortgage—*Jagjivan v. Sridhar*, 2 Bom. 252; *Clara Mookerjee v. Surendra Manilal Mehta*, A.I.R. 1963 Mad. 208. Thus, where the sellers (mortgagee's agents) suddenly stopped the sale under such circumstances as naturally led bidders to suppose that the sale was over and to go away from the place of auction and the purchaser was present, *held* that the purchaser was affected with the notice of the impropriety of the sale; and the sale, not being a *bona fide* one, must be set aside—*Chabildas v. Dayal*, 31 Bom. 566 (P.C.). When a person purchases a part of the mortgaged property with knowledge that the mortgagee is entitled to sell the property without the intervention of the court he cannot challenge the validity of the sale for want of notice to him when it has been sold with notice to the mortgagor; neither can he claim under sec. 51 the value of the improvement made—*R. S. Nadar v. Indian Bank Ltd.*, A.I.R. 1967 S.C. 1296.

432A. "Remedy in damages":—Unless there is a fraud, the only remedy of the mortgagor is by way of damages against the mortgagee who brings the mortgaged property improperly to sale—*Govindaswami v. Pukhraj*, (1940) 2 M.L.J. 281, A.I.R. 1940 Mad. 903, 1940 M.W.N. 722. In a suit by the mortgagor for an injunction restraining the mortgagee from putting the mortgaged property to sale the purchaser of the property at an improper sale by the mortgagee cannot be impleaded.—*Ibid*.

433. Appropriation of sale proceeds:—Sub-section (4) is taken from sec. 21 (3) of the English Conveyancing Act, 1881. After applying the sale proceeds to the payment of the costs of the sale, and in liquidation of the mortgage-money, the mortgagee must refund the surplus sale proceeds to the mortgagor. With regard to such money he is in the position of a trustee for the person entitled to it (*Pichu Vadhiar v. Secretary of State*, 40 Mad. 767), and he must pay the money to such person immediately after the sale; otherwise he will be liable to pay interest at 6 per cent. (i.e., Court

rate) from the date of sale—*Haji Abdul v. Haji Noor Mahomed*, 16 Bom. 141. If he pays it to a wrong person, he does not exonerate himself from the liability to pay it to the rightful claimant—*Tanner v. Heard*, 23 Beav. 555; *Matheson v. Clark*, 3 Drew. 3; *Charles v. Jones*, 35 Ch. D. 25; *Magnus v. Queensland National Bank*, 37 Ch. D. 466.

69A. (a) *A mortgagee having the right to exercise a power of sale under section 69 shall, subject to the provisions of sub-section (2), be entitled to appoint, by writing signed by him or on his behalf, a receiver of the income of the mortgaged property or any part thereof.*

(2) *Any person who has been named in the mortgage-deed and is willing and able to act as receiver may be appointed by the mortgagee.*

If no person has been so named, or if all persons named are unable or unwilling to act, or are dead, the mortgagee may appoint any person to whose appointment the mortgagor agrees; failing such agreement, the mortgagee shall be entitled to apply to the Court for the appointment of a receiver, and any person appointed by the Court shall be deemed to have been duly appointed by the mortgagee.

A receiver may at any time be removed by writing signed by or on behalf of the mortgagee and the mortgagor, or by the Court on application made by either party and on due cause shown.

A vacancy in the office of receiver may be filled in accordance with the provisions of this sub-section.

(3) *A receiver appointed under the powers conferred by this section shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage-deed otherwise provides or unless such acts or defaults are due to the improper intervention of the mortgagee.*

(4) *The receiver shall have power to demand and recover all the income of which he is appointed receiver, by suit, execution or otherwise, in the name either of the mortgagor or of the mortgagee to the full extent of the interest which the mortgagor could dispose of, and to give valid receipts accordingly for the same, and to exercise any powers which may have been delegated to him by the mortgagee in accordance with the provisions of this section.*

(5) *A person paying money to the receiver shall not be concerned to inquire if the appointment of the receiver was valid or not.*

(6) *The receiver shall be entitled to retain out of any money received by him, for his remuneration and in satisfaction of all costs, charges and expenses incurred by him as receiver, a commission at such rate not exceeding five per cent, on the gross amount of all money received as is specified in his appointment, and, if no rate is so specified, then at the rate of five per cent; on that gross amount, or at such other rate as the Court thinks fit to allow, on application made by him for that purpose.*

(7) *The receiver shall, if so directed in writing by the mortgagee, insure to the extent, if any, to which the mortgagee might have insured, and keep insured against loss or damage by fire, out of the money received by him, the mortgaged property or any part thereof being of an insurable nature.*

(8) *Subject to the provisions of this Act as to the application of insurance money, the receiver shall apply all money, received by him as follows, namely :—*

- (i) in discharge of all rents, taxes, land revenue, rates and outgoings whatever affecting the mortgaged property ;*
- (ii) in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver ;*
- (iii) in payment of his commission, and of the premiums on fire, life or other insurances, if any, properly payable under the mortgage-deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee ;*
- (iv) in payment of the interest falling due under the mortgage ;*
- (v) in or towards discharge of the principal money, if so directed in writing by the mortgagee ;*

and shall pay the residue, if any, of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the mortgaged property.

(9) *The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed ; and the provisions of sub-sections (3) to (8) inclusive may be varied or extended by the mortgage-deed, and, as so varied or extended, shall, as far as may be, operate in like manner and with all the like incidents, effects and consequences, as if such variations or extensions were contained in the said sub-sections.*

(10) *Application may be made, without the institution of a suit, to the Court for its opinion, advice or direction on any present question respecting the management or administration of the mortgaged property, other than questions of difficulty or importance not proper in the opinion of the Court for summary disposal. A copy of such application shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court may think fit.*

The costs of every application under this sub-section shall be in the discretion of the Court.

(11) *In this section, "the Court" means the Court which would have jurisdiction in a suit to enforce the mortgage.*

This section has been inserted by sec. 35 of the Transfer of Property Amendment Act (XX of 1929).

Sub-sec. (1) :—This clause does not give the plaintiff an unqualified right to have a Receiver appointed in the circumstances mentioned in the clause. It would be for the Court to deal with the situation on its merits—*per* Panckridge, J. in *In re Renuka Bose, Sub-non. Kameshwar v. Anath*, A.I.R. 1938 Cal. 93 (95), 42 C.W.N. 266, 175 I.C. 908. In the case of English mortgages a Receiver can be appointed in execution in cases where Sub-Rule (2) of Order 40, Rule 1, C. P. Code, would operate to prevent such an appointment—*Ibid.* The Court will not appoint a Receiver in execution of a mortgage-decree unless the circumstances are such as to make the sale of the properties a matter of serious difficulty—*Ibid.*

433A. Court's power to appoint receiver :—The Court has under the provisions of the Act an implied power to appoint a receiver subject to restrictions imposed on the power of such a receiver under Or. 40, r. 1, C. P. Code. Receivers can be appointed by the Court in execution of a final decree for sale—*Amarnath v. Abhoy Kumar*, A.I.R. 1949 Pat. 24, 27 Pat. 534. As to the directions to be given by the Court to such a receiver, see this case.

A receiver is entitled to his expenses properly incurred ; but payments made by the mortgagee to the receiver privately, without the sanction of the court cannot be added to the mortgage amount—*Venkata Satheyya v. Mulibai*, A.I.R. 1955 Andhra 274.

Sub-sec. (3) :—A Receiver appointed under this section, although he is to be deemed to be an agent of the mortgagor, is not liable or entitled to pay the latter's prior unsecured debts, merely *qua* such Receiver. Consequently, in the absence of express or implied authority conferred by the mortgagee on the Receiver to pay such a debt, it is not legally recoverable from him and so when the Receiver sues a person having such prior claim for a debt due under a new contract with himself, the defendant is not entitled to set off his old debt due from the mortgagor, unless the Receiver assents—*N. Banerjee & Co. v. Younie*, 45 C.W.N. 169. The terms of an indenture of appointment bodily incorporating the provisions of sub-sec. (8) of this section do not show any express authority to pay any

other debt before the dues of the mortgagee are satisfied, nor does a provision empowering the Receiver to carry on the mortgagor's business as before contain an implied authority to pay existing business debts—*Ibid*, per Mukherjea, J.

The existence of the receiver under sec. 69A is no impediment to the exercise by the mortgagee of the concurrent power of sale out of court under sec. 69—*Saraswathi Bai v. Varadarajulu Naicker*, (1956) 1 M.L.J. 223; *Champalal v. Gian Kaur*, A.I.R. 1964 Mad. 379. A receiver under this section cannot sell the mortgaged property—*Krishnammal v. Krishna*, A.I.R. 1956 Mad. 424. A finding by the court on an application under sec. 69A for the appointment of a receiver that the applicant is not entitled to any mortgage right over the disputed property, being a finding in a summary procedure, does not operate as *res judicata* in a subsequent mortgage suit by the mortgagee—*Venkatasubbiah v. Thirupurasundari*, A.I.R. 1965 Mad. 185.

70. If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession.

Accession to mortgaged property.

Illustrations.

(a) A mortgages to B a certain field bordering on a river. The field is increased by alluvion. For the purposes of his security, B is entitled to the increase.

(b) A mortgages a certain plot of building land to B and afterwards erects a house on the plot. For the purposes of his security, B is entitled to the house as well as the plot.

434. Principle :—This section is converse to sec. 63.

The principle of this section is in accordance with the following observations of the Privy Council: "Most acquisitions by the mortgagor enure for the benefit of the mortgagee, increasing thereby the value of the security, and similarly, any acquisitions by the mortgagee are accretions to the mortgaged property or substitutions for it, and therefore subject to redemption"—*Kishen Dut v. Mumtaz*, 5 Cal. 198 (210) (P.C.). Where an accession to the mortgaged property takes place, it becomes incorporated in the original security as though it has been in existence at the time when the original subject of the security was given.—*Krishna Gopal v. Miller*, 29 Cal. 803.

Scope :—This section regulates the rights of the mortgagor and the mortgagee *inter se*, and of course applies to their representatives. Third parties who have nothing to do with the security and between whom and the mortgagor and the mortgagee there is no privity of contract, are not affected by the provisions of this section. If a stranger, under a *bona fide* but mistaken belief that he has an absolute title to a land, which belongs to somebody else, puts up a building upon it, without any knowledge that the land is mortgaged, the mortgagee cannot claim the building against

this stranger third party; but the latter will be entitled to remove the materials—*Nannu Mal v. Ram Chander*, *infra*. There is no reason to restrict the scope of the section to accessions made by the mortgagor personally. The representatives of the mortgagee and the mortgagor would be governed equally by the rule, it being immaterial whether they are merely heirs or subsequent transferees—*Chettyar Firm v. Sein Htaung*, A.I.R. 1935 Rang. 420 (422), 159 I.C. 1038.

But an auction-purchaser at a sale held in execution of a decree passed on the foot of a prior mortgage, to which the second mortgagee was no party, acquires all the right, title and interest of the mortgagor, and must be treated as a *representative* of the mortgagor; consequently if he erects a building on the land the building will be liable to be sold as an accession to the second mortgage. The fact that he had no notice of the second mortgage is immaterial.—*Nannu Mal v. Ram Chander*, 53 All. 334 (F.B.), 1931 A.L.J. 273, 132 I.C. 401, A.I.R. 1931 All. 277 (284-286).

Application :—This section cannot apply to the case of a mortgagee who has purchased a share of the equity of redemption and sues to enforce his mortgage—*Arunagiri v. Radhakrishna*, A.I.R. 1942 Mad. 44 (47), (1941) 2 M.L.J. 520.

Contract to the contrary :—In the case of a charge created by a compromise decree, there can be a "contract to the contrary"—*Jagadeesa v. Bavamamlal*, A.I.R. 1946 Mad. 293, (1946) 1 M.L.J. 143.

435. Instances :—Where a village, without specification of boundaries is mortgaged as a whole, the mortgagee is, on the one hand, entitled to it as a security with any casual increase which may accrue to it; and is, on the other hand, subject to redemption by the mortgagor to the same extent—*Sadashiv v. Vithal*, 11 B.H.C.R. 32.

Where after the execution of two mortgages in respect of a house and certain lands appurtenant thereto, the mortgagor erected two other houses on the lands, and subsequently executed various mortgages in respect of the several houses, it was held that for the purposes of the security of the two prior mortgages, the two new houses were accessions to the mortgaged property, and became incorporated with the original subject of security—*Krishna Gopal v. Miller*, 29 Cal. 803. Where two houses and a bungalow and other property were first mortgaged to one person, and later on the houses and the bungalow were pulled down and seven new houses were built thereon, which were mortgaged to another, the first mortgagee had a right to sell the seven new houses under a decree for sale obtained by him on his mortgage—*Bhooresao v. Mahomed*, 1 C.P.L.R. 38. Where a shop mortgaged with its site is destroyed by fire and a new shop is constructed on the site, it will be regarded as an accession to the mortgaged property—*Shripad v. Kashibai*, A.I.R. 1945 Bom. 248, I.L.R. 1945 Bom. 294. Where a site only is mortgaged and not the building thereon or where after mortgage of the site, a building is erected thereon by the mortgagor and the mortgagee obtains the site in execution of his mortgage decree, he is entitled to have possession of the site after removal of the building, the value of which he need not pay unless he wants it and the mortgagor is willing to sell it at an agreed price—*Anthony*

v. *George*, A.I.R. 1950 Tr.-Coch. 78. Where the land containing a building is at first mortgaged, and machinery is subsequently planted in the building for permanent use, such machinery is an accession to the mortgaged property—*R. M. P. M. Chettyar Firm v. Siemens Ltd.*, 11 Rang. 322, A.I.R. 1933 Rang. 195. Improvements, e.g., electric installation effected on the mortgaged property, which are in the nature of fixtures and immoveable, are accessions to the mortgaged property and are liable for the mortgage charges—*Punjab & Sind Bank v. Kishen Singh*, A.I.R. 1935 Lah. 350, 16 Lah. 881, 156 I.C. 795. But where the property mortgaged included a rice-mill and various parts of machinery pertaining to the engine or other huller which was intended to be set up with the help of the engine and the schedule referred to all "samans" necessary to fit up the mill and the puller and all accessories, and for sometime the concern worked only as a huller but later on the mortgagors decided to work as a sheller also with the power derived from the engine and connected the sheller system with the huller by a belt and the two could be separated by taking away the belt: it was held that the machinery pertaining to the sheller system was not comprised in the mortgage security and the principles of this section did not apply—*Satyanaryanamurthi v. Gangayya*, (1939) 1 M.L.J. 692, A.I.R. 1939 Mad. 684, 1939 M.W.N. 383. A theatre erected on a leasehold land after the execution of the mortgage thereof, would be included in it, unless there was a contract to the contrary. The fact that the land mortgaged is a leasehold is immaterial, for this Act makes no distinction between freehold and leasehold property—*Macleod v. Kissan*, 30 Bom. 250. As a rule, buildings erected on the mortgaged land will be treated as an accession to the mortgaged property. But if a building is erected merely for temporary use, there being no intention that it should be attached to the land even slightly, the mortgagee will acquire no interest in it—*Jones on Mortgage*, §433; *Nannu Mal v. Ram Chander*, 53 All. 334 (F.B.), A.I.R. 1931 All. 277. A semi-pucca house built on the mortgaged land is however an accession to the land—*Chettyar Firm v. Sein Ttaung*, A.I.R. 1935 Rang. 420, 159 I.C. 1038; see also *Abdul Qayum v. Mt. Turi*, A.I.R. 1941 Pesh. 49. Where an undivided share in a property is mortgaged and in partition the mortgagor is allotted a specific property as substituted security, the improvement effected and new buildings constructed on such allotted property by the mortgagor or his transferee must be treated as accession and are available for satisfaction of the mortgage-debt—*Amar v. Bhagwan*, A.I.R. 1933 Lah. 771, 14 Lah. 749. The mortgage of the "entire taluka B" assessed to a certain revenue was held to comprise an alluvial mahal appertaining to the taluka, although it has been separately assessed—*Ganpat v. Saddat Ali*, 2 All. 787. Where accretion to the original holding by clearing new land is considerable, the clearing is not however accretion within the meaning of this section—*Tay Gyi v. Maung Yan*, A.I.R. 1933 Rang. 81, 146 I.C. 674. So Government waste lands, adjoining the mortgaged property, which are brought under cultivation, do not become subject to the mortgage and secs. 63 and 70 have no application to such extension of cultivation—*S. R. & C. Firm v. Ko P. Sin*, A.I.R. 1936 Rang. 127, 162 I.C. 383.

Where a co-sharer of a Touzi taking advantage of frequent alluvion and diluvion of lands dispossessed his co-sharers and possessed all the

reformed lands adversely to them, and though his title did not extend to the whole, he mortgaged the entire Touzi, but later on after another diluvion the mouza was again formed into thrice as big as the old one actually mortgaged and recorded as such in the settlement record: *held* that by his possession the mortgagor added the reformed land to the mortgage-security and as such the whole of the enlarged area must go to the mortgagee as security—*Saila Bala v. Swarna Moyee*, A.I.R. 1939 Cal. 275 (277), 68 C.L.J. 528, 181 I.C. 867. But if the interest of the recorded persons is that of licensees or tenants-at-will, there is no accession to the mortgaged property if the mortgagee acquires the interest by buying those persons out and the landlord on redemption is entitled to the possession of the plots in their original condition, because he can bring about the disappearance of these persons without any costs—*Gaya Prasad v. Ram Prasad*, A.I.R. 1939 Pat. 358, 179 I.C. 923.

The purchase of *mokarari* interest is an accession to the *shikmi* right already mortgaged, and the purchaser at a sale in execution of the decree on the mortgage is entitled to claim the right to the *mokarari* interest as well, basing his right to it as an accession—*Surja Narain v. Nanda Lal*, 33 Cal. 1212. If, after the mortgage, the mortgagor sells a portion of the mortgaged land to the mortgagee and then repurchases it from the mortgagee, the mortgage attaches to the portion for the benefit of the mortgagee—*Deolie Chand v. Nirban*, 5 Cal. 253. The enlargement of, or the removal of incumbrances from, the estate of a mortgagor, effected by himself, will generally enure for the benefit of the mortgagee by increasing the value of the security—*Shyama Charan v. Ananda*, 3 C.W.N. 323. Where a mortgagee sub-mortgages his mortgage-rights and afterwards purchases from his mortgagor the right of redemption in the mortgaged property, such accession in interest enures for the benefit of the sub-mortgagee and he will be entitled to sue for the sale of the entire proprietary right in the same way as if the proprietary interest had been mortgaged to him from the first—*Ajudhia Pershad v. Man Singh*, 25 All. 46. A subsequent mortgagee who has foreclosed stands in the position of the mortgagor in relation to the prior mortgagee. If he is also in the position of a landlord with regard to the original mortgagors after the foreclosure, and the mortgagors (*i.e.*, his tenants) surrender the occupancy holding to him, the surrender operates as an accretion to the mortgage—*Bhagwantrao v. Subh Karan*, 25 N.L.R. 12, A.I.R. 1929 Nag. 225 (226). In a mortgage deed the security was described as "Municipal S. N. 222-B-1 together with the cinema theatre building being built on items 1 and 2". The mortgagee himself purchased the property in execution of his mortgage decree. The mortgagee claimed not only the building but anything fixed to the building as a cinema, such as ceiling boards and exhaust fans: *Held* that what was sold was the building and not the cinema theatre and consequently the ceiling boards and exhaust fans did not pass to the purchaser—*Insurance & Banking Corpn. v. S. Paramasiva Mudaliar*, A.I.R. 1957 Mad. 610.

436. Accession after decree :—The accession to the mortgaged property must take place before the mortgage becomes extinguished. Where acquisitions are made by a mortgagor after the decree for sale has been passed or after the mortgaged property has been sold, such acquisitions do not form accretions to the mortgaged property so as to

pass to the mortgagee or to the purchaser in Court-auction, but belong only to the mortgagor, as the mortgage-interest had ceased to exist at the time the acquisitions were made—*Kapniah Sivananjiah v. Sithay Gounden*, 41 M.L.J. 490, A.I.R. 1921 Mad. 627, 70 I.C. 367; *Haradhan v. Hargobind*, 2 P.L.T. 665, 63 I.C. 552. But in another Madras case, where a property was mortgaged by a Muhammadan woman and her eldest son, and after the decree on the mortgage was passed, the shares of the mortgagors were increased by inheritance of the share of another son who died after the passing to the decree, it was held that the increased shares were liable to be attached and sold in execution of the mortgage decree—*Ajijuddin v. Sheik Budan*, 18 Mad. 492; *Kastoori Devi v. Guru Granth Saheb*, A.I.R. 1965 All 193. A mortgage decree for sale does not extinguish the mortgage. Consequently, under this section, the mortgagee-decree-holder is entitled to have his decree satisfied by sale of an accession made after the passing of the decree—*Shripad v. Kashibai*, A.I.R. 1945 Bom. 248, A.I.R. 1945 Bom. 294; *Sidheswar Prasad Singh v. Ram Saroop Singh*, A.I.R. 1963 Pat. 412 (F.B.).

71. When the mortgaged property is a lease * *, and the mortgagor obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to the new lease.

Amendment :—The words “for a term of years” have been omitted by sec. 36 of the T. P. Amendment Act (XX of 1929), as they are unnecessary. These words have also been omitted from secs. 64 and 65.

This section is supplementary to sec. 64.

437. Principle :—The principle of this section is that a renewed lease is a graft upon the old stock and is therefore subject to the same equities regarding foreclosure and redemption as the old lease—*Moody v. Mathews*, 7 Ves. 174. The mortgagor of a renewable lease can hold a renewed lease only subject to the mortgage—*Leigh v. Burnett*, 29 Ch. D. 231. The mortgagee gets the benefit of the renewed lease as security for his mortgage, although the renewal may have been obtained without any covenant for renewal—*Visnu Trimbak v. Tattia Vasudeb*, 1 B.H.C.R. 22; *Mahomed Assudollah v. Karamoottoolah*, 4 N.W.P. 11. The rule equally applies though the renewal was obtained after the original term had expired—*Pickering v. Bowels*, 1 Br. C. C. 197; or though the new lease was not to commence till after the expiration of the old one—*Rakestraw v. Brewer*, 2 P. Wms. 115. If a new lease or other interest of a like nature be obtained by the mortgagor or his representative or successor, either on a forfeiture (by any contrivance or otherwise) of the original lease, or by other means, the owner of the mortgage or charge will have the benefit for the purpose of the security, whether he be a volunteer or purchaser for valuable consideration, and although money was expended by a volunteer in obtaining the new interest—*Moody v. Mathews*, 7 Ves. 174.

If the mortgagor renders the renewal impossible by purchasing the reversion, the whole of the estate so acquired will be subject to the mortgage—*Trumper v. Trumper*, 14 Eq. 295.

72. When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he may spend such money as is necessary—

(a) for the due management of the property and the collection of the rents and profits thereof ;

(b) for its preservation from destruction, forfeiture, or sale ;

(c) for supporting the mortgagor's title to the property ;

(d) for making his own title thereto good against the mortgagor ; and,

(e) when the mortgaged property is a renewable lease-hold for the renewal of the lease ;

and may, in the absence of a contract to the contrary, add such money to the principal money at the rate of interest payable on the principal, and, where no such rate is fixed, at the rate of nine per cent. per annum.

Where the property is by its nature, insurable, the mortgagee may also, in the absence of a contract to the contrary,

72. A mortgagee may spend such money as is necessary—

Rights of mortgagee in possession.

(a) * * * * *

(b) for the preservation of the mortgaged property from destruction, forfeiture or sale ;

(c) for supporting the mortgagor's title to the property ;

(d) for making his own title thereto good against the mortgagor ; and,

(e) when the mortgaged property is a renewable lease-hold, for the renewal of the lease ;

and may, in the absence of a contract to the contrary, add such money to the principal money at the rate of interest payable on the principal and where no such rate is fixed, at the rate of nine per cent. per annum.

Provided that the expenditure of money by the mortgagee under clause (b) or clause (c) shall not be deemed to be necessary unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title.

Where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary,

insure and keep insured against loss or damage by fire the whole or any part of such property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the principal money, with the same priority and with interest at the same rate. But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed, or (if no such amount is therein specified) two thirds of the amount that would be required, in case of total destruction, to reinstate the property insured.

insure and keep insured against loss or damage by fire the whole or any part of such property; and the premiums paid for any such insurance shall be *added to the principal money with interest at the same rate as is payable on the principal money or, where no such rate is fixed, at the rate of nine per cent. per annum.* But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed or (if no such amount is therein specified) two thirds of the amount that would be required in case of total destruction to reinstate the property insured.

Nothing in this section shall be deemed to authorize the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorized to insure.

Nothing in this section shall be deemed to authorize the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorized to insure.

Amendment :—This section has been amended by sec. 37 of the T. P. Amendment Act (XX of 1929). The reasons are stated below in proper places.

438. Application of section :—The rules contained in this section only reproduce the doctrine which the Courts of justice in India have uniformly adopted prior to the passing of this Act—*Girdhar Lal v. Bhole Nath*, 10 All. 611; *Bohra Thakur Das v. Collector*, 28 All. 593. Therefore the doctrines of this section will be applied to mortgages created before the enactment of the T. P. Act—*Ibid.*

This section, like sec. 69 of the Contract Act, is based upon the fiction of an implied request by the mortgagor—*Ram Tahal Sing v. Bissesar*, 23 W.R. 305 (P.C.); *Chedilal v. Bhagwan Das*, 11 All. 234. It will not however apply if the parties enter into an agreement to the contrary. Thus, where by the terms of a mortgage, the mortgagor personally covenanted to pay the municipal taxes, the mortgagee who pays the same cannot add them to the mortgage-amount under clause (b)—*Sayed Ibrahim v. Arumugathayee*, 38 Mad. 18 (23), 16 I.C. 877. So again, where the mortgagee has specially undertaken to incur the expenses of the litigation necessary to recover the lands, he is not entitled to claim such costs from

the mortgagor under clause (c)—*Thekkamanengath v. Pazhiot*, 28 M.L.J. 184, 27 I.C. 989.

Where the mortgage-deed was silent as to the payment of rent to the Zemindar and it stated that interest on the mortgage-money and the profits from the property mortgaged would be equal, this section had no application nor could sec. 76 (h) apply and the mortgagee who had paid the rent was not entitled to tack it on to the mortgage-money. The case was governed by sec. 77 and according to which sec. 76 (h) could not apply to such a case—*Durga Shankar v. Ganga Sahai*, A.I.R. 1932 All. 500, (1932) A.L.J. 493. The mortgagee can recover costs, charges and expenses incurred subsequent to the preliminary decree with interest—*Sultan Pillai v. Madhavan Pillai*, 1968 Ker. L.T. 248.

439. Mortgagee need not be in possession :—The language of the old section shows that it was limited to cases "*where during the continuance of the mortgage, the mortgagee took possession of the mortgaged property.*" In spite of these words, it was held that this section was not exhaustive and that a mortgagee making payments to save the mortgaged property from being sold for arrears of revenue had an additional charge on the property for the sums so paid by him, although he was not a mortgagee "in possession"—*Rakhohari v. Bipradas*, 31 Cal. 975; *Upendra v. Tara Prasanna*, 30 Cal. 794. The Bombay High Court also held that this section could not be taken to imply that a mortgagee *not in possession* had no similar right to charge the mortgaged property for payment made by him in relation to the security and to add the amount to the original loan—*Nadershaw v. Shirin Bai*, 25 Bom.L.R. 839 (843), A.I.R. 1924 Bom. 264. So also, in an old Privy Council case it was held that a mortgagee, who was not a mortgagee in possession, had a right to tack to the mortgage the amount of revenue paid by him to save the estate—*Nagendra Chunder v. Kaminee*, 11 M.I.A. 241 (259).

These words have therefore been omitted from the present section.

If a usufructuary mortgagee fails to obtain possession, he has no charge on the property for the mortgage-money, but is only entitled to a money-decree under sec. 68, and consequently any amount paid by him to save the estate from sale cannot be charged on the mortgaged property—*per Subramania Ayyar, J. in Periantha v. Marudainayagam*, 22 Mad. 332 (336), following *Arunachalam v. Ayyavayyan*, 21 Mad. 476 (F.B.).

A usufructuary mortgagee, who grants a lease of the mortgaged property to the mortgagor at a rent equal to the interest on the mortgage, is entitled to a charge on the mortgaged property for payment of Government revenue made by him, which ought to have been paid by the mortgagor—*Imdad Hasan Khan v. Badri Prosad*, 20 All. 401 (407, 408).

440. Necessary expenses :—The question whether the expenditure was 'necessary' is one of fact—*Kadir Moidin v. Nepean*, 26 Cal. 1 (P.C.); *Jagannath v. Jagjiban*, 28 O.C. 221, 87 I.C. 829, A.I.R. 1925 Oudh 429.

The mortgagor and the mortgagee may enter into an agreement in the mortgage-deed that a fixed sum shall be charged annually for expenses to be incurred by the mortgagee in possession for certain specified purposes (e.g., repairs to canals, expenses on account of village headmen, service

inams of village headmen, etc.).—*Chalikani v. Venkatarayanam v. Zemindar of Tuni*, 46 Mad. 108 (113) (P.C.), 71 I.C. 1035, A.I.R. 1923 P.C. 26. See also *Md. Rahimtulla v. Esmail*, A.I.R. 1924 P.C. 133 (135), 48 Bom. 404, 51 I.A. 236, 80 I.C. 411.

Proviso :—The proviso curtails the power of the mortgagee to make the expenses under clauses (b) and (c). Unless he gives notice to the mortgagor, the expenses will not be deemed to be 'necessary'.

The proviso added by the Amending Act of 1929 is not retrospective. Therefore a mortgagee who had paid prior to 1929 the municipal taxes could add the amount to the principal even if no notice had been served by him on the mortgagor—*Narayanaswami v. Perumal*, A.I.R. 1953 Mad. 720, (1953) 2 M.L.J. 150. Under the Proviso the mortgagee who was out of possession could not pay the land revenue without calling upon the mortgagor to pay it—*Dal Singh v. Sunder Kunwar*, A.I.R. 1944 Oudh 208, (1944) O.W.N. 58. See also *Vasudevayya v. Bhagirathi Bai*, A.I.R. 1950 Mad. 333 (1950) 1 M.L.J. 5. The words "add such money to the principal" in this section do not exclude the personal right of the mortgagee to sue the mortgagor under sec. 69 of the contract Act—*ibid* and *Dal Singh v. Sundar Kunwar*, *supra*.

Clause (a) omitted :—Clause (a) relating to expenses for the management of the property and the collection of rents and profits has been transferred to clause (h) of sec 76.

442. Clause (b) :—Expenses for preservation from destruction :—If the mortgagee of a thatched house reconstructs and repairs it to keep it habitable he is entitled to a charge for the money spent with interest—*Jogendranath v. Raj Narain*, 9 W.R. 488; *Lakshman v. Hari Denkar*, 4 Bom. 584. Where the mortgagee rebuilds the mortgaged house destroyed by accidental fire in terms of the deed of mortgage, the mortgagor must pay the cost of rebuilding before redemption—*Sakharam Shet v. Amtha*, 14 Bom. 28. Where the mortgagee rebuilds a katcha house after it has fallen down into a pucca house as contemplated by the parties at the time of the execution of the mortgage, the mortgagee can recover the cost of rebuilding—*Qasim v. Bhagwandeem*, 7 O.W.N. 488, A.I.R. 1930 Oudh 337 (338), 126 I.C. 397. See also Notes under the new sec. 63A for improvements. As regards repairs, see sec. 76 (d).

443. Preservation from forfeiture or sale :—A mortgagee in possession is entitled to claim sums paid for arrears of Government revenue or of rent or in satisfaction of a decree, before the property which he saves from the revenue or execution sale can be redeemed by the mortgagor because such payments are small in the nature of salvage payments—*Girdhar v. Bholanath*, 10 All. 611; *Upendra v. Tara Prasanna*, 30 Cal. 794; *Manohar v. Hazarimal*, 35 C.W.N. 1040 (1044) (P.C.); *Anandi v. Dur Najaf Ali*, 13 All. 195; *Imdad Hasan v. Badri Prosad*, 20 All. 401 (408); *Ram Sewak v. Sheo Naik*, 45 All. 388 (390); *Rakhohari v. Bipra Das*, 31 Cal. 975 (978); *Nilawa v. Krishnappa*, 8 Bom.L.R. 350; *Rajkumar Lal v. Jaikaram Das*, 5 P.L.J. 248, 57 I.C. 653; *Ma Pwa v. K. P. S. A. R. P. Firm*, 12 Bur.L.T. 36, 43 I.C. 190; *Venkata Narasimha v. Kuppa Chetti*, 40 M.L.J. 524, 63 I.C. 24; *Ambika v. Ramgati*, 14 I.C. 418; *Ramakrishnaiah v. Chandrasekhara*, A.I.R. 1953 Mys. 114; *Venkata Setteyya v. Muli Bai*,

A.I.R. 1955 Andhra 274. The principle of salvage lien is applicable to payment of rent and other dues the non-payment of which would obliterate all subsidiary interests. For the application of this principle and that of subrogation and waiver of charge, see *Swaminatha v. Ramanatha*, A.I.R. 1943 Mad. 573, I.L.R. 1944 Mad. 44. Where the mortgagee professes to pay rent payable by the mortgagor, not as mortgagee but under a purchase afterwards found by the court to be invalid, must be credited with the amounts paid as rent, because the conveyance having failed he made payments as mortgagee—*Foodeni v. Azhar Hussain*, 10 Pat. 210, A.I.R. 1931 Pat. 325 (326), 131 I.C. 814.

The right of the mortgagee under this clause will be subject to the obligation imposed upon him by sec. 76 (c). This section imposes an obligation to pay the revenue and Government charges when they can be paid out of the income. If they can be so paid, the mortgagee cannot recover them under this section as a lien upon the property. It is only when they cannot be paid and the mortgagee has paid them out of his own pocket that he can recover them as a lien under this clause—*Farzand Ali v. Kaniz Fatima*, 22 O.C. 270, 54 I.C. 264.

The word 'sale' in this clause is a sale *ejusdem generis* with destruction and forfeiture, that is, a sale by which the mortgagee's security is likely to be imperilled. It does not, therefore, contemplate a sale merely of the equity of redemption. This section includes only payments made to save the security itself—*Venkata Narasimha v. Kuppa*, 40 M.L.J. 524, 63 I.C. 24 (*per* Ramesma J.; *Spencer, J. contra*); *Hardeo v. Deputy Commissioner*, 1 Luck. 367, A.I.R. 1926 Oudh 281 (286); *Rajendra Prosad v. Bahuria*, 1 P.L.J. 589, 38 I.C. 232; *Sheo Dulare v. Batasha*, 16 O.C. 48, 19 I.C. 744. In other words, a sale which does not affect the interest of the mortgagee is not covered by this section—*Gaya Prosad v. Gur Dayal*, 22 O.C. 32, 51 I.C. 549. In Allahabad, however, a sale merely of the equity of redemption is not permitted where the property is subject to a usufructuary mortgage, but the entire property is sold, and therefore a usufructuary mortgagee paying off a decree for sale of the property can be said to have saved his security from sale, and is entitled to tack the amount so paid to his mortgage-money—*Abdul Qaiymu v. Saddruddin*, 27 All. 403. Where a prior mortgagee deposited money under O. 21 r. 89 to set aside a sale made at the instance of a puisne mortgagee, he must be allowed to add the amount to the mortgage-money, because the sale proclamation purported to sell not merely the equity of redemption but the entire property—*Jagannath v. Jagjiwan*, 28 O.C. 221, A.I.R. 1925 Oudh 429 (431).

A subsequent mortgagee, who makes a payment to the prior mortgagee who has got a decree for the sale does not acquire any additional charge on the property but is subrogated to the rights of the prior mortgagee—*Perianna v. Marudainayagam*, 22 Mad. 332 (335). See sec. 92.

A payment of a public charge for non-payment of which the property is not liable to immediate sale (*e.g.*, road-cess) does not constitute a charge upon the property—*Rajendra Prosad v. Bahuria*, 1 P.L.J. 589, 38 I.C. 232, following *Upendra v. Tara Prasanna*, 30 Cal. 794. So also, money paid for municipal tax is not allowed to be charged on the property (for it is only the moveable and not the immoveable property which is liable to

be sold in the first instance for non-payment of tax)—*Syed Ibrahim v. Arumugathayee*, 38 Mad. 18 (23); *Gopala Krishna v. Sanjeera*, 38 M.L.J. 228, 55 I.C. 333.

445. Clause (c)—Supporting the mortgagor's title:—A mortgagee is allowed proper costs, charges and expenses incurred by him in relation to the mortgage debt or mortgage security including the costs of litigation properly undertaken by him—*Nadershaw v. Shrinibai*, 25 Bom.L.R. 839, A.I.R. 1924 Bom. 264, 87 I.C. 129; see also *Sir Md. Ejaz Rasul v. Saigid Ali*, A.I.R. 1941 Oudh 498 (501), 1941 O.W.N. 768, 194 I.C. 615; *Venkata Setteyya v. Mulilai*, A.I.R. 1955 Andhra 274. Where the mortgagor's title is impeached (e.g. by tenants) the costs incurred by the mortgagee in defending such title constitute a charge upon the property mortgaged—*Pokree Saheb v. Pokree Beary*, 21 Mad. 32. Where the mortgagee had to take criminal proceedings against persons disputing mortgagor's title and setting up the title of a stranger, he could recover the costs from the mortgagor—*Venkataswami v. Muthusami*, 34 M.L.J. 177, 45 I.C. 949. But where a mortgagee with knowledge that a third person had an interest in the mortgaged property accepted a mortgage of the property, he cannot claim from the mortgagor the costs incurred by him in the litigation for opposing the claim of that person—*Ram Ditta Mal v. Karm Devi*, 190 P.L.R. 1912, 17 I.C. 243.

446. Clause (d)—Defence of mortgagee's title against mortgagor:—The mortgagee is further entitled to add to his mortgage-money the necessary expenses of defending his own title against the mortgagor, for instance, the expenses of defending an action brought by the mortgagor to set aside the mortgage, which was dismissed with costs—*Eardley v. Knight*, 41 Ch. D. 537; *Dattaram v. Vinayak*, 28 Bom. 181; or the costs incurred by the mortgagee in defending an unsuccessful redemption-suit brought by the mortgagor—*Vanadgrajulu v. Dhanalakshmi*, 16 M.L.T. 365, 26 I.C. 184. When a mortgagee files a suit to assert his title against the mortgagor denying his title the amount spent in litigation may be added to the mortgage money—*Minakshi v. Janaki*, A.I.R. 1942 Mad. 592 (594), (1942) 2 M.L.J. 124, 55 M.L.W. 413.

447. Clause (e)—Renewal of leases:—A mortgagee is entitled to charge the mortgagor for renewal though there be no covenant to that effect—*Lacon v. Mertins*, (1743) 2 Atk. 1 (at p. 4). A mortgagee of a *Kanomdar* paying the renewal fee of the landlord is, in addition to his right under this section of adding such amount to the mortgage money, entitled to a prior charge by the doctrine of salvage lien—*Swaminatha v. Ramanatha*, A.I.R. 1943 Mad. 573, LL.R. 1944 Mad. 44.

448. "May add such money to the principal":—The mortgagee, instead of adding the expenses incurred to the principal money, is entitled to sue the mortgagor personally—*Venkataswami v. Muthusami*, 34 M.L.J. 177, 45 I.C. 949. See also *Munnabai v. Mohanlal*, A.I.R. 1953 Nag. 259, I.L.R. 1952 Nag. 366. Thus, where the mortgagee has spent money to preserve the property from sale under clause (b), this section does not take away from him the right to recover the money personally by a separate suit—*Parsotam v. Jaijit*, 1890 A.W.N. 90; *Nikka Mal v. Sulaiman*, 2 All. 193; *Murray v. M. S. M. Firm*, A.I.R. 1936 Rang. 47, 161 I.C. 626; *Tirumalai v. Muthusami*, supra, at p. 952. A *darpatnidar* making deposit

and obtaining possession of the *patni* under sec. 13 of the Bengal Patni Regulation, 1819, can under this section, add the subsequent payments made by him for head rents of the *patni*, to his original deposit—*Midnapur Zemindary Co. v. Saradindu*, A.I.R. 1948 Cal. 250, 52 C.W.N. 724. So also, where the mortgagee had to institute criminal proceedings against the tenants who had cut off and carried away the crops on the land asserting the title of a stranger as owner, he was entitled to recover the expenses of the prosecution by bringing a suit against the mortgagor or his heir personally—*Venkatasami v. Muthusami*, 34 M.L.J. 177, 45 I.C. 949. The mortgagee can elect either to sue for the money separately or to add it to the mortgage-money under this section. Consequently when he has obtained a personal decree for such sum, he cannot add it again to the mortgage-debt—*Imdad Hasan v. Badri Prosad*, 20 All. 401 (408). If he relinquishes his lien for the sum spent, he cannot afterwards enforce it; but he is not precluded from bringing a suit to recover the money personally from the mortgagor. Thus, where the mortgagor deposited in Court under sec. 83 the mortgage-money only but not the money paid by the mortgagee for Government revenue, and the latter accepted the deposit and gave up possession of the property, held that he could not afterwards sue for the recovery of the amount by sale of the mortgaged property, but he might bring a simple money suit for the amount—*Anandi Ram v. Dur Najaf Ali*, 13 All. 195.

Where by the terms of a usufructuary mortgage the mortgagees were to pay to the mortgagors nothing but Malikana and that they were not accountable to the mortgagors otherwise, it was held in a suit for redemption by the mortgagors that they were entitled to redeem on payment of the principal amount of the mortgage after deducting the Malikana not paid—*Behary Lal v. Shib Lal*, A.I.R. 1924 All. 591, 46 All. 633, 82 I.C. 25.

Under the English law, the expenses cannot be recovered from the mortgagor personally, by a separate suit, except where there is an express agreement by the mortgagor to that effect. The mortgagee can only add the money to the mortgage amount—*Ex parte Fewings*, 25 Ch. D. 338; *Lacon v. Mertins*, 3 Atk. 1. The same view has been taken in *Sheo Dulari v. Batashā*, 16 O.C. 48, 19 I.C. 744; *Jagennath v. Jagjiwan*, 12 O.L.J. 289, and *Nadershaw v. Shirinbai*, 25 Bom. L.R. 839, A.I.R. 1924 Bom. 264, 87 I.C. 129. But see *Bhuneswari Devi v. Sheogovind Lall Missir*, A.I.R. 1963 Pat. 185 where it has been laid down that a separate suit for reimbursement under sec. 69 of the Contract Act has not been barred by this section.

449. Interest :—All money spent under this section by the mortgagee shall carry interest at the same rate as the principal, and where no such rate is fixed, at 9 per cent. per annum. The interest shall be calculated from the time the expense was incurred—*Quarrel v. Beckford*, 1 Maddock 281; *Gaya Prasad v. Gur Dayal*, 22 O.C. 32, 51 I.C. 549. The interest shall be simple and not compound—*Kishori Mohun v. Ganga Babu*, 23 Cal. 228 (P.C.). See also *Sakharam v. Ram Chandra*, A.I.R. 1951 Bom. 19, I.L.R. 1951 Bom. 209. No interest is allowed on money spent on improvements—*Ibid*; *Bhabhanbai v. Kanji Ravji*, A.I.R. 1950 Kutch 90. Where the mortgagee is in possession but the mortgage is not a usufructuary one the interest on the cost of improvement will have to be calculated—*Ibid*. A mortgagee is, in the absence of a contract to the contrary, entitled to interest on the money paid in respect of the Govern-

ment revenue in excess of the amount payable as such on the date of the original mortgage—*Kaniz Fizza v. Datadin*, 2 O.W.N. 650, 90 I.C. 184, A.I.R. 1925 Oudh 678.

Costs :—Where the mortgagee's right to possession was challenged and he was compelled to file a suit which was decreed with mesne profits and costs, the mortgagee could claim actual cost incurred by him in the suit; but he was not entitled to add the amount of mesne profits to the mortgage debt—*Ramakrishnaiah v. Chandrasekhara*, A.I.R. 1953 Mys. 114. Where the mortgagee was allowed costs against the other party in the former's suit for defending his title but he made no attempt to execute the decree, he was not entitled to debit the mortgagor in his accounts with these costs *Sakharam v. Ramchandra*, supra.

Insurance :—The last two paras of the section are taken from sec. 101 (1) (ii) of the English Law of Property Act, 1925.

The proportion of two-thirds has been fixed upon because mortgagees seldom lend more than two-thirds of the value of the property which is given as security.

73. Where mortgaged property is sold through failure to pay arrears of revenue or rent due in respect thereof, the mortgagee has a charge on the surplus (if any) of the proceeds, after payment thereof of the said arrears, for the amount remaining due on the mortgage, unless the sale has been occasioned by some default on his part.

Charge on proceeds of revenue-sale.

73. (1) Where the mortgaged property or any part thereof or any interest therein is sold owing to failure to pay arrears of revenue or other charges of a public nature or rent due in respect of such property, and such failure did not arise from any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of any surplus of the sale-proceeds remaining after payment of the arrears and of all charges and deductions directed by law.

(2) Where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act, 1894 (I of 1894), or any other enactment for the time being in force providing for the compulsory acquisition of immoveable property, the mortgagee shall be entitled to claim

payment of the mortgage-money, in whole or in part, out of the amount due to the mortgagor as compensation.

(3) Such claims shall prevail against all other claims except those of prior encumbrancers, and may be enforced notwithstanding that the principal money on the mortgage has not become due.

Amendment :—This section has been re-drafted by sec. 38 of the T. P. Amendment Act (XX of 1929). The reasons are stated below.

The section as so-re-drafted in 1929 has retrospective effect—*Girdhar Lal v. Alay Hasan*, A.I.R. 1938 All. 221 (F.B.), (1938) A.L.J. 313, 174 I.C. 702.

450. Principle :—The principle embodied in this section is the principle of substitution of properties and securities in favour of a person who through no fault of his own is deprived of the original properties and securities—*Subbaraju v. Seetharama Raju*, 39 Mad. 283 (287); *Penumeta v. Veegesena*, 28 I.C. 232. This section contemplates that when a mortgaged property is sold for arrears of revenue or rent not through any fault of the mortgagee, the mortgage lien is transferred to the surplus sale-proceeds—*Nim Chand v. Asutosh*, 9 C.W.N. 117. The surplus sale-proceeds in the hands of the Collector after sale of the mortgaged property for arrears of revenue must be taken to represent the property itself, so that a decree obtained by the mortgagee declaring his lien on the property will have the effect of giving him a lien on the surplus money itself—*Krishtodas v. Ramkant*, 6 Cal. 142 (147); *Gosto Behary v. Shib Nath*, 20 Cal. 241 (244). The object of this section is to relieve the mortgagee of the effects of the injury which he would suffer by reason of the property being sold, and to give him a right over the residue of the sale-proceeds—*Beni Prasad v. Rewat Lal*, 24 Cal. 746 (749).

451. Scope and application of section :—The whole object is that the mortgagee's security should not be diminished. If portions of the property are converted into cash that cash also should be available to him as a part of his security—*Mukhram v. Bateswar*, A.I.R. 1937 Pat. 307, 169 I.C. 805. The right given to the mortgagee by this section is over and above the right he has under the law to realize the mortgage-debt by enforcing his security against the mortgaged property or property substituted therefor—*Girdhar Lal v. Alay Hasan*, supra, at pp. 223, 226. This section is intended to refer to cases where the effect of a sale for arrears of revenue or rent is to nullify the mortgage—*Beni Prasad v. Rewat Lal*, 24 Cal. 746 (749). Where the sale is *not free from incumbrances*, the mortgagee can lay no claim to the surplus sale-proceeds but must enforce his lien against the property in the hands of the auction-purchaser—*Prem Chand v. Purnima*, 15 Cal. 546; *Narotam v. Sukhraj*, 3 Luck. 719, 5 O.W.N. 791, 116 I.C. 49, A.I.R. 1928 Oudh 442 (448); *Krishna Chandra v.*

Bipin Behari, A.I.R. 1938 Pat. 176, 16 Pat. 299, 174 I.C. 474. Thus, the sale, in execution of a rent-decree under sec. 152, Oudh Rent Act, of an under-proprietary holding which has been mortgaged by the judgment-debtor passed only the interest of the judgment debtor, i.e., his equity of redemption; that is, the holding is not sold free from incumbrances, and consequently this section has no application—*Narotam v. Sukhraj*, supra.

Where in spite of acquisition of a portion of the property by the municipality and the substitution thereof by another plot as compensation, a decree is passed creating a charge over the entire property without mentioning the substituted property the auction purchaser cannot claim any title to the substituted property—*Nallamuthu v. Aravamuthu*, A.I.R. 1952 Mad. 263.

Where a Zamindar mortgages his zamindary with his *sir* lands, and by losing his Zemindary rights becomes an exproprietary tenant in respect of the *sir* lands, the usufructuary mortgage does not become ineffectual and takes effect as a mortgage of the ex-proprietary rights—*Shamsher v. Lad Batuk*, A.I.R. 1953 All. 147.

So long as the mortgagee's claim is not satisfied, the unsecured creditor of the mortgagor will not have any right to the surplus sale-proceeds—*Gosto Behari v. Shib Nath*, 20 Cal. 241 (244). See sub-section (3).

This section applies also where the lien instead of being actually destroyed is *in jeopardy*. Thus, where the property is sold with power to avoid all incumbrances, as in a rent-sale under sec. 167 of the Bengal Tenancy Act, the mortgagee may abandon his lien upon the mortgaged property and claim to realise the demands from the surplus sale-proceeds (even though the purchaser has not yet avoided the incumbrance)—*Nim Chand v. Asutosh*, 9 C.W.N. 117 (118). Whether the property is sold with or without the power to annul incumbrances, in either case the mortgagee has a right to claim payment out of the surplus sale-proceeds. The mortgagee's right under this section is not affected by anything contained in secs. 159, 161-169 of the Bengal Tenancy Act—*Gobind Sahai v. Sibdul*, 33 Cal. 878 (880).

The remedy of the mortgagee is not confined only to the surplus sale-proceeds. So, where a property is sold for arrears of rent with power to annul all incumbrances, then so long as the incumbrances are not validly annulled under sec. 167, Bengal Tenancy Act, the mortgagee has a right to proceed against the property in the hands of the purchaser—*Rasik Chandra v. Jagabandhu*, A.I.R. 1929 Cal. 392 (394), 113 I.C. 904.

When a property is sold under a decree obtained by a first mortgagee in a suit in which the puisne incumbrancers were parties, it passes into the hands of the purchaser discharged from all incumbrances. But equity regards the rights of the puisne incumbrancers not as extinguished or discharged by the sale but transferred thereby to the surplus sale-proceeds. The principle laid down in this section should be applied.—*Berhamdeo v. Tara Chand*, 33 Cal. 92 (111, 112).

452. Acquisition of property under Land Acquisition Act :—See sub-section (2). Even prior to the enactment of this sub-section it was held.

that the rule in this section would equally apply if the security was otherwise destroyed, e.g., if the property was taken under the Land Acquisition Act. In such a case the mortgagee's right in the land so acquired was transferred to the compensation money and he could lay claim to the said money. —*Viraraghava v. Krishnasami*, 6 Mad. 344; *Jotoni Chowdhurani v. Amar Krishna*, 13 C.W.N. 350, 1 I.C. 164; *Venkatarama v. Esumsa*, 33 Mad. 429; *Prag Din v. Nankau*, 7 O.W.N. 217, A.I.R. 1930 Oudh 292 (294), 123 I.C. 56. Thus, were during the pendency of a suit by the mortgagee in which he obtained a preliminary decree, a part of the mortgaged property was compulsorily acquired under the Land Acquisition Act, the mortgagee was held to be entitled to an injunction restraining the mortgagor from taking the purchase money out of the hands of the Land Acquisition Collector—*Asutosh v. Babu Lal*, 5 P.L.J. 650, 59 I.C. 513, 2 P.L.T. 110. (*Contra*—*Basa Mal v. Tajammal*, 16 All. 78). Where a charge is created by a decree other than a compromise decree, the decree holder can claim like a simple mortgagee payment out of the amount due to the judgment-debtor as compensation—*Syed Shah Safiul Alam v. Syed Shah Mohammad Aminul Alam*, A.I.R. 1969 Pat 162; *Nirmal Sundari v. Mrinalini*, 63 C.W.N. 869.

The new sub-section (2) gives effect to this view; see *Girdhar Lal v. Alay Hasan*, A.I.R. 1938 All. 221 (227) (F.B.), (1938) A.L.J. 313, 174 I.C. 70.

A mortgagee can bring a suit to enforce his security as against the compensation money withdrawn by the mortgagor provided that he brings his suit within 12 years of the cause of action as prescribed by Art. 132 of the Limitation Act. Sec. 68 is inapplicable to such a case—*Girdhar Lal v. Alay Hasan*, supra, at p. 226. Where, however, only a portion of the mortgaged property is acquired and the mortgagee brings a suit after 6 years but within 12 years of the cause of action for sale of the mortgaged property and for a simple money-decree for the compensation money, the proper decree to be passed is a decree for sale of the available mortgaged property under O. 34, r. 4, with a direction that in the event of the non-realization of the entire mortgage-debt by sale the mortgagee will be entitled to a simple money-decree for an amount not in excess of the amount withdrawn—*Ibid*, at p. 227. The West Bengal Estates Acquisition Act is an enactment providing for the compulsory acquisition of immovable property as mentioned in sec. 73 (2)—*Abdul Khaleque v. Medaswar Hosain*, A.I.R. 1967 Cal. 56.

In some cases it was held that if the mortgaged property was taken under the Land Acquisition Act, the property was to be considered as 'destroyed' within the meaning of sec. 68, and the mortgagee's remedy was to require another security from the mortgagor, in default of which, he was to sue for the mortgage-money—*Sajjada v. Janki*, 20 O.C. 256, 42 I.C. 793; *Prakash v. Hasan Banu*, 42 Cal. 1146 (1152).

This view is no longer correct.

453. Mortgagee's remedy :—In the old section it was said that the mortgagee had a "charge" on the surplus sale-proceeds; in the present section the word 'charge' has been omitted, and it is provided that the mortgagee can claim payment out of the sale-proceeds.

Under the old section also it was held in a Patna case that the existence of statutory charge upon the surplus sale-proceeds was no bar to the mortgagee's seeking a *money-decree against the mortgagor* or his successors—*Benarasi v. Mohiuddin*, 3 Pat. 581 (590).

The new section gives to the mortgagee rights against the sale-proceeds. If the sale is of the whole estate, then the rights given under this new section correspond to the right of substitution. Where, however, the sale is of a portion of the mortgaged property, the right of the mortgagee nevertheless to go against the sale-proceeds is conferred by the new section—*Kapuri v. Mathura*, A.I.R. 1934 Pat. 209, 148 I.C. 972. The mortgagee has a right to claim the mortgage-money out of the sale-proceeds in execution of his mortgage-decree and if he files a fresh suit court can convert it into a petition for execution—*Ramnathan Chettiar v. Abdul Hameed*, A.I.R. 1963 Mad. 73. Where a portion of the mortgaged property had been sold for arrears of revenue and the sale of a portion was subject to encumbrance under sec. 54 of the Revenue Sale Act (XI of 1859): *held* that notwithstanding the claim against the sale-proceeds, the mortgagee had the right to follow the mortgaged property in the hands of the purchaser—*Ibid*, at p. 210. The right of the mortgagee under this section to proceed against the surplus sale-proceeds in the hands of a money decree-holder cannot be taken away by the revenue sale being held either by or without annulling the encumbrances—*Mukram v. Bateswar*, A.I.R. 1937 Pat. 307, 169 I.C. 805. A mortgagee who had purchased the mortgaged property in execution of the landlord's decree (obtained after impleading the mortgagee) is only entitled to his mortgage-money out of the sale-proceeds after satisfaction of the claims of the prior encumbrances—*Central Bank of India v. Sachindra*, A.I.R. 1933 Pat. 257 (259), 144 I.C. 760; *Dhirendra Nath De v. Naresh Chandra Ray*, A.I.R. 1958 Cal. 453.

In the circumstances mentioned in this section the question frequently arises, what would be the remedy of the mortgagee if the surplus sale-proceeds are not sufficient to satisfy his debt? Acceptance of the surplus sale-proceeds do not amount to a relinquishment by the mortgagee of his right to recover by all means the remaining mortgage-money due to him—*Ganga Sahai v. Tulsi Ram*, 25 All. 371 (373). The remedy of the mortgagee must be determined according to the circumstances of each particular case. It has been held by the Calcutta High Court that if the mortgagee obtains a decree on his mortgage, and before that decree is executed the property is sold under sec. 165, Bengal Tenancy Act in execution of a rent-decree obtained against the mortgagor, and the surplus sale-proceeds are insufficient to satisfy the mortgage-decree, the mortgagee is entitled to have the balance of his decree satisfied *out of the property* in the hands of the purchaser; in other words, the property in the hands of the purchaser is liable to be sold again to satisfy the deficiency of the mortgage-debt—*Parameshwar v. Anath Bandhu*, 51 I.C. 333 (335). But if the mortgaged property sold for arrears of rent under sec. 165, Bengal Tenancy Act is purchased by the *mortgagee himself* the inference is that the charge in respect of *this* property is extinguished (old sec. 101 of this Act), although he may not have taken steps to annul the incumbrance under sec. 167, B. T. Act, and if the surplus sale-proceeds are insufficient

to satisfy his mortgage-debt, he is entitled to proceed for the satisfaction of the balance of his mortgage-decree against the *other properties* of the mortgagor—*Mastulla v. Jan Mamud*, 28 Cal. 12 (16, 17). Where the mortgaged property sold for arrears of revenue was purchased by the *mortgagor benami* in the name of a third person, so that the property returned into the possession of the mortgagor, the mortgagee would be entitled to put up the same property to satisfy the balance of the mortgage-money that remained due after taking out the surplus proceeds of the previous revenue-sale—*Ganga Sahai v. Tulsi*, 25 All. 371 (374); *S. Lakshmayya v. Intoory Bolla Reddy*, 26 Mad. 385 (387). The proprietor of a revenue-paying estate executed a mortgage, and then subsequently granted a *putni* in favour of another person who had it registered under sec. 40 of Act XI of 1859 (Bengal Revenue Sales Act). The mortgagee obtained a decree on his mortgage in a suit in which the *putnidar* was made a party. After the decree the estate was sold for arrears of revenue subject to the incumbrance of the *putni*, and was purchased by the mortgagee himself. He then withdrew the surplus sale-proceeds, by which his decree was partly satisfied, and for the unsatisfied balance he applied for sale of the *putni* interest. *Held* that the *putni* interest was liable to be sold for the balance of the mortgage-debt—*Susilabala v. Dinobandhu*, 14 C.W.N. 186 (190), 5 I.C. 70.

Where the mortgaged property has been sold for arrears of revenue, the mortgagee will be entitled to the surplus sale-proceeds not only in the hands of the Collector, but also in the hands of certain money-decree holders of the mortgagor who have drawn out the sale-proceeds from the Collectorate—*Gosto Behary v. Shib Nath*, 20 Cal. 241 (244).

If after a sale of the mortgaged property for arrears of revenue, the mortgagor's interest in the property is revested in him in consequence of the *sale being set aside*, the mortgagor ceases to have any interest in the sale-proceeds, and the mortgagee can fall back upon his original security—*Rash Behari v. Kusum Kumari*, 86 I.C. 882, A.I.R. 1925 Cal. 1145. If the property is sold for arrears of rent and purchased by the mortgagee himself, the mortgage is extinguished, and the mortgagee's claim is transferred to the surplus sale-proceeds—*Hem Chandra v. Tafazzal*, 8 C.W.N. 332 (336).

This section applies to partition. On partition the mortgagee of an undivided share prior to the partition gets as his security only the properties allotted to the mortgagor on partition—*Bhuyan Shyam Sunder v. Nilkantha Das*, A.I.R. 1956 Orissa 165; *Rup Chand Mullick v. Madan Mohan Dutt*, A.I.R. 1960 Cal. 351.

454. Sub-section (3) :—The doctrine of substituted security applies to a charge. Thus where a decree for money against a motor transport company creates a charge on the buses and thereafter the company is wound up and its buses are sold by the liquidator, the charge in favour of the decree-holder can be enforced against the sale-proceeds of the buses—*Union of India v. Official Liquidator*, A.I.R. 1960 Andh. Pra. 555.

So long as the mortgagee's claim is not satisfied, the unsecured creditors will not be entitled to take any portion of the surplus sale-proceeds, and if any one takes any portion of the money, he does so under

the liability of being sued in case the mortgagee finds any difficulty in getting himself paid. The unsecured creditors are not entitled to draw any portion of the sale-proceeds, even though they leave enough in the hands of the Collector—*Gosto Behary v. Shib Nath*, 20 Cal. 241 (244). Where a puisne mortgagee, not a party to a suit by the prior mortgagee, intervenes at the stage of the sale and the security is sold subject to the puisne mortgage, the puisne mortgagee cannot claim payment out of the surplus sale proceeds—*Jayaben v. Bhanumati*, A.I.R. 1969 Guj. 222.

74-75. [Omitted.]

These two sections have been omitted here but re-enacted as sections 92 and 94, with substantial amendments.

"These sections are based on what is known as the principle of 'subrogation'. For reasons stated in the notes in the proposed new sections 92 and 94, we propose to delete these sections."—*Report of the Special Committee*.

76. When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property,—

Liabilities of mortgagee in possession.

- (a) he must manage the property as a person of ordinary prudence would manage it if it were his own ;
- (b) he must use his best endeavours to collect the rents and profits thereof ;
- (c) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature *and all rent* accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the property may be summarily sold ;
- (d) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (c) and the interest on the principal money ;
- (e) he must not commit any act which is destructive or permanently injurious to the property ;
- (f) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy or so much thereof as may be necessary, in reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money ;

- (g) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported ;
- (h) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after deducting the expenses *properly incurred for the management of the property and the collection of rents and profits and the other expenses* mentioned in clauses (c) and (d), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest * * * and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money ; the surplus, if any, shall be paid to the mortgagor ;
- (i) when the mortgagor tenders or deposits in manner hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his * * * receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of Court, as the case may be *and shall not be entitled to deduct any amount therefrom on account of any expenses incurred after such date or time in connection with the mortgaged property.*

If the mortgagee fail to perform any of the duties imposed upon him by this section, he may, when Loss occasioned by his default. accounts are taken in pursuance of a decree made under this chapter, be debited with the loss, if any, occasioned by such failure.

Amendment :—This section has been amended by sec. 40 of the Transfer of Property Amendment Act (XX of 1929). Besides the addition of the italicised words in clauses (c), (h) and (i), the words "on the mortgage-money" have been omitted from clause (h), and the word "gross" has been omitted from clause (i).

463. Scope of section :—Section 76 does not apply to a mortgage by the lessee. This section defines the duties of the mortgagee to the mortgagor but has no bearing on his liabilities to the lessor. Even sec. 109, which defines the rights and liabilities of the lessor's transferee, is curiously silent as to the assignee of the lessee—*Ardeshir v. K. D. & Bros.*, 27 Bom.L.R. 553, 88 I.C. 79, A.I.R. 1925 Bom. 330.

This section is not restricted to usufructuary mortgages. Where under a deed of mortgage by conditional sale, the mortgagee took possession of the mortgaged property with the consent of the mortgagor when the latter failed to pay the money on the date, *held* that this section should be applied in reduction of the mortgage-debt in view of clause (i) of this section—*Afsar Shaik v. Saurava Sundari*, -25 C.L.J. 560, 40 I.C. 371. The Allahabad High Court has said that this section applies to a case where *during the continuance* of the mortgage the mortgagee takes possession of the mortgaged property; and that therefore it cannot apply where the mortgage is *in its inception* usufructuary—*Kallu v. Ganesh*, 116 I.C. 747, A.I.R. 1929 All. 348 (349). But this view has not been accepted by the Oudh Chief Court, which interprets the expression “during the continuance of the mortgage” as meaning “after the contract establishing the relationship of mortgagor and mortgagee between the parties has been entered into and established, and till the time the mortgage comes to an end or is extinguished”; and consequently it does not exclude a mortgage which is in its inception usufructuary—*Lakshmi v. Mohamdi*, 7 Luck. 454, A.I.R. 1932 Oudh 123 (132), 137 I.C. 102.

It should be noticed that this section uses different terms in the different clauses, such as “rents and profits” “income” “receipts” “all sums received” according to the context in which they occur.

Until the final decree is passed, a mortgagee in possession has the liabilities imposed by this section—*Satyanarayana v. Suryanarayana*, A.I.R. 1949 Mad. 613, (1949) 1 M.L.J. 116. Plea that a suit under S. 76 is not maintainable because an earlier proceeding under sec. 83 has been finally decided by High Court in appeal against preliminary decree and that judgment has become final, cannot be raised in appeal against final decree—*Manickchand v. Saleh Mohamed Sait*, A.I.R. 1969 S.C. 751: (1969) 1 S.C.C. 206: (1969) 2 S.C.J. 147.

464. What amounts to mortgagee's “taking possession” :—“It is not necessary that the mortgagee should be in actual physical occupation of the property. He may equally effectually be in possession through his agent or receiver.”—*per* North, C. J. in *Richards v. Overseas of Kidderminster*, (1896) 2 Ch. 212 (219, 220). He may be said to be in possession by receiving rent from the tenants who occupy the lands. But the simple receipt of rents and profits by a mortgagee will not make him a mortgagee in possession. It ought to be shown that he has intercepted the power of the mortgagor to manage his estate, and has received the rents as part of the management of the estate—*per* Cotton L. J. in *Noyes v. Pollock*, (1886) 32 Ch. D. 53 (61). If the agent of mortgagor realises rents from the tenants of the mortgaged property and pays them to the mortgagee, the latter cannot be said to be a mortgagee in possession—*Ibid*.

The possession taken by the mortgagee may be independent of the provision of the mortgage-deed. Thus, where a mortgage-deed is silent as to possession and the mortgagee takes possession of the mortgaged property, he is accountable for the rents and profits received—*Madari v. Baldeo Prosad*, 27 All. 351. Where possession by a person is attributable to a mortgage or charge or where the mortgagee is let into possession by

the mortgagor, possession can be retained by such person against any one including the landlord till the dues under his mortgage or charge are paid—*Creet v. Gangaraj*, A.I.R. 1937 Cal. 129 (138, 139), I.L.R. (1937) 1 Cal. 203, 170 I.C. 214.

Effect of mortgagee's taking possession:—A mortgagee who enters into possession of the mortgaged property in his capacity as a mortgagee can never, during the continuance of the mortgage, assert any adverse possession against the mortgagor whose right to redeem remains alive for 60 years and no question of adverse possession arises until after expiration of that period—*Wajid Ali v. Alidad Khan*, A.I.R. 1940 Pat. 45, 184 I.C. 124 relying on *Khiraajmal v. Daim*, 32 I.A. 23, 32 Cal. 296 and *Bakha Singh v. Ram Narain*, 47 All. 73, 22 A.L.J. 905, A.I.R. 1925 All. 133. Where during the subsistence of a mortgage a mortgagee is proved or admitted by both parties to have come into possession with the consent of the mortgagor, the possession must be taken to be possession as a mortgagee and cannot be said to be adverse possession—*Angnu Ram v. Bhikhi*, A.I.R. 1941 Oudh 84, 1941 O.L.R. 13.

Possession by mortgagor in any other capacity:—Where the mortgagor is allowed to remain as a tenant of the mortgagee under what is called an attornment clause, in regard to such occupation the mortgagee does not stand in the position of a mortgagee in possession—*Chunilal v. Abdul Karim*, A.I.R. 1937 Bom. 483 (487) 39 Bom.L.R. 795, 172 I.C. 584. Where a usufructuary mortgagee never obtained possession or after obtaining possession was dispossessed by the mortgagor who was at fault, the mortgagee is entitled to claim interest from the mortgagor on the amount advanced by the former for the period during which the mortgagor has been in possession—*Dal Singh v. Sunder Kunwar*, A.I.R. 1944 Oudh 208, (1944) O.W.N. 58. The principle of this section would apply to all mortgagees who get into possession by way of further security for the payment of their debt. Thus, where the mortgagee was let into possession of the mortgaged house under a lease, for the same period as the mortgage, on the footing that the estimated rent of the house should be set off month by month against the monthly interest, *held* that this section applied and the rent of the house would be set off against the interest in taking accounts. And it makes no difference to this proposition that the mortgagee-lessee was in the position of a tenant holding over after the lease-period had expired—*Vengubai v. Ramaswami*, 26 L.W. 450, 1927 M.W.N. 749, A.I.R. 1927 Mad. 964 (965), 105 I.C. 419. Where the mortgagee entered into possession of the mortgaged property by virtue of a lease under which the rent was appropriated by the lessee towards the reduction of the mortgagor-debt *held* that the substance of the transaction was that the lessee had taken possession in his own interest in order to secure payment of the amount due to him, and the relation of the parties was that of mortgagor and mortgagee; the latter was therefore bound to pay the Government revenue payable in respect of the property under clause (c) of this section—*Kishundial v. Mahabir*, 5 P.L.J. 492, 1 P.L.T. 711, 58 I.C. 291. A prior mortgagee who takes a lease of the mortgaged property subsequent to the execution of a puisne mortgage is chargeable as a mortgagee in possession and not as a lessee—*Ibid*. If a tenant inducted by the mortgagor before the mortgage pay rent to the

mortgagee such tenant cannot be dispossessed in execution of a decree for redemption.

465. Clause (a)—He must manage with ordinary prudence:—The mortgagee in possession is in equity considered in some measure in the light of trustee and thus the same measure of prudence is prescribed in the clause as in sec. 15, Trusts Act. A mortgagee in possession has his own right of managing the lands; and he is not in any sense dependent upon the consent of the mortgagor in determining as to what rent he should reasonably seek from a tenant in respect of a particular land and what tenant he should keep—*Barjorji v. Shripatprasadji*, 29 Bom.L.R. 215, A.I.R. 1927 Bom. 145 (148), 100 I.C. 1033. A usufructuary mortgagee may enter into any arrangement which will facilitate the recovery of what he may consider to be a reasonable return for the money; and for this purpose he may *lease out* the mortgaged property either to third parties or to the mortgagor himself—*Md. Karamat Ali v. Ganeshi Lal* 49 All. 658, A.I.R. 1927 All. 552 (554), 25 A.L.J. 467, 101 I.C. 516. But he cannot create a right beyond his own term, *i.e.*, he cannot grant a *permanent* lease or a lease for a period lasting *beyond the term* of his mortgage. Such a lease is inoperative so far as the mortgagor is concerned, and he is entitled to eject the lessee—*Jhagru v. Raghunath*, 10 P.L.T. 625; 119 I.C. 551, A.I.R. 1929 Pat. 630 (632); *Purshottam v. Ramcharanlal*, A.I.R. 1967 Madh. Pra. 237. Where a usufructuary mortgagee has settled *bakasht* land, the right of the tenant cannot be determined by a contract between the mortgagor and the mortgagee, but is to be determined by the rule of law. If these tenants are occupancy raiyats, their right to remain on the land will continue in spite of the mortgagor going into possession—*Rameshwar v. Naramdeshwar*, *supra*.

It is not permissible for the mortgagee to create an interest in the mortgaged property which will enure beyond the termination of his interest as mortgagee. Further, a mortgagee in possession must manage the mortgaged property as a person of ordinary prudence and as if it were his own—*Mahabir v. Harbans*, A.I.R. 1952 S.C. 205; *Rashtaria Baratan Bhundar v. Harikishan*, 1966 cur. L.T. 395. A permissible settlement by a mortgagee in possession and the springing of rights in the tenant conferred or created by statute based on the nature of the land and possession for the requisite period is an exception to the general rule. In such a case the tenant cannot be ejected by the mortgagor even after redemption of the mortgage. He may become an occupancy or non-occupancy raiyat—*ibid*; *Prabhu v. Ramdeo*, A.I.R. 1966 S.C. 1721. Where the terms of the mortgage prohibit the mortgagee from making any settlement on the land either expressly or by necessary implication, this exception will not apply—*ibid*. If the lease is one which could have been made by the owner in the course of prudent management it is binding on the mortgagor even after the mortgage has been redeemed. But the lease cannot continue beyond the period for which it was granted—*Harihar Prasad v. Deonarain*, A.I.R. 1956 S.C. 305; *Habib Seth v. Kasinath*, 1968 All. L.J. 446. The general rule is that a lessee from a mortgagee cannot continue after redemption—*Aladat Khan v. Kaji Nasaruddin*, 1961 M.P.L.J. 924.

A *darpatnidar* in possession of the *patni* under sec. 13 of the Bengal Patni Regulation of 1819 can at the request of the mortgagor *patnidar*

apply the income of any year to the purchase of subordinate tenures for the purpose of enhancing the value of the security—*Midnapur Zemindary Co. v. Saradindu*, A.I.R. 1948 Cal. 250, 52 C.W.N. 724. A mortgagee in possession of a shop can let it out and the appertaining room on a monthly tenancy, and the tenant does not become a trespasser after redemption of the mortgage—*Hardei v. Wahid Khan*, A.I.R. 1954 All. 16. But where a mortgagee in possession was not authorised to change the incidents of the *bhaoli* holding, a commutation of the *bhaoli* rent into *nagdi* and its amalgamation with other lands would not be binding on the mortgagor after redemption—*Jhalki v. Bachu*, A.I.R. 1950 Pat. 246, 29 Pat. 180. Where the mortgagor allows the mortgagee to let the mortgaged premises on hire he cannot make vacant possession as the condition precedent for the tender of the mortgage money—*Abdul Hamid v. Manilal*, 1968 M.P.L.J. 451.

A mortgagee in possession is bound to cultivate the ordinary crops which the land is capable of yielding. But he is not bound to cultivate any other particular crop. He may cultivate it as he likes, and with as little profit to himself as he likes, and no objection can be made that he is not doing his best to help the former to pay off the debt. The general rule is that the mortgagee in possession is only accountable for what he receives and is not bound to take any particular trouble to make the most of another man's property—*Girjoji v. Keshavrao*, 2 B.H.C.R. 211 (212, 213). He will not be liable for deterioration of the property arising from ordinary decay owing to the lapse of time which has caused a diminution of the annual value—*Richards v. Morgan*, 4 Y. & C. 510. A mortgagee ought not to be charged exactly with the same degree of care as a man is supposed to take who keeps possession of his own property. But if there be gross negligence, by which the property is deteriorated in value, the mortgagee who is in possession is responsible for that deterioration—*Wragg v. Denham*, (1836) 2 Y. & C. Ex. R. 117 (at pp. 121, 122). The mortgagee is responsible for waste, for the consequence of wilful default, and for all loss resulting from negligence amounting to breach of trust—*Girjoji v. Keshavray*, 2 B.H.C.R. 211. If he is shown to be negligent, he will be accountable not only for what he has received, but for what he might or ought to have received but for his wilful default—*Caplin v. Young*, 33 Beav. 330; *Parkinson v. Hanbury*, L.R. 2 H.L. 1. He is not bound to engage in and will not be allowed for, speculation and adventure in respect of the property—*Hughes v. Williams*, 12 Ves. 493 (496). Thus, in the case of open mines, the mortgagee has undoubtedly the right to work them but he cannot be called upon to speculate by making a large outlay. And in no case is he bound to spend more than a prudent owner would do—*Rowa v. Wood*, (1822) 2 J. & W. 553.

A mortgagee in possession can create a right in the tenant to hold the land rent-free as a tenant, but it would not be binding against the mortgagor, unless the settlement is made *bona fide* in the ordinary course of business—*Rup Narain v. Sheo Sagar*, A.I.R. 1939 Pat. 258, 180 I.C. 105; *Asa Ram v. Mst. Ram Kali*, A.I.R. 1958 S.C. 183. See also *Mohabir Gope v. Harbans Narain*, A.I.R. 1952 S.C. 205; *Mathra Puri v. Hukam Chand*, A.I.R. 1965 Punj. 231. On redemption the tenant is liable to be evicted—*Ram Kailash Singh v. Baliram Singh*, A.I.R. 1963 Pat. 26. A

monthly tenant inducted by the mortgagee cannot claim protection under the Rent Control Act after the passing of the decree for redemption—*Kamalakar & Co. v. Gulamshafi*, A.I.R. 1963 Bom. 42. Where the mortgage deed provides that the mortgagee is not entitled to settle the mortgaged land for more than 12 years so as to entitle the settlee to claim occupancy rights, the settlee cannot claim those rights even if he is in occupation for more than 12 years—*Sheo Sunder Kuer v. Dulhim Suroya Mukha*, A.I.R. 1969 Pat. 279.

466. Clause (b)—Collection of rents and profits :—Where the mortgagee comes into possession of the mortgaged property in the capacity of a mortgagee, it is his duty to collect the rent from the lessee and to eject him in proper course of law. The mortgagee is liable to account for the profits and credit the same to the mortgagor—*Ram Kishan v. Badri Bishal*, A.I.R. 1937 All. 337, I.L.R. 1937 All. 685, 170 I.C. 624. A mortgagee in possession must be diligent in collecting the rents and profits. But failure to get the highest possible rent does not necessarily show want of prudence on his part. He is liable only for wilful default—*Ram Pratap v. Sher Ali*, 3 N.L.R. 106 (following *Hughes v. Williams*, 12 Ves. 493).

The mortgagee is not an assurer of the continuation of the same rate of profits which his mortgagor was able to raise. The mortgagee in possession is liable for only so much of the land as he has actually cultivated unless it be proved that but for his gross mismanagement or fraud he might have received more—*Shah Makhan Lal v. Shri Kishen Singh*, 12 M.I.A. 157 (193). The mortgagee is not responsible for the total recorded rental of the property, but only for such sums as were actually received by him or on his behalf and for such sums, if any, as might have been received by him but for his own neglect or fault—*Banarsi Prasad v. Ram Narain*, 25 All. 287 (P.C.); *Parkinson v. Hanbury*, (1867) L.R. 2 H.L. 1; *Gouri Nath v. Fateh Singh*, 3 O.L.J. 689, 38 I.C. 537. But where the mortgagee in possession fails to recover rent by a suit which proves abortive he cannot be charged with the rent merely because he failed to recover it—*Burke v. O'Connor*, (1855) 4 Ir. Ch. R. 418.

Where the mortgagor takes the mortgaged property on lease from the mortgagee and makes default in payment of rent, which according to the mortgage bond is to be credited towards interest the mortgagee can recover the rent even though time-barred—*Ghulam Mohammad v. Rajeshwar*, I.L.R. 1940 Lah. 658, A.I.R. 1940 Lah. 333, 192 I.C. 505. If a mortgagor takes the mortgaged property on lease from the mortgagee, the mortgagee as landlord can file a suit on the basis of a rent note—*Bharoselal v. Daryao*, 1961 Jab. L. J. 207; *Jagta v. Hari Chand*, A.I.R. 1959 J. & K. 103.

Where a mortgagee in possession instead of letting the property to raiyats and realising rents in the ordinary way, cultivates it himself, he is not liable to account for the whole of the profits arising to him by farming the land but only for such profits as he would have realised had he let it to a tenant, or as the mortgagor would have realised had he let it—*Raghunath v. Baraik Geereedharee*, 7 W.R. 244.

Where in the case of a usufructuary mortgage the *jenmi* failed to

recover the *michavarom* payable to him and allowed it to be barred, his inaction would enure to the benefit of the mortgagee and not of the mortgagor—*Kochu Kunju v. Sankara*, A.I.R. 1954 Tr.-Coch. 53. But where the mortgaged property fetching rent lay vacant for some period and the usufructuary mortgagee was allowed interest during the period, credit for fair rent was given to the mortgagor for that period—*Damji v. Devsi*, A.I.R. 1953 Katch, 77.

The mortgagee in possession will be liable for the gross negligence of an agent employed by him for the purpose of collecting the rents, although proper care was taken in the selection of such agent—*Jones on Mortgages* § 1123.

467. Clause (c)—Payment of revenue :—Even before the Act a mortgagee in possession was bound to manage the property as a person with ordinary prudence would manage as if it were his own, and unless there was an agreement to the contrary he was bound to pay out of the income of the property the Government revenue and such charges of a public nature as might accrue due in respect of the property and be payable by the person in possession of the rents and profits, and he was not entitled to charge such payments against his mortgagor in the accounts—*Mirza Abid Hussain v. Mt. Kaniz*, A.I.R. 1924 P.C. 102 (106), 46 All. 269, 51 I.A. 157, 29 C.W.N. 214, 80 I.C. 1019; *Rameshwar v. Naramdeshwar*, A.I.R. 1940 Pat. 627. But where under the terms of the mortgage-deed as well as those of a lease of the mortgaged properties taken from the mortgagee by the mortgagor the Government revenue was payable by the latter, but had actually to be paid by the mortgagee, he is entitled to add the same for the purpose of ascertaining his total dues under the mortgage—*Sahib Chandra v. Lachmi Narain*, A.I.R. 1929 P.C. 243 (245), 51 All. 686, 56 I.A. 339, 33 C.W.N. 1091, 119 I.C. 612. This clause is the counterpart of clause (c) of section 65. In the absence of a contract to the contrary, the mortgagee in possession must pay revenue and other public charges in respect of the mortgaged property, and he is the person primarily responsible for payment of the same. He has no right to appropriate the income without paying the revenue—*Md. Hadi v. Parbati*, 25 O.C. 2, A.I.R. 1922 Oudh 91, 68 I.C. 549; *Kannye v. Nistarini*, 10 Cal. 443; *Kundanmal v. Kashibai*, 26 Bom. 363; *Vithal v. Sriram*, 29 Bom. 391, 7 Bom. L.R. 313. A *Kanom* deed could not be read as embodying a contract to the contrary to the provisions of this section and where the revenue payable to the Government was increased, the *kanomdar* and not the *jenmi* was liable to pay the enhanced revenue—*Sankunni v. Tavazi*, A.I.R. 1943 Mad. 627, (1943) 2 M.L.J. 127. Where at the time of the execution of the mortgage, no revenue was assessed on the land, but it was subsequently assessed, the mortgagee in possession was bound to pay the revenue—*Md. Hadi v. Parbati*, (supra). If owing to the default of the mortgagee in paying the revenue, the property is sold away, the mortgagor would not lose his right of redemption—*Kalappa v. Shivayya*, 20 Bom. 492 (494); *Lakshmaya v. Appadu*, 7 Mad. 111 (112). Where the mortgaged property is sold for arrears of rent due to the mortgagee's default and is purchased by the mortgagee himself, the mortgagor is entitled in equity to redeem the mortgage—*Jaikaran v. Sheo Kumar*, A.I.R. 1927 All. 747 (748), 103 I.C. 370. This decision has been distinguished by Harris, C.J. and Agarwala, J.

of the Patna High Court in a case, where the landlord was the purchaser at the rent sale, but later on it came into the hands of the mortgagee and the mortgagor claimed redemption, on the ground that the equity of redemption had for ever been extinguished and did not revive when the mortgagee eventually obtained the property—*Fekua v. Babu Lal*, 18 Pat. 133, A.I.R. 1939 Pat. 382, 183 I.C. 374. Where on default of the mortgagee to pay the revenue, the mortgagor pays it in order to avert the forfeiture or sale of the property, he may take credit for the amount when the accounts are adjusted and sue him every year in order to force him to make regular payment—*Jaijit Rai v. Govind*, 6 All. 303; *Hari v. Sridhar*, 10 N.L.R. 9, 23 I.C. 131. If the mortgagee fails to pay the revenue and the mortgagor pays it, he is entitled to be reimbursed not only for the money expended but also for the interest thereon by way of damages—*Krishan v. Ambu Kurup*, 51 M.L.J. 633, A.I.R. 1927 Mad. 59, 98 I.C. 802, even where at the date of the mortgagor's suit for recovery of the amount, a preliminary decree had been passed in his suit for redemption against the mortgagee and a final decree was passed later on, because the mortgage-deed subsisted at the date of the mortgagor's suit for recovery of the amount—*Duraiswami v. Venkata Reddy*, A.I.R. 1940 Mad. 283, 50 M.L.W. 889. In such a case the mortgagee will be debited with the loss caused to the mortgagor and the compensation will be allowed for the whole period of the accounting—*Misri Lal v. Gajodhar*, A.I.R. 1943 Oudh 433, (1943) O.W.N. 347. But unless the mortgagee has actually collected rents or profits for a period prior to his getting into possession or unless he is so authorized to do, the mortgagor must pay the revenue for period prior to the possession of the mortgagee—*Jagat v. Sheonarain*, A.I.R. 1938 Pat. 196 (198), 174 I.C. 1001.

The mortgagee however is not bound, in the absence of an express contract, to pay enhanced revenue if the enhancement is made subsequently to his mortgage. Such enhancement must be paid by the mortgagor—*Krishnier v. Arrappulli*, 14 M.L.J. 488; *Panigattan v. Raman Nair*, 17 M.L.J. 517; *Thippa v. Krishnaswami*, 9 M.L.T. 206, 8 I.C. 845; *Panambatta v. Kalathipodkil*, 16 M.L.T. 317, 25 I.C. 641; *Hari v. Sridhar*, 10 N.L.R. 9. (But see *contra*—*Tuppan Numbudri v. Chinna Pari Kutti*, 18 M.L.J. 31; *Nathuwath v. Kolli Vallapil*, 22 M.L.J. 151, 12 I.C. 140; *Nanu Nair v. Ashta Moorthi*, 29 M.L.J. 772, 29 I.C. 386; *Vesteva v. Mahabala*, A.I.R. 1926 Mad. 405, 91 I.C. 943; *Chempathoor Raman v. Nagalaseri*, 24 I.C. 870; *Kolli Valapil v. Natuwath*, 14 I.C. 590). Thus, where there was nothing in the mortgage-deed to show that the terms as to the amount to be paid by the mortgagee had reference to any other than the revenue under the settlement in force at the time of the mortgage, the ultimate responsibility in respect of any addition to the land revenue must devolve on the mortgagor—*Krishnier v. Arrappulli*, 14 M.L.J. 488.

The mortgagee is bound to pay the revenue under this clause, if he is able to pay it "out of the income of the property" in his hands—*Panigattan v. Raman Nair*, 17 M.L.J. 517. If it cannot be paid out of the income, he is certainly not bound to pay it; but if he does pay it out of his own pocket, he can add the money so paid to the amount of the mortgage-money under sec. 72—*Farzand Ali v. Kaniz Fatima*, 22 O.C. 270, 54 I.C. 264. He cannot, however, get credit for any rents payable to the land-

lord which are not actually paid by him—*Prosanna v. Girish*, A.I.R. 1934 Cal. 149 (150), 37 C.W.N. 1162, 149 I.C. 667. So also, in case of enhanced revenue, if the mortgagee pays it out of his own funds, he will be entitled to tack the amount to his mortgage-money—*Kamayya v. Devapa*, 22 Bom. 440; *Bohra Thakur Das v. Collector*, 28 All. 593.

The rule that the mortgagee of a lease-hold property becomes liable on the covenant for payment of rent, though he has never occupied or become possessed in fact of the property, applies only if there is no special provision to the contrary—*Fala Krista v. Jagannath*, A.I.R. 1932 Cal. 775 (782), 36 C.W.N. 709, 59 Cal. 1314, 140 I.C. 788.

This clause does not apply where there is an express contract to the contrary, e.g., where the deed of mortgage distinctly provides that the Government revenue shall be paid by the mortgagor. In such a case the mortgagee will not be bound to pay the revenue, and if the property is sold on account of the revenue falling into arrears, the sale cannot be set aside—*Ooppath Naramparambath v. Koya Kutti*, 29 I.C. 344. So also in the case of enhanced revenue, although the decisions are not consistent as to which party is liable to pay it in the absence of any express contract (see *supra*), there can be no question that if the mortgagor expressly undertook the liability to pay the enhanced revenue, he must pay it, and cannot at the time of redemption claim the difference between the original and the enhanced rate that he had to pay—*Akbar Khan v. Kali Bhan*, 39 I.C. 437 (Oudh).

'Other public charges' :—For instance, the mortgagee is bound to pay *tagavi* claims, for non-payment of which the property is liable to be sold away—*Chitta Bhula v. Bai Jamni*, 40 Bom. 483; *Jhalliram v. Daulatsingh*, A.I.R. 1951 Nag. 254, I.L.R. 1950 Nag. 862. The irrigation and other cesses charged upon the land are part of the land revenue and are therefore 'public charges'—*Gunnam Dorayya v. Vadapillari*, 27 M.L.J. 295, 25 I.C. 797. Where the mortgagee in possession pays municipal taxes, and there is an agreement between the mortgagee and mortgagor that the rent is to be set off against the principal and interest, he is entitled to set off the amount paid as municipal taxes in the mortgage account so that he can remain in possession till the liquidation of the sum paid as taxes—*Kesho Ram v. Ram Lal*, A.I.R. 1936 Pat. 312, 163 I.C. 55. See also *Ram Asray v. Hira Lal*, A.I.R. 1949 All. 681.

Rent :—The amendment by Act XX of 1929 which imported the words "and all rents" in cl. (c) did not really change the law and create a new liability on the part of the mortgagee in possession. Even under the old law, it was the duty of such a mortgagee to pay the rent of the mortgaged property—*Jagat v. Sheonarain*, A.I.R. 1938 Pat. 196, 174 I.C. 1001. See *Kannye v. Nistarini*, 10 Cal. 443 and *Vithal v. Shriram*, 29 Bom. 391.

The word "summarily" occurring in the latter portion of this clause implies that the proceedings for realization of rent by sale of the property are of a summary nature; for instance, as in the case of a certificate proceeding under the Public Demands Recovery Act—*Jagat v. Sheonarain*, *supra*, at p. 198; *Jay Prasad Choubey v. Mt. Jasoda*, A.I.R. 1958 Pat. 649.

This section deals with the relative rights and duties of the mortgagor

and mortgagee and a third party, *e.g.*, the landlord cannot recover arrears or rent directly from the mortgagee—*Sachindra Mohan v. Commissioners for the Port of Calcutta*, I.L.R. (1938) 1 Cal. 21, 41 C.W.N. 1141; *Govindarajulu v. Gopalaswamy*, A.I.R. 1941 Mad. 401, 1941 M.W.N. 185. Where the mortgage-deed is silent as to the liability to pay rent, the mortgagee is liable—*Deo Saran v. Barhu Singh*, A.I.R. 1952 Punj. 286.

Arrears of rent :—The mortgagee is bound to pay arrears of rent even though they were for a period prior to the execution of the mortgage—*Kshetra Nath v. Durgapada*, 52 I.C. 902 (Cal.). The mortgagee is bound to pay arrears of rent which fall due in respect of the mortgaged property, but he is not bound to pay arrears of rent which accumulate in respect of that portion of the holding which is not mortgaged to him—*Ram Dulare v. Sahdeo*, A.I.R. 1925 All. 189, 83 I.C. 188. A usufructuary mortgage-deed provided that out of the rents and profits of the mortgaged property, rent payable to the jenmi by the mortgagor should be paid every year by the mortgagee and the balance should be appropriated in lieu of interest. The mortgagee did not pay the rent: *held* in the suit for redemption the mortgagor was entitled to claim an adjustment of these unpaid rents due to the jenmi against the mortgage-amount and that interest should be allowed on these arrears—*Kelu Kurup v. Manail Paru*, (1940) 1 M.L.J. 693, A.I.R. 1940 Mad. 686, 1940 M.W.N. 55. See in this connection *Ram Ranbejoy v. Badri Upadhyaya*, A.I.R. 1946 Pat. 36, 24 Pat. 545.

Even where no money was left with the mortgagee to pay the arrears of rent, the mortgagee is bound to pay the rent during the continuance of the mortgage and in case of default he cannot take advantage of it and purchase the property in the name of a *benamidar*—*Narain v. Mahant*, A.I.R. 1952 Pat. 421. See also *Bira Naik Mahanta Sidhakamal*, A.I.R. 1951 Or. 300, I.L.R. (1949) 1 Cut. 21.

468. Clause (d).—Repairs :—Under this clause, his duty to make the repairs lies to the extent of the surplus rents and profits in his hands—*Richards v. Morgan*, (1753) 4 Y. & C. 570 Appx. It is a paramount duty of the mortgagee to make the necessary repairs out of the surplus profits, and the Court will not accept the excuse that to do so would diminish his interest or profits—*Shiva Devi v. Jaru*, 15 Mad. 290 (291). If he fails to make the necessary repairs, the amount of the loss caused to the mortgagor by such non-repair is an item which must be considered in determining the accounts in settlement of the mortgage at the time of redemption—*Shiva Devi v. Jaru*, *supra*. The duty of the mortgagee to make repairs arises only if he is in actual possession of the property; therefore where the mortgagee instead of taking possession leased the property to the mortgagor, *held* that not having been in possession he was not liable for damages for neglecting to keep the house in repair—*Baquar Ali v. Nisar Husain*, 1885 A.W.N. 262.

But the mortgagee is bound to make such necessary repairs as he can pay for out of the rents and profits. Especially, where the mortgage-deed places the duty of doing the repairs on the mortgagor, the mortgagee is not entitled to spend money on repairs out of his own pocket, and add the amount to the mortgage-money—*Kallu v. Ganesh*, 116 I.C. 747, A.I.R. 1929 All 348. Sec. 76(d) merely limits the amount to be spent on

repair, it is not concerned with the question of priorities dealt with by sec. 76(h); hence there is no conflict between sec. 76(d) and sec. 76(h)—*Anandram Jivraj v. Premraj Mukunddas*, A.I.R. 1968 S.C. 250. Mortgagee is not bound to repair if there is no surplus after deducting interest and public charges—*Laxmiamma v. Narasimha*, 11 Law Report, 767.

Under this section a possessory mortgagee is entitled to make constructions on the land independently of any contract, provided it does not amount to waste. The amount spent on such construction is recoverable as mortgage-money at the time of redemption—*Rukmangal v. Mt. Durga*, A.I.R. 1946 Oudh 101, 21 Luck. 43. But see *Venkatashiah v. Venkatakrishnah*, A.I.R. 1958. Mys. 20 where it has been held that the money so spent cannot be recovered.

469. Clause (e):—Act destructive or injurious to the property:— The rule in clause (e) may be compared with sec. 66, in which a similar obligation is laid on the mortgagor in possession.

The mortgagee is prevented by this clause from doing any act likely to destroy or injure the property. Thus, he cannot cut down any trees which already existed on the property when it was mortgaged; but the removal of trees *planted by the mortgagee himself* is not an act destructive or permanently injurious to the property—*Ranchandra v. Shripati*, 50 Bom. 692, A.I.R. 1929 Bom. 595 (596), 99 I.C. 400; *Krishna v. Srinivasa*, 20 Mad. 124 (127, 128). Cutting of timber and clearing the ground for purposes of improvement will not constitute waste. If the trees have existed before possession was made over to the mortgagee the mortgagor will have the right to value the trees cut—*Chandi v. Thomman*, A.I.R. 1951 Tr.-Coch. 109. The Babul tree when cut down does not grow again from the trunk. Having regard to its uses it is "timber" and the cutting of it by the mortgagee amounts to an act of waste—*Ram Kumar v. Krishna Gopal*, A.I.R. 1946 Oudh 106, 21 Luck. 48. There is however no prohibition in this clause against taking the wood of a fallen tree which fell from natural causes. Such wood is part of the profits of the property and a mortgagee in possession is entitled to take the profits—*Durga v. Ganga*, A.I.R. 1932 All. 500, (1932) A.L.J. 493. If the land is not agricultural land, it cannot be said that the utility of the land has been injured by the tree-roots or stumps remaining on the land after the removal of the trees planted by the mortgagee—*Ramchandra v. Shripati*, (supra). The mortgagee's act of cutting bamboo-clumps planted by the mortgagor amounts to waste, unless the bamboos were of a mature age and ripe for cutting. The cutting of bamboo of a particular class may amount to *sayer* produce like the cutting of jungle, and does not constitute an act of waste—*Mahabir v. Sheoshankar*, 112 I.C. 434, A.I.R. 1929 Oudh 124. But while the mortgagee is forbidden to commit ruinous acts, he is not liable for the losses caused by accident or *vis major*, e.g., loss of the mortgaged premises by accidental fire. In such cases, the mortgagee is not only not liable for the loss, but is, on the other hand, entitled to get an additional security from the mortgagor and in default to recover the mortgage-money (sec. 68)—*Venkataswara v. Kesava Chetti*, 2 Mad. 187. The mortgagee is liable for the timber value of the trees that fall during his possession due to natural causes if he neglects to give notice to the mortgagor asking the latter to remove the trees—*Nani Kunjukrishna v. Padmanava Pillai*, A.I.R.

1959 Ker, 38. Where the mortgagee in possession is to apply the whole income towards interest he cannot be made liable in damages for not erecting protective works to prevent the silting of the mortgaged fields caused by water-channels constructed by the Government—*Velayudhan Narayanan v. Krishna Sankaran*, A.I.R. 1960 Ker. 298.

Where two houses were divided by a partition-wall and there was a communication-door between the two houses, and the owner mortgaged them to two different persons after closing the door, *held* that neither of the two mortgagees could re-open it, and that if one attempted to open it, the other could restrain him from doing so. An act like the opening of this door materially altered the condition of the property, and unless it could be clearly shown to be an improvement, it was *destructive of the property* within the meaning of this clause. For if the door of communication was left open by one party, the house was of no use to the other—*Lachmi Narain v. Jethu Mal*, 16 All. 386 (387).

A mortgagee is not entitled to act in a manner detrimental to the mortgagor's interests such as by giving a lease which may enable the tenant to acquire permanent or occupancy rights in the land, thereby jeopardising the mortgagor's right to get khas possession. Such an act will fall within sub-cl. (e) of this section—*Mahabir v. Harbans*, A.I.R. 1952 S.C. 205. A mortgagee in possession as such has no right to create tenancies, permanent or otherwise, and whatever tenures are created by him during his possession would *ipso facto* come to an end when the mortgage is redeemed—*Ram Chand v. Raj Hans*, 3 A.L.J. 517; *Gauri v. Mangla*, A.I.R. 1926 All. 463, 94 I.C. 442 (creation of occupancy right). The termination of the lease is subject to any right that might be conferred on the tenant by statute—*Bhanshali Kushalchand Ramji v. Sha Shamji Jivraj*, A.I.R. 1958 Bom. 53.

Although a lease granted by the mortgagor after the mortgage which is permanent and not in the usual course of management or which is against the covenants in the mortgage is not binding on the mortgagee, and he can take steps to put an end to the lessee's possession, still such a lessee has a right to redeem and having that right he has also the right to restrain waste on the part of the mortgagee in possession, such as would depreciate the value of the equity of redemption—*Basanta v. Adarmani*, 40 C.W.N. 57.

470. Clause (f) :—Insurance :—Section 72 gives the mortgagee power to insure the property, and if he so insures, this clause directs him to apply any money which he actually receives under the policy in case of loss or damage of the property, either in re-instating the property, or, according to the wish of the mortgagor, in reduction or discharge of the money.

“Under section 72, the mortgagee can insure the mortgaged premises for an amount not exceeding two-thirds of the money which would be required to restore the property in case of total destruction. But clause (f) of section 76 requires the mortgagee to apply any money which he may receive on a policy of insurance in re-instating the property, and if he fails to do so, he may be debited with such loss as may be sustained by the mortgagor. But how the mortgagee can be expected to discharge

this duty when he receives two-thirds only of the value of the property, is a puzzle for which I do not pretend to be able to give you any solution. The fact that a similar provision is found in the English Coveyancing Act, from which this section is borrowed almost word for word, may account for its finding a place in the Indian Act, but cannot help us in solving the difficulty"—Ghose's *Law of Mortgage* (5th Edn.), pp. 575-576.

This clause does not apply where the insurance was made neither by the mortgagor nor by the mortgagee but by the Receiver appointed by the Court in the mortgage-suit. If in such a case the property is destroyed by fire before it was brought to sale in execution of the mortgage-decree, and the Receiver obtained a large sum of money under the policy, held that the money received by the Receiver was not subject to the terms of the mortgage-deed, inasmuch as the insurance was kept on foot by the Court through the Receiver as a matter of protection for the benefit of all persons who were parties to the mortgage-suit, and not by the mortgagor or mortgagee in accordance with their contract in the mortgage-deed. The Court had ample discretion in directing in what manner the money so received should be laid out, and the mortgagor could not claim that it should be laid out in restoring the premises that had been destroyed or damaged by fire—*Seth Dooly Chand v. Rameshwar Singh*, 40 I.C. 623 (Cal.).

471. Clause (g) :—Accounts :—In the case of a mortgagee in possession, although it may have been executed before the Act came into operation, yet the principles of this section and sec. 77 with regard to the liability of the mortgagee to account are applicable, since they are mere codification of the law in existence before the Act—*Md. Sadiq v. Harakh Narain*, A.I.R. 1936 Pat. 583 (584), 166 I.C. 545; *Kamala Prasad v. Bamdeo*, A.I.R. 1935 Pat. 148 (149), 155 I.C. 22. A mortgagee in possession is not a trustee for the mortgagor and has to render accounts according to this section and to prove that his accounts are true and correct—*Anandji v. Ahmedbhoy*, I.L.R. 1940 Bom. 645, A.I.R. 1940 Bom. 287, 42 Bom. L.R. 580. The liability to account of a mortgagee in possession depends entirely upon whether under the contract he has to hand over from time to time anything of the rents and profits to the mortgagor, for of such money he is a trustee for the mortgagor until it is paid over. In cases where only a portion fixed or proportion of such rents and profits is to be retained by way of interest, the liability to account is clear. Similarly, where the whole of the rents and profits are to be retained in reduction of a fixed rate of interest and the mortgagor must pay the balance of the fixed rate from some other source, it is clearly necessary to account, because the mortgagee in possession and the mortgagor cannot otherwise know how much excess he may have been from time to time to pay—*Md. Sadiq v. Harakh Narain*, A.I.R. 1936 Pat. 583 at p. 584. In the case of a stipulation that the mortgagee should pay the mortgagor a certain sum annually over due payments from the earliest period of the contract cannot, in taking accounts in a redemption suit, be treated as statute-barred. The Court has in such circumstances the right in equity to allow simple interest on such over-due amounts—*Ibid* at p. 585. So long as the relationship of mortgagor and mortgagee subsists the mortgagee who is in possession

is bound to account for the rents and profits. No question of limitation can arise so long as that relationship continues—*Narasimha v. Sheshayya*, A.I.R. 1925 Mad. 825 (828), 48 M.L.J. 363, 90 I.C. 138. Where the mortgage-deed mentions that the mortgagee should pay every year to the mortgagor a certain sum, that sum for the whole mortgage period (even beyond 12 years) should be set off against the mortgage-debt—*Banwari v. Sakhray*, A.I.R. 1931 All. 585, (1931) A.L.J. 421, 135 I.C. 248. A mortgagee is bound to give an account of the profits realised by him from the mortgaged property so long as it was in his possession, though the mortgage be not a usufructuary one, and whether the possession was taken with or without the consent of the mortgagor—*Nilkant v. Jeenooddeen*, 7 W.R. 30. In a mortgage with possession where the mortgagee is bound to render account of rents and profits, the rent can be taken to be equivalent to the interest only in the absence of a definite finding as regards rent—*Hardt v. Mt. Damodari*, A.I.R. 1933 Lah. 141, 145 I.C. 122. The mortgagee cannot contract himself out of the statutory liability to keep accounts. Clauses (g) and (h) of this section are not qualified by any such proviso as "in the absence of a contract to the contrary". Therefore, they apply in all cases excepting those in which sec. 77 makes them inapplicable. Hence every mortgagee in possession is bound to account under these two clauses unless he establishes a contract in terms of sec. 77—*Kamala Prasad v. Bamdeo*, A.I.R. 1935 Pat. 148, 155 I.C. 22; *Lal Bahadur v. Murlidhar*, 27 O.C. 250, 74 I.C. 95, A.I.R. 1924 Oudh 92 (94). See in this connection *Mahadeo v. Md. Siddiq*, A.I.R. 1949 All. 189, I.L.R. 1949 All. 302 and *Baij Nath v. Parbin Singh*, A.I.R. 1945 All. 48, I.L.R. 1945 All. 42. Where a mortgage-deed providing for interest is silent as to possession, and the mortgagee takes possession of the mortgaged property, he is accountable for the rents and profits received—*Madari v. Baldeo Prasad*, 27 All. 351 (F.B.). But before the liability to account can be enforced, it must be proved that the mortgagee had received possession. The mortgagee is to be charged in respect of that only of which he has taken possession—*Chunital v. Abdul*, A.I.R. 1937 Bom. 483 (486), 39 Bom. L.R. 795, 172 I.C. 584. Where the mortgagor himself is allowed to remain in possession as a tenant of the mortgagee, his liability to account does not arise—*Shivaraj v. Mylapore H. P. Fund, Ltd.*, A.I.R. 1943 Mad. 62, 1942 M.W.N. 625. The account usually directed against the mortgagee in possession is of what he has, or without default might have, received from the time of his taking possession. His liability in the first instance extends in favour of those interested in the equity of redemption—*Ibid.* This liability, although absolute in the abstract may be reduced or qualified by the obstruction of the mortgagor to make the best use of the property—*Ibid.*, at p. 487. The mortgagee is none the less bound to keep accounts because he holds possession also as lessee—*Hunooman Pershad v. Babooee*, 6 M.I.A. 393 (422). A mortgagee in possession is under a statutory liability to keep accounts under clauses (g) and (h) of this section and this is so in the case of every mortgage whether usufructuary or otherwise. Where he fails to keep the accounts as required by law, the Court can make every presumption against him—*Angnu v. Bhiki*, A.I.R. 1941 Oudh 84, 1941 O.L.R. 13. If the mortgagee refuses or neglects to deliver in the accounts, the Court must take the best evidence

available and decide upon it. The general presumption will no doubt be against the mortgagee, but this would not justify the Court in accepting without examination any evidence which may be offered by the mortgagor—*Ghose's Law of Mortgage*, 5th Edn., p. 598; *Muhammed v. Uttamchand*, 63 I.C. 598 (600); *Allah Yar v. Thakur Das*, 24 P.L.R. 1918, 44 I.C. 9; *Gholam Nuzuf v. Emanum*, 9 W.R. 275.

A suit merely for accounts cannot be maintained by the mortgagor unless he asks for redemption also—*Hari v. Lakshman*, 5 Bom. 614. If the same mortgagee holds two separate mortgages from the same person, the latter has a right to obtain separate accounts of the two mortgages, although the two accounts may have been included in one suit—*Ram Chandra v. Janardan*, 14 Bom. 19. As regards the mode of keeping and taking accounts see *Samji v. Ratna*, A.I.R. 1950 Kutch 47 and *Bhabhanbai v. Kanji Raoji*, A.I.R. 1950 Kutch 90.

The mortgagee is under a statutory liability to keep clear, full and accurate accounts. Accounts to be full must be detailed and supported by vouchers. If he does not render accounts or keep them, the Court will make every presumption against him—*Kazim v. Debi Dayal*, A.I.R. 1934 Oudh 104, 9 Luck. 456, 148 I.C. 880; *Ram Kishan v. Badri Bishal*, A.I.R. 1937 All. 337, I.L.R. 1937 All. 685, 170 I.C. 624; *Gajadhar v. Baidyanath*, A.I.R. 1950 Pat. 379, 29 Pat. 545; *Deoki Devi v. Devi Das*, A.I.R. 1951 Pepsu. 18. The accounts to be kept by the mortgagee are independent of those which may be kept by a third person, as for example, the patwari, and cannot be dispensed with on the ground that the latter was keeping them—*Kuddi Lal v. Aisha*, 2 Luck. 564, A.I.R. 1927 Oudh 199 (201, 202), 102 I.C. 263; *Lakshmi Narain v. Mohamdi*, 7 Luck. 454, 137 I.C. 102, A.I.R. 1932 Oudh 123 (133). The mortgagee is liable to the mortgagor for any sum realised by him out of the mortgaged property. The fact that the realisations were unauthorised or unlawful does not qualify his liability in this matter. If the mortgagee in possession does not keep accounts or does not produce the accounts in a suit for redemption the Court will make every presumption against him. The Court will calculate the amount due under the mortgage on the basis of gross rentals, on the hypothesis that all the tenants had paid their rents—*Lakshmi Narain v. Mohamdi*, supra; *Said Ahmad v. Raja Barkhandi*, 8 Luck. 40, 139 I.C. 64, A.I.R. 1932 Oudh 255. But it cannot be laid down as a hard and fast rule that whenever a mortgagee has failed in his obligation under this clause he must necessarily be made liable on the basis of the gross rental. It is conceivable that there may be cases in which the raising of a presumption that all the tenants have paid their rents may not be justified—*Kazim v. Debi Dayal*, supra, at p. 106; *Chunilal v. Abdul*, supra. When the mortgagee is made liable for the rental, he should be allowed the costs of collection—*Kazim v. Debi Dayal*, supra, at p. 106. The liability of the mortgagee for the omission to take drastic measures against the mortgagor who was the agent of the mortgagee for collection of rents must be limited by the circumstances of the case, and he cannot be required to account for more than what he has received in the absence of proof that but for his gross default or mismanagement or fraud he might have received the full rent—*Chunilal v. Abdul*, supra, at p. 487. Where a mortgagee has obtained possession under an invalid agreement for sale,

his possession may be deemed to be that of a mortgagee when it is established that the agreement was inoperative in law; and he may be called upon to account for the rents and profits as if he were the mortgagee in possession—*Bama Charan v. Nimai*, 35 C.L.J. 58. If the mortgagee does not keep any accounts nor file them in Court, his claim for interest must be disallowed—*Rai Shadi Lal v. Lal Bahadur*, 1933 A.L.J. 339 (P.C.), 37 C.W.N. 420 (423), A.I.R. 1933 P.C. 85; *Shankarlal Lallubhai v. Bai Jiykor*, A.I.R. 1966 Guj. 40. The mortgagee's accounts must be prepared by himself or by his own agent, and must comprise the gross receipts realised from the tenantry, and not merely what actually reaches the mortgagee's hands. These accounts must be full and complete, and not mere abstracts of the receipts during the period of the mortgagee's possession. An account professing to show the demand and collections from the tenantry, for any one year should be supported by detailed account showing each item of collection and every individual mentioned in the total sheet. It is not a sufficient reason for the non-production of the accounts required by law for the defendants to say that, under their peculiar circumstances, they could not keep them—*Rām Kissen v. Sha Kundan Lal*, W.R. (1864) 177. Where the mortgagee in possession fails to keep accounts, the fair occupational rent, and not actual receipts is to be credited towards income. If that rent is less than the amount of interest then the mortgagee cannot claim to add the balance to the principal but must be satisfied with whatever he has received. If the amount is more than the amount of interest, the additional amount will go towards the satisfaction of the principal—*Suratsing Chandanmal Marwadi v. Nomanbhai Abdulhussein Bohari*, A.I.R. 1961 Bom. 43.

Where in an English mortgage it was agreed between the mortgagor and the mortgagees that certain nominees of the latter should be appointed managers and be liable to furnish accounts to the mortgagees and a separate deed of management was contemporaneously executed by the mortgagor in favour of the nominees to which the mortgagees were not parties: *held* that the managers were the agents of the mortgagor and not of the mortgagees who had perfect right before lending money to insist upon mortgagor appointing managers in whom the mortgagees had confidence—*Motilal v. Eastern Mortgage & Agency Co.*, 25 C.W.N. 265 (P.C.).

Whether a mortgagee is liable to be redeemed or to render account depends upon the term of the decree. Where under a mortgage decree the mortgagee had the right to retain possession of the mortgaged property until a fixed amount is paid by the mortgagor, he could redeem only on payment of the amount decreed without any question of accounting—*Shivraj v. Mylapore H. P. Fund, Ltd.*, A.I.R. 1943 Mad. 62, 1942 M.W.N. 625. If it is desired that accounts should be taken as against the mortgagee in possession, there must be a special direction in the decree. The Court must determine whether the mortgagee is a mortgagee in possession, and if so, from what date. It must not be left to the commissioner. The question is primarily one of fact, but it frequently involves matters of law, e.g., whether particular acts of a mortgagee—directions given to tenants and so forth—amount in law to taking possession. If no special direction is given by the Court, the commissioner

is right in not taking accounts on the basis of the mortgagee being in possession. If the Court on the allegations of the parties and proof thereof has not directed accounts on that basis, it cannot afterwards alter its order by doing so—*Anandji v. Ahmedbhoy*, I.L.R. 1940 Bom. 645, A.I.R. 1940 Bom. 287, 42 Bom. L.R. 580. Before accepting or rejecting the accounts in suits between the mortgagor and the mortgagee, it is usually necessary to examine them critically. When an account is presented, the Judge on whom rests the responsibility of coming to a true decision, must examine it, and before arriving at a conclusion as to whether it is such an account as a prudent man ought to accept, he must consider the details and ascertain whether it has been kept on principles which indicate that it is probably correct—*Kundan Mal v. Kashibai*, 26 Bom. 363 (371). Before having recourse to an estimate or average not based on actual figures, the Judge must apply his mind carefully to the account which purports to be the account of actual receipts and disbursements and determine on its inherent appearance of accuracy and probability and any other evidence that may be available whether it is an account which most probably represents correctly what has actually occurred—*Ibid* (at p. 370). Where accounts are impeached on the ground of fraud, two or three instances of particular items, which can be taken as false and fraudulent, must be brought to the notice of the Court before it can be called upon to order the accounts to be re-opened from the first—*Boo Jinathoo v. Shah Nagar*, 11 Bom. 78 (following *Williams v. Barbour*, L.R. 9 Ch. D. 529).

The mortgagee in possession cannot contract himself out of the duty to account—*Chen Sankar Lal v. United Bank of India Ltd.*, A.I.R. 1955 Cal. 569.

472. Clause (h) :—Under this clause the mortgagee is bound to apply the rents and profits, after deducting the expenses herein mentioned, in discharge of the interest, and in reduction of the principal money if possible. The rule has been thus stated: "The gross receipts, whether they arise from the rents or from accidental payments, are ascertained at the end of each year, and after deducting the necessary outlay on account of revenue, expenses of collection and preservation of the estate, the balance goes to reduce, either in whole or in part, the interest and if there is a surplus over, it goes to the reduction of the principal money, the account being closed at the end of each year"—*Ghose's Law of Mortgage*, 5th Edn., p. 594; *Muhammad v. Uttam Chand*, 63 I.C. 598 (Lah.); *Jaijit Rai v. Gobind*, 6 All. 303. If the mortgage-debt is fully paid off out of the usufruct, and the mortgagee thereafter continues to remain in possession and to receive the profits, he is said to avail himself of another man's money for his own use and benefit, and ought to be charged with interest from the time at which the mortgage-debt was satisfied—*Bhayalal v. Mahomed Hakim*, 57 I.C. 294 (Nag.). The Allahabad High Court holds that no interest is payable on the surplus money found with the mortgagee after the satisfaction of the mortgage, till the date of the institution of the suit for redemption. But after the institution of the suit such interest is payable by the mortgagee. The institution of the suit is really a notice to the mortgagee calling upon him to hand over the surplus money. From that date the mortgagor will be

entitled to interest—*Ismail Hasan v. Mehdi Hasan*, 46 All. 897 (902), 80 I.C. 63, A.I.R. 1924 All. 881.

Under this clause the liability of the mortgagee in possession is absolute and he cannot contract himself out of it unless he can bring himself strictly within the exception mentioned in sec. 77—*Sarfraz v. Mannilal*, A.I.R. 1943 Oudh 38, (1942) O.W.N. 585. Such a mortgagee is not a trustee in the strict sense of the term but holds a fiduciary character. Hence, a court of equity has full power to order interest to be paid on collections which have been wrongly withheld by the mortgagee—*Jagannath v. Sripathibabu*, A.I.R. 1945 Mad. 297, (1945) 1 M.L.J. 478. As to the instances of the mortgagee's liability to account for the rents and profits realized by him, see *Arunachalam v. Jagannatha*, A.I.R. 1948 Mad. 137, (1947) 1 M.L.J. 399; *Kerala Varman v. Parameswaran*, A.I.R. 1950 Tr.-Coch. 105; *Koyakkutti v. Kunhipathu*, A.I.R. 1950 Tr.-Coch. 33. Where in a suit for the sale of the mortgaged property the mortgagee who was in possession of the property during the continuance of the mortgage fails to establish tenancy under the mortgagor, the latter is entitled to have an accounting from the mortgagee for the profits derived by him and so that they may be adjusted against the mortgage money—*Upendra v. Taranath*, A.I.R. 1962 Assam 52.

The mortgagee must, if he retains some of the mortgagor's money, apply it to the reduction of capital. This equitable liability takes precedence of his right under the contract to refuse piecemeal payment of the capital sum lent. Where, however, he is entitled to retain the whole of the rents and profits and where his liability to make the stipulated payments to or on behalf of the mortgagor is independent of the amount of such rents and profits as he may in fact receive from the property, there can be no reason to call upon him to account. A mortgagee cannot be held liable to account for yearly rents or to apply the sums which he fails to pay in reduction of the capital—*Md. Sadiq v. Harakh Narain*, A.I.R. 1936 Pat. 583 (585), 166 I.C. 545. If a usufructuary mortgagee retains a portion of the consideration agreeing to pay interest thereon, arrear of interest is to be treated as an item to be included in the settlement of accounts at the time of redemption—*Mathevi Bhargavi v. Ayyappan Kochan*, A.I.R. 1959 Ker. 163.

The mortgagees will be debited not only with the profits actually received by them, but also with the profits which they could have realised but for negligence and carelessness. Even though there is a stipulation in the mortgage-deed that if the profits of the mortgaged property be found to be insufficient to cover the interest, the mortgagor shall pay the deficiency, such stipulation can apply only to the case where the profits of the property have decreased and not to the case where the mortgagees owing to their own default have failed to realise the profits—*Ratan Dei v. Sher Singh*, 1929 A.L.J. 217, A.I.R. 1929 All. 260 (268), 114 I.C. 876.

Where the mortgagee (of a zarpeshgi lease) fails to pay the balance of the rent, as agreed in the mortgage-deed, to the mortgagor, the mortgage-money is from time to time reduced and the Court in a redemption suit acts rightly in making the account on the principle laid down in this

clause. But the sub-mortgagees are not liable to account on the basis of the original zarpeshgi deed, because there is no privity of contract between them and the original mortgagor and the decree for payment of money cannot properly be made against them, though the mortgagor's decree for recovery of possession will of course be valid against them—*Bachu Lal v. Jang Bahadur*, A.I.R. 1939 Pat. 427 (428), 180 I.C. 795.

The mortgagee obtained a lease of the mortgaged house from the mortgagor and advanced a certain sum to him for repairing and reconstructing the house. The advance was to be set off against the rent payable at a certain rate by the mortgagee—*held*, clause (h) had no application since the mortgagee came into possession as tenant and not as mortgagee, nor was the possession in any way referable to the mortgage sued upon—*Gulab Chand v. Ram Kumar*, A.I.R. 1941 Pat. 296, 22 P.L.T. 230, 193 I.C. 533.

A stranger auction-purchaser purchased the mortgaged property at a sale in execution of the decree of the prior simple mortgagee. The puisne mortgagee sued to realise his money by the sale of the mortgaged property. The stranger auction-purchaser was allowed to continue in possession till the proportionate share of the money due on the prior mortgage had been paid off, because the money paid for his purchase was utilised to pay off the prior mortgage. *Held*, that the puisne mortgagee in calculating the money due to him was not entitled to call for an account of the profits of the property in the hands of the stranger auction-purchaser, who, in his turn, was not entitled to claim any interest for the period during which he was in possession—*Mohd. Mohsin v. Kausar Raza*, A.I.R. 1956 All. 422.

Occupation rent:—An alternative mode of charging the mortgagee in actual occupation is to charge him with an occupation rent, and that is more suitable in the case of buildings, whether places of residence or trade premises. It is only when he is actually in possession, or at least by his servants or agent, that occupation rent is charged—*Shepard v. Jones*, 21 Ch. D. 475. In the case of *buildings* in the possession of the mortgagee, personally occupied by him for the purpose of residence or carrying on trade, he might be charged with a fair occupation rent; and in the case of *lands* personally occupied or cultivated by him, he might be charged either in that way or with the actual net profits realised by him in using the land—*per* Westropp, C.J. in *Prabhakar v. Pandurang*, 12 B.H.C.R. 88. But there can be no question of occupation rent if the mortgagee does not occupy the premises but lets them out to tenants—*Kishun Lal v. Hira Lal*, 10 P.L.T. 487, A.I.R. 1929 Pat. 571 (573), 120 I.C. 768. Where a mortgagee in possession actually cultivates the mortgaged land or part of it, he should be charged the net profits of his cultivation and not occupation rent—*Dadnu v. Somnath*, 6 N.L.R. 109, 7 I.C. 547 (549).

The words "net profits" in sec. 9 (1) of the U. P. Debt Redemption Act are to be interpreted in the sense in which the words "fair occupation rent" have been used in the present clause—*Dara v. Mathura*, A.I.R. 1951 All. 643 (F.B.), 1951 A.L.J. 354. The most favourable rate of rent at which the land could be settled with a tenant is the "fair occupation

rent" at which profits are to be worked out. The circle rates, in the absence of any other evidence should be taken as a "fair occupation rent"—*ibid* overruling A.I.R. 1944 All. 283 and A.I.R. 1950 All. 192.

Expenses for management, collection, etc.—The italicised words providing for expenses incurred for management and collection of rents and profits have been newly added. These words formerly occurred in clause (a) of sec. 72, and the expenses could be made an additional charge on the property. Under the present section this is not allowed, but the mortgagee is simply permitted to deduct these expenses in the account of his receipts.

In the case of a possessory mortgage collection charges may properly be added where the mortgagee is held liable to accounting under this section. Where, however, the mortgagee in possession is not liable to account to the mortgagor, the mortgagee is not entitled to collection charges in the absence of a provision to that effect in the mortgage-deed—*Kirat Singh v. Ram Saran*, A.I.R. 1941 Oudh 380, (1941) O.W.N. 687, 194 I.C. 405. A mortgagee in possession in the absence of evidence is entitled to 10 per cent. of the profits of the mortgaged property as costs of collection—*Sir Md. Ejaz Rasul v. Saiyid Ali*, A.I.R. 1941 Oudh 498, 1941 O.W.N. 768, 194 I.C. 615; see also *Secretary of State v. Saroj Kumar*, 62 I.A. 53, 62 Cal. 499, A.I.R. 1935 P.C. 49; *Girish Chandra v. Shoshi Shikhareswar*, 27 Cal. 951 (P.C.), 4 C.W.N. 631; *Thakur Dwara v. Jangu Singh*, A.I.R. 1950 All. 105. A mortgagee in possession filing suits to recover arrears of rent from the tenants is entitled to the costs of the rent suits—*Sir Md. Ejaz Rasul v. Saiyid Ali*, *supra*. The mortgagee can charge only the expenses incurred by him in the management of his estate. Consequently he cannot charge for personal services—*Mahadev v. Rama Chandra*, 6 Bom. L.R. 590. But he is not debarred from employing an agent to manage the estate and from charging for his salary—*Heera Singh v. Sahoo Lachman Das*, (1858) 1 N.W.P. S.D.A. 447. But if the manager is his own son, he cannot charge for his salary unless the son resides at a distance from his father, in which case his cost of maintenance will be debited against the mortgagor—*Kadir Moidin v. Nepean*, 26 Cal. 1 (P.C.). Usually, collection charges are allowed at 10 per cent. on the gross receipts—*Girish Chunder v. Shoshi Shikhareswar*, 27 Cal. 951 (P.C.). Again, if the mortgagee has to sue tenants or others for recovery of rent, for injunction against waste, for trespass or the like, he is entitled to charge for the cost of litigation—*Sounders v. Rao Khooman Singh*, (1853) N.W.P.S.D.A. 692; *Basant Singh v. Mata Baksh*, 17 O.C. 47, 23 I.C. 456. In Madras, however, it has been held that the mortgagor is not responsible for any expenses of litigation incurred by the mortgagee in recovering rents from tenants put into possession by the mortgagee himself, and the fact that the mortgagor is himself the tenant under the mortgagee can make no difference in principle—*Pokree Saheb v. Pokree Beary*, 21 Mad. 32.

The words "on the mortgage-money" have been omitted from this clause because they are ambiguous. Where the mortgage deed provides for the payment of simple interest only, the word 'mortgage-money' might indicate compound interest. The word 'interest' is sufficient to show that

according to the terms of a particular mortgage-deed it will be calculated as simple or compound as the case may be.

473. Clause (i). Effect of tender or deposit—Account for 'gross' receipts :—As cl. (h) provides for deducting expenses incurred for the management of the property or collection of rents and profits the word 'gross' has become unnecessary and superfluous and hence it has been omitted.

Before this amendment, there was a divergence of opinion as to whether the mortgagee was entitled to deduct the collection charges and other expenses after the mortgagor tendered or deposited the mortgage-money. The Allahabad High Court was of opinion that the mortgagee was liable to account for the gross receipts from the date of the deposit, and was not entitled to any deduction on account of collection charges, even though there was an interval of several years between the date of the deposit and the date of institution of the redemption suit—*Bent Prasad v. Narain*, 5 I.C. 529 (531). The Madras High Court, on the other hand, held that a mortgagee remaining in possession after a lawful tender or deposit was no doubt liable to account for gross receipts from the mortgaged property, but he would be entitled to all due allowances such as for payment of Government revenue, collection charges and necessary repairs of the property, subsequent to the tender or deposit, though he might not be entitled to the benefits of the special stipulations in the mortgage-deed. The words "notwithstanding the provisions in the other clauses of this section" have been used in clause (i) out of abundant caution, and are not intended to mean that the mortgagee remaining in possession after a valid tender or deposit was not to be repaid the expenses which he had justly incurred in performing the duties under clause (a), (c) and (d). The mortgagee was not a person of worse position than a trespasser—*Subba Rao v. Sarvarayudu*, 47 Mad. 7 (26, 27) A.I.R. 1923 Mad. 533, 44 M.L.J. 534, 72 I.C. 292.

To avoid this conflict of opinion, the italicised words have been added at the end of this clause, adopting the Allahabad view.

The question whether the mortgagor is entitled to claim any interest on the profits received by the mortgagee after the date of deposit has been answered by the Allahabad High Court in the affirmative (*Bent Prasad v. Narain*, 5 I.C. 529), and by the Madras High Court in the negative (*Subba Rao v. Sarvarayudu*, 47 Mad. 7 at p. 29). The Bombay High Court has held that where a mortgagee in possession holds over after payment of everything due to him, interest on surplus profits is to be calculated not from the date of the suit but from the date when the mortgage amount was paid—*Kishanji v. Motilal*, A.I.R. 1929 Bom. 337, 31 Bom. 476.

The word "expenses" in this clause should not be restricted to what has to be spent for the management and collection of rents and profits. The mortgagee is not entitled to the credit for public taxes which he paid after the amount due under the decree was tendered by the mortgagor—*Rajagopala v. Pandithan*, A.I.R. 1946 Mad. 464, (1946) 1 M.L.J. 392. Where the mortgagor brings a suit for redemption and accounts on the ground that the debt has been satisfied out of the profits,

he would be entitled to a preliminary decree even if he has not deposited the amount of the mortgage—*Ganshul Fatma v. Badri Singh*, A.I.R. 1952 Pat. 155. The word 'receipts' in sec. 76(i) does not mean mesne profits—*Narain Prasad Singh v. Radha Kant Prasad Singh*, A.I.R. 1967 Pat. 5.

474. Mortgagee liable for loss :—The last para makes the mortgagee liable for loss occasioned by failure on his part to perform any of the duties imposed upon him by this section. If a portion of the mortgaged property is lost owing to some default on his part, and he is therefore unable to put the mortgagor in possession of that portion at the time of redemption, the mortgagee will be debited with the value of the land in taking the mortgage-accounts—*Gopala Menon v. Narayana*, 5 L.W. 339, 40 I.C. 70.

Where the mortgagee in possession obtained a decree against the lessee of the mortgaged property but failed to execute it, he must make good to the mortgagor the loss caused by such failure although the lease had been effected by the mortgagor—*Chandra v. Dwarke*, A.I.R. 1936 Lah. 42 (44), 161 I.C. 984. The stipulation in a mortgage-deed that if the profits be found to be insufficient, the mortgagor shall pay the deficiency in interest from year to year, does not apply to a case where the profits have not in fact decreased, but the mortgagees have owing to their own default failed to recover them—*Mt. Ratan Dei v. Sher Singh*, A.I.R. 1929 All. 260 (263), 114 I.C. 876.

A suit for redemption against the mortgagee in possession was dismissed as premature because the period of 12 years for mortgagee's possession had not expired. The lower appellate court decreed the suit as the period of 12 years expired during the pendency of the appeal and allowed the plaintiff to realise mesne profits from the date of the suit. On further appeal to the High Court it was held that the plaintiff was entitled to recover mesne profits from the date on which lower appellate court passed the decree—*Ayyan Krishna v. Kunjikutty Amma*, A.I.R. 1956 Trav.-Co. 203.

The last para enables the mortgagor to set off any loss suffered by him owing to the mortgagee's default in the same suit; a separate suit for such account is not necessary—*Shiva Devi v. Jaru*, 15 Mad. 290 (291). The question must be dealt with in the suit itself and must not be left to be determined in execution—*Gopala Menon v. Narayana*, supra.

The last para provides with only a cumulative remedy and is not intended to operate as a bar to any other remedy which the mortgagor may have under the law—*Siva Chidambara v. Kamatchi*, 33 Mad. 71 (73). Thus, where the mortgaged property has been sold away owing to the mortgagee's default in payment of arrears or revenue, the mortgagor may either at the time of passing of the decree for redemption ask that the mortgagee be debited with the loss under the last para of sec. 76, or he may bring a separate suit for compensation for loss of the land—*Siva Chidambara v. Kamatchi*, supra. So also, where the mortgagee causes loss to the mortgaged property in his possession by cutting away certain trees, the mortgagor can recover damages from him by a separate suit, and need not necessarily debit the mortgagee with

the loss when taking accounts at the time of redemption. The word 'may' in the last para of this section has not the force of 'must'—*Mahabir v. Sheo Shankar*, A.I.R. 1929 Oudh 124 (125), 112 I.C. 434.

Under the last paragraph the mortgagee is liable to account not only for the income but also for the corpus—*Chen Sankar Lal v. United Bank of India Ltd.*, A.I.R. 1955 Cal. 569. A mortgagee is not entitled to deduct the cost of cultivation of the mortgaged land under sec. 76 (i)—*Narain Prasad Singh v. Radha Kant Prasad Singh*, A.I.R. 1967 Pat. 5.

77. Nothing in section 76, clauses (b), (d), (g) and (h), Receipts in lieu of interest. applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal

475. Scope of section :—This section refers only to clauses (b), (d), (g) and (h) but omits clause (c) of sec. 76 which makes it obligatory upon the mortgagee to pay the Government revenue, etc.—*Misri Lal v. Gajdhar*, A.I.R. 1943 Oudh 433, (1943) O.W.N. 347. Where the entire receipts from the mortgaged property are not appropriated by him in lieu of interest or of interest and defined portion of the principal, the mortgagee is not entitled to the benefit of this section—*Rameshwar v. Rama Asrey*, A.I.R. 1942 Oudh 499, (1942) O.W.N. 556.

The principle underlying secs. 76 and 77 is that the usufruct of the mortgaged property represents the mortgagor's money in the hands of the mortgagee for which he is bound to account at the time of redemption except to the extent to which he is expressly authorized to appropriate such usufruct towards interest due to him or towards interest and principal, if any surplus is left after meeting the interest—*Kelu Karup v. Manail Paru*, (1940) 1 M.L.J. 693, A.I.R. 1940 Mad. 686, 1940 M.W.N. 55. A lessee mortgaged his interest by a mortgage-deed which provided that the mortgagee should remain in possession of the property and enjoy the profits in lieu of interest but he was to pay the rent due to the lessor. At the end of 3 years the mortgagor was to regain possession of the property merely on the repayment of the principal amount. The mortgagee did not pay the rent: *held*, the effect of the document was to take the mortgage entirely out of the purview of sec. 76, clause (h), and as the lessor did not insist on the payment of rent, his inaction enured to the benefit of the mortgagee, not of the mortgagor. Hence in a suit for redemption the mortgagor was not entitled to credit for the unpaid rents—*Cheriyath v. Kannumot*, (1941) 1 M.L.J. 484, A.I.R. 1941 Mad. 549, 1941 M.W.N. 239. But where under the possessory mortgage-deed a sum of money was calculated as the amount of profits which would accrue annually to the mortgagee, and it was provided that if the amount fell short, this would have to be made good by the mortgagor at the time of redemption: *held*, that the mortgagor's undertaking to make up the deficiency in profits was wide enough to cover the case of remissions, and although the deed was not "accountive" the mortgagee was entitled to recover the deficiencies in

profits under the terms of the mortgage—*Kirat Singh v. Ram Saran*, A.I.R. 1941 Oudh 380, 1941 O.W.N. 687, 1941 O.L.R. 463, 194 I.C. 405.

Clauses (g) and (h) of sec. 76 are absolute in their terms and are not qualified by any contract to the contrary. The liability of a mortgagee in possession to render accounts and give credit to the mortgagor for all receipts after deduction of expenses is absolute, and the mortgagee cannot contract himself out of it unless he can bring himself strictly within the exception provided by the present section—*Mt. Faridunessa v. Sir Md. Ejaz Rasool*, *infra*. In this case it was held that the mortgage-deed did not come within the exception provided by this section as the interest on the principal *plus* interest up to the date when the mortgagee took possession was more than the income of the property, and the provision in the deed depriving the mortgagor of his right to account, it was held, could not confer any advantage upon the mortgagee in derogation of sec. 76.

This section only comes in where the mortgagor is from the outset safe from being confronted at the time of redemption with a demand for anything more than the principal sum advanced. It does not cover the case in which only a part of the interest is to be paid out of the usufruct—*Kamala Prasad v. Bamdeo*, A.I.R. 1935 Pat. 148 (149), 155 I.C. 22; *Mt. Faridunnissa v. Sir Md. Ejaz Rasool*, A.I.R. 1942 Oudh 203, (1941) O.W.N. 1378, 198 I.C. 234. See in this connection *Thakan v. Rampartap*, A.I.R. 1950 Pat. 201 and *Sundaram v. Mannadiar*, A.I.R. 1947 Mad. 197; I.L.R. 1947 Mad. 411. Where the terms of the usufructuary mortgage were that the mortgagees were to receive the profits in lieu of interest, to pay to the mortgagors nothing but *malikana* and that they were not accountable to the mortgagors otherwise, *held* that the mortgagees were not bound to account to the mortgagors and that the mortgagors were entitled to redemption on payment of the principal money after deducting the *malikana* for the years for which it was not paid by the mortgagees—*Behari Lal v. Sibalal*, 46 All. 633, A.I.R. 1924 All. 591, 82 I.C. 25. Where a *katkobala* provided that the lands were to be kept in *kat* for 9 years, that during the time the mortgagees will be entitled, on paying the rent to the landlord, to appropriate the profits in lieu of the annual rent payable, and that on the expiry of 9 years the mortgagor would redeem the *katkobala* after paying the entire amount due for principal and interest, it was held that the plaintiff could redeem only upon payment of the principal and interest, and he was not entitled to an account of the rents and profits received by the mortgagees from the land—*Osman Ali v. Faijian*, 53 C.L.J. 380, 134 I.C. 95. Where the sub-mortgagee in possession was, after payment of Government revenue yearly, out of the profits, to appropriate the balance in payment of interest, the sub-mortgagor was not entitled to ask for an account—*Mahmood Ali v. Ali Mirza*, A.I.R. 1934 Oudh 220 (222), 148 I.C. 903. In a mortgage with possession it was stipulated that the mortgagee should absorb the income towards interest and in case the income fell short of the amount of interest accrued due, the mortgagor should make good the balance; and in case of failure to pay the interest agreed the mortgage-amount was to carry compound interest at a higher rate. The income fell short, but the mortgagee failed to inform the mortgagor of the shortage: *held* that the mortgagee was not entitled to charge compound interest—*Chandra v. Dwarka*, A.I.R. 1936 Lah. 42 (44), 161 I.C.

984. Where under the terms of a usufructuary mortgage, the mortgagee after meeting certain specified expenses was to appropriate the balance towards interest, and no rate of interest was fixed, *held* in a suit for redemption that there was no liability on the mortgagee to account nor on the mortgagor to pay interest—*Sitla Sahai v. Dhum Sing*, 28 O.C. 110, A.I.R. 1925 Oudh 114, 82 I.C. 406. So also, where it was stipulated that after deducting the Government revenue, the village expenses and the pay of servants (which was a fixed sum settled and agreed upon), the mortgagee should appropriate the surplus profits towards interest, the mortgagors having no claim for profits and the mortgagee having no claim for interest, the Privy Council held that the stipulation fell within this section and the mortgagee was not bound to account for the rents and profits—*Bachhu Lal v. Syed Mohāmmad*, 10 O.W.N. 299 (P.C.), 37 C.W.N. 457 (464), 144 I.C. 1025. See also *Durga Shankar v. Ganga Sahai*, A.I.R. 1932 All. 500, (1932) A.L.J. 493; *Ramdhan Puri v. Bankay Bihari Saran*, A.I.R. 1958 S.C. 941. A usufructuary mortgage-deed provided that the mortgagee would be entitled to appropriate in lieu of interest the profits remaining after payment of the Government revenue and malikana to the malikanadars, and that all profits from increased income should go to the mortgagee, and the mortgagor would have no concern with them. The mortgagee made profits by not paying malikana to the malikanadars. *Held* that by virtue of this section the mortgagee was not liable for any account; but the mortgagor could claim that he should be indemnified by the mortgagee against the contingency that a valid claim for arrears of malikana might be made against him by the malikanadars—*Raghubar v. Mohit Narayan*, 7 Pat. 44, 114 I.C. 473, A.I.R. 1929 Pat. 37 (39). Where a simple mortgagee redeems a prior usufructuary mortgage under which the mortgagee is entitled to appropriate the profits towards interest and obtains possession of the property, he acquires all the rights of the usufructuary mortgagee, and hence is liable to render accounts to the mortgagor—*Tajammal v. Amiruddin*, A.I.R. 1942 Oudh 189 (191), (1941) O.W.N. 1239, 197 I.C. 471. The fact that in a suit on his mortgage he has allowed set off to the mortgagor for the profits received against interest due on the bond is no bar to his standing on his rights later on; and hence the mortgagor has no right to ask him to render accounts of the profits received by him—*Ibid.* Where it was stipulated in a usufructuary mortgage that the profits of the property should be taken in lieu of a *portion* of the interest, *held* that this section did not apply and the mortgagee was liable to account to the mortgagor and give credit for the surplus amount, if any—*Mahomed Ishaq v. Rup Narain*, 54 All. 205 (F.B.), 1931 A.L.J. 977, A.I.R. 1931 All. 562, overruling *Shafi-un-nessa v. Fazalrab*, 7 A.L.J. 787, 7 I.C. 293 (294).

In the last-mentioned case (7 A.L.J. 787) it was remarked that in the absence of an express stipulation therefor, a usufructuary mortgagee is exempted by sec. 77 from tendering accounts to the mortgagor. This view is not correct. It is just the contrary to what is stated in sec. 77. This section lays down that mortgagee in possession is exempted from liability to render accounts under sec. 76 (*h*) if there is an express contract that the profits shall be taken in lieu of interest, etc. In other words, every mortgagee in possession, whether usufructuary or otherwise, is bound to account to the mortgagor, under sec. 76 (*h*) as to the profits of the

mortgaged property, unless he establishes a contract in terms of sec. 77 which takes the case out of sec. 76 (h)—*Kishun Lal v. Hira Lal*, 10 P.L.T. 487, A.I.R. 1929 Pat 571 (573), 120 I.C. 768; *Mahomed Ishaq v. Rup Narain*, supra; *Faujmal v. Motilal* (1968) 1 Andh. L.T. 341.

Where the mortgage deed provided that the mortgagee was to remain in possession in lieu of principal and interest, he was exempt from keeping accounts under this section of the profits realized by him during the period in suit under sec. 4 of the U. P. Encumbered Estates Act 25 of 1934—*Ram Pattan v. Murli Dhar*, A.I.R. 1946 Oudh 83, 21 Luck. 184.

It should be noted that inspite of an express declaration by the mortgagor that the receipts of the property shall be taken in lieu of interest or partly in lieu of interest and partly in lieu of defined portions of the principal, the Courts are unwilling to exonerate the mortgagee from the liability to account under sec. 76 (g). See *Mahtab v. Collector*, 5 All. 419; *Tippayya v. Venkata*, 6 Mad. 74; *Surendra v. Khitindra*, 29 C.L.J. 434, 53 I.C. 59. If the parties merely make an estimate of the amount of rents and profits that would be available for reduction of the debt, the mortgagee is not exempted from liability to account—*Surendra v. Khitindra*, supra. A clause in a deed of usufructuary mortgage excluding the mortgagee's liability to render account cannot override the provisions of the Bengal Money Lenders Act imposing absolute liability on the mortgagee as money lender to render account—*Md. Yusuf v. Sarifan Bibi*, A.I.R. 1962 Cal. 457. When usufruct is stipulated to be enjoyed by the mortgagee in lieu of interest, the mortgagee is liable to render accounts under sec. 9 of the Orissa Money Lenders Act—*Padmabati Devi v. Bhagabat Charan Padhi*, I.L.R. (1967) Cut. 695.

Priority.

78. Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

476. Principle :—The rule as to priority of mortgages is stated in the equitable maxim *qui prior est tempore potior est jure* (he who is prior in time is stronger in law) enunciated in sec. 48. *Prima facie*, and apart from notice, the priority of mortgages in India depends upon the respective dates of their creation, the earlier in date having the precedence—*Lloyds Bank v. P. E. Guzdar & Co.*, 56 Cal. 868, A.I.R. 1930 Cal. 22 (23), 121 I.C. 625. This section is an exception to the above principle; it lays down that the Court would postpone the prior legal estate to the subsequent equitable estate where the owner of the legal estate had assisted in or connived at the fraud which had led to the creation of a subsequent equitable estate without notice of the prior legal estate—*Northern Counties Fire Insurance Co. v. Whipp*, 26 Ch. D. 482 (494); *Balmakan Das v. Moti Narayan*, 18 Bom. 444 (447).

The question of postponement of the prior mortgagee to the subsequent mortgagee raises the question as to whether the subsequent mortgagee was induced to advance money due to the gross neglect of the prior mortgagee. The onus lies on the subsequent mortgagee who asserts excep-

tion to the general rule—*Dharani v. Pramatha*, A.I.R. 1936-Cal. 283 (284), 40 C.W.N. 648, 63 Cal. 880, 165 I.C. 332. In a suit by a subsequent mortgagee for declaration that the prior mortgage was sham and without consideration, the question may be gone into; but the *onus* is on him to show that the prior mortgage was bogus and created with intent to defraud him—*Venkatappa v. Brahmayya*, A.I.R. 1953 Mad. 1000. There is no distinction between legal and equitable mortgages in this country as in English law—*Imperial Bank v. U Rai Gyaw*, 50 I.A. 283, 51 Cal. 86, 1 Rang. 637; *Webb v. Macpherson*, 30 I.A. 238, 31 Cal. 57; *Gokul Das v. Eastern Mortgagee & Agency Co.*, 33 Cal. 410, 10 C.W.N. 276, 4 C.L.J. 102; *Ram Kinkar v. Satya Charan*, A.I.R. 1939 P.C. 14, 43 C.W.N. 281.

This section has no application and cannot be used to defeat the rights of a person who has obtained indefeasible title to the property, as by continuous possession or prescription—*Nallamuthi v. Baitha Naickan*, 23 Mad. 37.

This section applies to cases of prior and subsequent mortgagees and not to the case of a prior mortgagee and subsequent purchaser—*Sita Ram v. Raj Narain*, A.I.R. 1934 Cal. 283, 150 I.C. 145.

It is necessary to prove that the fraud, misrepresentation or gross neglect of the prior mortgagee was the *proximate* cause for the advance of money by the subsequent mortgagee. If the fraud, etc., of the prior mortgagee is not the proximate and primary cause but only one of the various *contributory* factors that led the subsequent mortgagee to advance money, this section can have no application—*Ratan Lal v. Mukandi*, 1933 L.L.J. 16, A.I.R. 1933 All. 299 (300), 146 I.C. 488. The words "fraud", "misrepresentation" and "gross negligence" in this section are three different kinds of conduct and are disjunctive. There can, therefore, be a gross neglect without there being any element of fraud or misrepresentation—*Rangappa v. Imamuddin*, A.I.R. 1934 Nag. 29 (31), 30 N.L.R. 196.

477. Fraud :—Negligence is not fraud, but it may be evidence of fraud if it is so gross as to be incompatible with the idea of honesty—*Rangappa v. Imamuddin*, supra. Where the mortgagee had fraudulently concealed the fact from a subsequent incumbrancer that he himself made a prior advance upon the same property, he could not set up his rights as a prior mortgagee in opposition to the subsequent incumbrancer—*Bhurrut Lal v. Gopal Saran*, 11 W.R. 286. So, where the prior mortgagee was shown to have consented to a second mortgage which contained a recital that it was free of all prior incumbrances, *held* that the prior mortgagee could not claim priority over that charge in favour of his own mortgage.—*Raman Chetty v. Steel Brothers*, 15 C.W.N. 813 (P.C.) 11 I.C. 503, 21 M.L.J. 936; *Sakhiuddin v. Sonallah*, 22 C.W.N. 641 (643), 45 I.C. 986. But if a prior mortgagee knowing that a second mortgage is going to be executed merely keeps quiet, he is not guilty of constructive fraud and does not lose his priority; nor does his attestation to the second mortgage amount to constructive fraud, if he is not aware of its contents—*Salamat Ali v. Budh Singh*, 1 All. 303. But if he attests the second mortgage, knowing of its contents, and keeps silent, the prior mortgagee will lose his priority—*Salamat v. Budh Singh*, supra.

Fraud may be inferred where the duplicity of the prior mortgagee

cannot be accounted for on any other supposition than that he intended to defraud, even though there is nothing on record to show what that fraud is—*Nanda Lal v. Abdul Aziz*, 43 Cal. 1052 (1081, 1082), following *Walker v. Linom*, [1907] 2 Ch. 104.

A charge of fraud must be substantially proved as laid, and when one kind of fraud is charged another kind of fraud cannot, upon failure of proof, be substituted for it—*Abdul Hossein v. Turner*, 11 Bom. 620 (643) (P.C.), following *Montesquien v. Sandys*, 18 Ves. 302 (314). "The mere averment of fraud in general terms is not sufficient for any practical purpose in the defence of a suit. Fraud may be alleged in the largest and most sweeping terms imaginable. What you have to do is, if it be a matter of account, to point out a *specific* error and establish it by evidence. Nobody can be expected to meet a case, and still less to dispose of a case summarily upon mere allegations of fraud without a definite character being given to those charges by stating the grounds upon which they rest"—*per* Lord Hatherly in *Wallingford v. Mutual Society*, 5 App. Cas. 685 (701). If a plaintiff desires to press a claim to relief against a defendant on the ground of fraud, it must be pleaded and particulars of the fraud alleged must be specifically set out—*Lloyds Bank v. P. E. Guzdar & Co.*, 56 Cal. 868, A.I.R. 1930 Cal. 22 (28), 121 I.C. 625. A person who charges another with fraud must himself prove that fraud, and the plaintiff is not relieved from this obligation because the defendant has himself told an untrue story—*Mahomed Golab v. Mahomed Sulliman*, 21 Cal. 612 (620).

478. Misrepresentation :—For the definition of misrepresentation reference may be made to sec. 18 of the Contract Act.

Misrepresentation does not necessarily mean *fraudulent* misrepresentation, just as gross negligence does not mean negligence amounting to fraud—*Shan Maun Mull v. Madras Building Co.*, 15 Mad. 268 (275).

479. Gross negligence :—There is a distinction between the English and the Indian law, as regards the meaning of gross negligence. According to English law, gross negligence means negligence amounting to fraud and the tendency of English decisions is to refuse to postpone the prior incumbrancer merely on the ground of gross negligence unaccompanied by any element of fraud. The Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner—*Northern Counties Fire Insurance Co. v. Whipp*, (1884) 26 Ch. D. 482, 33 L.J. Ch. 629, 51 L.T. 806. The rule of equity is that a prior encumbrancer will not be postponed to a subsequent encumbrancer unless he has been guilty of gross negligence amounting to fraud—*per* Wood, V.C. in *Dowle v. Saunders*, 34 L.J. Eq. 87. Mere negligence is not sufficient to deprive a mortgagee of his priority; his negligence must be such as to amount to evidence of fraudulent intention, such as to lead the Court to conclude that he is an accomplice in the fraud—*per* Lord Eldon in *Evans v. Bicknell*, (1801) 6 Ves. 174 (182). There must be either direct fraud or negligence amounting to evidence of fraud to induce the Court to interfere for the purpose of postponing a party—*per* Lord Eldon in *Martinez v. Cooper*, (1826) 2 Russ. 198.

But in India the law is otherwise. It has been pointed out in a

Madras case that gross neglect of itself and apart from fraud is a reason for postponement of the prior mortgagee—*Shan Maun Mull v. Madras Building Co.*, 15 Mad. 268 (275). So also, it has been held in a Calcutta case that this section makes fraud, misrepresentation and gross negligence quite disjunctive; one cannot be defined in term of the other or others. They are three different kinds of conduct and are in no way co-extensive. It is not necessary that there should be fraud or something indicating fraud to bring a case within the category of gross negligence—*Nanda Lal v. Abdul Aziz*, 43 Cal. 1052 (1080), 34 I.C. 115; *Cowasji v. Tyabji*, 23 S.L.R. 97, A.I.R. 1928 Sind 179 (183), 112 I.C. 722. In *Damodara v. Somasundara*, 12 Mad. 429 (431) and *Monindra Chandra v. Troylucko*, 2 C.W.N. 750 (753), the English cases were followed and gross negligence was interpreted as neglect amounting to fraudulent intention. But the ruling in *Monindra v. Troylucko*, 2 C.W.N. 750 has been disapproved of in the recent case of *Lloyds Bank v. P. E. Guzdar & Co.*, 56 Cal. 868, A.I.R. 1930 Cal. 22 (29), 121 I.C. 625. It has been held by the Lahore High Court also that neglect is something different from fraud; it may include honest inadvertence. Neglect is to be determined in every case on its own facts and no precedent can serve as a safe guide in this matter—*Mt. Ghulam Fatima v. Mt. Gopal Devi*, A.I.R. 1940 Lah. 269, 190 I.C. 599; on appeal *Gopal Devi v. Ghulam Fatima*, A.I.R. 1943 Lah. 113, 45 P.L.R. 143.

In a more recent English case it has been observed that a party may be guilty of negligence, but it is not essential that he should be guilty of fraud—*Oliver v. Hinton*, [1899] 2 Ch. 264.

No general definition of gross neglect has been or can be laid down. Each case must depend upon the facts proved in it and reasonable inferences from such facts—*Damodara v. Somasundara*, 12 Mad. 429 (431); *Nanda Lal v. Abdul Aziz*, 43 Cal. 1052 (1083). "Gross negligence is negligence with a vituperative epithet. What constitutes gross negligence is always excessively difficult to define or by way of anticipation to illustrate"—*per* Campbell, L.J. in *Colyer v. Finch*, (1856) 5 H.I.C. 905 (924), 26 L.J. Ch. 65. Gross neglect means a failure on the part of the prior mortgagee to take such reasonable precautions against the risk of a subsequent encumbrancer being deceived as in the circumstances renders it unjust that the earlier mortgage should retain its priority. Each case must turn upon its own facts. For instance, an act or omission that would amount to gross neglect on the part of a banker or a man of business might not be so regarded in the case of an ill-educated man or a woman—*Lloyds Bank v. P. E. Guzdar & Co.*, 56 Cal. 868, A.I.R. 1930 Cal. 22 (29), 121 I.C. 625. See also *Dharani v. Promatha*, *infra*. Thus, an omission to examine the revenue-papers or to look into the entries in the *khevat* may or may not constitute gross neglect according to the facts and circumstances of the case—*Ratan Lal v. Mukandi*, 1933 A.L.J. 16, 146 I.C. 488, A.I.R. 1933 All. 299 (301). So the failure to give proper description of one of the properties and to comply with secs. 21 and 22 of the Registration Act leading to the failure of the properties being properly indexed would constitute negligence on the part of the mortgagee—*Galliara v. U. Thet*, A.I.R. 1929 Rang. 117 (119, 120), 7 Rang. 118, 117 I.C. 580. A mortgagor after mortgaging his house to M, subsequently mortgaged the same house to successive mortgagees expressly mentioning that the house was free from

incumbrance and title-deeds were given to the subsequent mortgagees along with possession. M had allowed the mortgagor to retain the title-deeds in his possession as well as the house: *held*, that the neglect was a gross one and on the principles of this section the subsequent mortgagee was legally entitled to ignore M's mortgage—*Mt. Ghulam Fatima v. Mt. Gopal Devi*, A.I.R. 1940 Lah. 269, 190 I.C. 599. But where the mortgagee allowed the mortgagor to remain in possession of the property and the latter was paying rent, the mortgagee could not be said to be guilty of negligence within the meaning of this section—*Benarsi Das v. Moti Ram*, A.I.R. 1940 Lah. 308, 42 P.L.R. 265.

The mere fact that a prior mortgagee who was entitled to possession did not take possession or that he omitted to record the prior mortgage-deed in the revenue papers, did not show such gross negligence on his part as to deprive him of his priority—*Mahesh v. Daulat*, 30 P.L.R. 128, A.I.R. 1929 Lah. 314, 118 I.C. 655. So also, the mere fact that the prior mortgagee did not have his mortgage registered till after the execution of the second mortgage, did not show any gross neglect on his part, if it was registered within the four months' time allowed by the Registration Act. Thus, if the prior mortgage was executed on the 20th March, and was presented for registration on 22nd June, and in the meantime a second mortgage was created on the 7th June and registered on the following day, the prior mortgage could not be postponed to the subsequent mortgage, if there is nothing to show that the prior mortgagee induced the second mortgagee to advance money—*Surendra v. Haridas*, 60 Cal. 225, A.I.R. 1933 Cal. 398 (400), 144 I.C. 196. An act or omission on the part of the prior mortgagee which has enabled the mortgagor to deal with the property as if it was not encumbered would be gross neglect within the meaning of this section. Though failure to secure the title-deeds or delay in registration each standing by itself may not be evidence of negligence, yet both circumstances taken together coupled with some conduct on the mortgagee's part which would have the effect of inducing a subsequent mortgagee to advance money on the faith that the property was not encumbered, may be evidence of gross negligence—*Sumarapuri v. Thangavelu*, A.I.R. 1938 Mad. 87, 46 M.L.W. 778. Negligence consists in omitting to do something which a reasonable man would do or the doing of something which a reasonable man would not do, in either case causing unintentionally some mischief to a third party. Gross negligence is a relative term and means the absence of care that was requisite under the circumstances. In determining the degree which would satisfy the test of grossness, the test to be adopted is that it must at least be carelessness of so aggravated a nature as a reasonable man would have observed and to indicate an attitude of mental indifference to obvious risks—*Dharani v. Pramatha*, A.I.R. 1936 Cal. 283 (288), 40 C.W.N. 648, 63 Cal. 880, 165 I.C. 332; *Rangappa v. Imamuddin*, A.I.R. 1934 Nag. 29 (31), 30 N.L.R. 196.

Where the subsequent mortgagee is himself guilty of gross negligence, he cannot burden the prior mortgagee with the consequences of his own negligence. The law does not accept the argument of negligence against negligence, like that of estoppel against estoppel—*Ratan Lal v. Mukundi*, supra. See also *Surendra v. Mohendra*, 59 Cal. 781, 36 C.W.N. 420 (427),

140 I.C. 662, where the second mortgagee was infinitely more negligent in not calling for an important document of the mortgagor's title than the prior mortgagee who was merely negligent in not calling for an original document of title and in being satisfied with a certified copy of it on the mortgagor's representation that the original had been lost.

This section speaks of *gross* negligence, and so, a *slight* negligence on the part of the prior mortgagee in parting with the mortgage-deed cannot be considered sufficient to deprive him of his priority—*Mutha v. Sami*, 8 Mad. 200 (202). If a prior mortgagee accepted a certified copy of a document (redemption certificate) relating to the property on the mortgagor's representation that the original had been lost, and did not call for an affidavit, this omission was not negligence, far less any *gross* negligence such as this section contemplates—*Surendra v. Mohendra*, *supra*.

480. Non-possession of title-deeds by the first mortgagee:—The question whether the first mortgagee, who omits to obtain possession of the title-deeds at the time of execution of the mortgage, or who after obtaining them parts with their possession, is guilty of gross negligence must be decided with reference to the nature and circumstances of each case. The mere possession of the title-deeds by the second mortgagee and non-possession of them by the prior mortgagee will not make the latter lose his priority over the former—*Thorpe v. Holdsworth*, 38 L.J. Ch. 194; *Hunt v. Elmes*, 2 DeG. F. & G. 578. The Court will not impute fraud or gross and wilful negligence to the prior mortgagee if he has *bona fide* inquired for the title-deeds and a reasonable excuse has been given for the non-delivery—*Hewitt v. Loosemore*, 9 Hare 449. If the prior mortgagee can satisfy the Court that the absence of title-deeds was reasonably explained to him by the mortgagor when he obtained his mortgage, or that he was subsequently induced to part with them upon such grounds and under such circumstances as to exonerate him from any serious imputation of negligence, he ought not to lose his priority because the mortgagor may have afterwards dishonestly handed over the title-deeds to a second mortgagee—*Somasundara v. Sakharai*, 4 M.H.C.R. 369. It cannot be said that a mortgagee owes a duty to all persons who in the future may become puisne mortgagees of the same property to take care that the mortgagor is not enabled to commit a fraud upon subsequent encumbrancers by being allowed to be in possession of the documents of title—*Lloyds Bank v. P. E. Guzdar & Co.*, 56 Cal. 868, A.I.R. 1930 Cal. 22 (28), 121 I.C. 625. "Title-deeds are not in the eye of the law analogous to fierce dogs or destructive elements where from the nature of the thing the Courts have implied a general duty of safe custody on the part of the person having their possession or control"—*per* Fry, L.J. in *Northern Counties Insurance Co. v. Whipp*, (1884) 26 Ch. D. 482. Thus, where after a mortgage-deed was executed and the title-deeds were handed over to the mortgagee, the mortgagor obtained the title-deeds back from the mortgagee on the representation that they were required for effecting a mutation of names in the Land Revenue Registers, and subsequently utilised them for effecting a mortgage of the same property to another, *held* that under the circumstances the conduct of the prior mortgagee did not amount to gross negligence and that he was not to be postponed to the subsequent

mortgagee—*Chettiar Firm v. Chettiar Firm*, 4 Rang. 238, 98 I.C. 19, A.I.R. 1926 Rang. 195. Where the mortgagee handed over the mortgage-deed to his vendee as a security for unpaid purchase-money, and then the vendee made over the deed to the mortgagor who then sold the property, *held* that the conduct of the mortgagee did not at all amount to negligence—*Mutha v. Sami*, 8 Mad. 200 (202). Where the prior mortgagee obtained the important document of title, and omitted to obtain possession of a document in respect of a portion of the property, his conduct did not amount to gross negligence—*Chettiar Firm v. Chettiar Firm*, 7 Rang. 28, A.I.R. 1929 Rang. 65 (66), 116 I.C. 475.

Before a prior mortgagee can be postponed under this section, the Court must be satisfied that the subsequent mortgagee was induced *directly* and not remotely to advance money on the security of the property by reason of the gross neglect of the prior mortgagee.—*Lloyds Bank v. P. E. Guzdar & Co.*, *supra*. To cite a familiar illustration, “in one sense every man who sells a pistol or a dagger enables an intending murderer to commit a crime; but is he, in selling a pistol or a dagger to some person who comes to buy it in his shop, acting in breach of any duty? Does he owe any duty to all the world to prevent people taking advantage of his selling pistols or daggers in his business, because he does in one sense enable a person to commit a crime?”—*per* Lord Halsbury in *Farquharson v. King*, [1902] A.C. 325, 86 L.T. 810, 71 L.J.K.B. 667. The same remarks apply to a prior mortgagee who unsuspectingly hands over the title-deeds to the mortgagor.

The burden lies on the prior mortgagee to explain the omission. If it appears that he asked for the title-deeds and received a reasonable excuse for their non-production, or that he received some of the deeds under the reasonable belief that he was receiving all, or that he parted with their possession on some reasonable representation made by the mortgagor, he ought not to lose his priority as against a subsequent incumbrancer—*Manners v. Mew*, (1885) 29 Ch. D. 725; *Oliver v. Hinton*, [1899] 2 Ch. 264.

But the Court will impute fraud or gross or wilful negligence to the mortgagee if he *omits all inquiry* as to the deeds—*Hewitt v. Loosemore*, *supra*. If it appears from the conduct of the prior mortgagee that there was no *bona fide* inquiry for the title-deeds or reasonable excuse for their non-production, the Court will certainly impute gross and wilful negligence to the prior mortgagee and will therefore postpone him to the second mortgagee. Thus, a prior mortgagee who allows the title-deeds, for nearly 4 years after his mortgage, to be in the possession of the mortgagor and gives no reasonable explanation of their being so in his possession, is guilty of gross neglect under this section—*Shan Maun Mull v. Madras Building Co.*, 15 Mad. 268 (274), affirming *Madras Building Co. v. Rowlandson*, 13 Mad. 383. Where the prior mortgagee surrendered the title-deeds to the mortgagor in order that the latter would raise loan elsewhere and repay the mortgagee, and then the mortgagor raised loan by a second mortgage but the money was not paid to the first mortgagee, *held* that the prior mortgagee parting with the title-deeds to the mortgagor for the purpose of raising money by another mortgage was guilty of gross negligence, unless he

took the ordinary precautions that any person advancing money on the security of the deeds should know of his mortgage, such as sending some person with the deeds, insisting that they should be inspected in his presence, or otherwise. He would therefore lose his priority—*Madras Hindu Union Bank v. Venkatarangiah*, 12 Mad. 424 (428). G mortgaged certain title-deeds of immoveable property with the defendant Bank to secure an over-draft. Subsequent to this deposit, representing that the title-deeds were required to be shown to an intending purchaser, G. obtained possession of the same and mortgaged them to the plaintiff Bank giving them to understand that the property was free from any encumbrance. On the fact of prior encumbrance being discovered, the plaintiff Bank applied for a decree on the mortgage and for prior charge. *Held* that the defendant Bank (prior mortgagee) was guilty of gross negligence in parting with the possession of the title-deeds, and lost its priority. The prudent and normal practice of the defendant Bank (who held an equitable mortgage which was not registered), when the mortgagor applied that the title-deeds might be shown to an intending purchaser, was not to allow the mortgagor to have possession of the title-deeds, but to hand over the title-deeds to the Bank's solicitors in order that the solicitors should arrange with the solicitors of the purchaser for the examination of the documents. This would have been a prudent and safe course for a Bank to follow in Calcutta, where mortgages are created by deposit of title-deeds, and such mortgages are not usually registered. In departing from this usual and prudent course the defendant Bank was guilty of gross negligence, and consequently its mortgage must be postponed to that of the plaintiff Bank—*Lloyds Bank v. P. E. Guzdar & Co.*, 56 Cal. 868, A.I.R. 1930 Cal. 22 (25, 26), 121 I.C. 625. Where the prior mortgagee, at the request of the mortgagors returned to them the title-deeds to enable them to raise money to pay off his mortgage, and the mortgagors agreed to raise the money in five days, but after the five days the mortgagee did not take any active steps to get back the title-deeds, *held* that this conduct amounted to gross negligence, and disentitled him to claim priority over a subsequent mortgagee—*Damodar v. Somasundara*, 12 Mad. 429 (432, 433); *Cowasji & Co. v. Tyabji*, 23 S.L.R. 97, A.I.R. 1928 Sind 179 (184), 112 I.C. 722. The vendor sold a property to the vendee, but the latter being unable to pay the greater portion of the purchase-money gave a mortgage of the property to the vendor but did not deliver the title-deeds. Moreover in the sale-deed it was stated that the whole purchase-money had been paid in cash. The vendee afterwards gave a second mortgage of the property by deposit of title-deeds. *Held* that the prior mortgagee (vendor) was guilty of gross negligence in not taking delivery of the title-deeds. His neglect to recover the title-deeds when he had full notice that the vendee was impecunious and a bad paymaster, was gross and culpable negligence and was rendered more so by a deliberate suppression of the existence of the mortgage in the sale-deed and suggestion that the purchase-money was paid in cash—*Nanda Lal v. Abdul Aziz*, 43 Cal. 1052 (1083), 34 I.C. 115. These cases are illustrations of the well-known maxim of law: "*He who trusts most shall suffer most.*"

Where the mortgagor deposits all title-deeds showing his title, but does not deposit other material deeds, the mortgagee cannot be held guilty of any gross neglect so as to postpone him to a subsequent mortgagee—*Ralli*

Brothers v. Punjab National Bank, A.I.R. 1930 Lah. 920 (927), 11 Lah. 564, 129 I.C. 21. Where the prior mortgagee failed to secure the title-deeds and delayed registration in order to enable the mortgagor to secure the necessary funds for payment of the amount due to him, that is, to raise money by borrowing or selling any portion of his properties and the subsequent mortgagee took his mortgage after being satisfied that there was no prior encumbrance, the prior mortgagee was postponed as he was guilty of gross negligence—*Samarapuri v. Thangavelu*, A.I.R. 1938 Mad. 87 (89), 46 M.L.W. 778. See also *Oonamalai v. Narasimha*, A.I.R. 1938 Mad. 161 (163, 164), 47 M.L.W. 40. Where the mortgagee parted with the title-deeds when he had sufficient reasons to think that the mortgagor required them for the purpose of effecting a sale of the properties, it was held that the mortgagee was guilty of negligence under this section, but there was no estoppel under sec. 115 of the Evidence Act against him—*Nataraja v. Lakshman*, A.I.R. 1937 Mad. 195 (199), 170 I.C. 845.

In the case of a mortgage by deposit of title-deeds much greater care is necessary in the matter of their custody on the part of the mortgagee for his own safety and security and also to avoid the risk of the mortgagor being able to represent that the property is unencumbered, because there is no document about the transaction which could be traced by an innocent subsequent encumbrancer on search—*Dharani v. Pramatha*, A.I.R. 1936 Cal. 283 (289), 40 C.W.N. 648, 63 Cal. 880, 165 I.C. 332.

In some other cases it has been held that since mortgages by deposit of title-deeds cannot be effected in *mofussil* places, it is a common practice in the *mofussil* to leave the title-deeds in the possession of the mortgagor, and since the existence of a system of registration has caused mortgagees in general to attach little importance to the possession of title-deeds, the failure of the prior mortgagee to obtain possession of them should not necessarily be imputed to him as gross negligence—*Rangasami v. Annamalai*, 31 Mad. 7 (10) (following *Agra Bank v. Barry*, L.R. 7 H.L. 135); *Monindra Chandra v. Troylucko*, 2 C.W.N. 750 (752, 754). See also *Balmakundas v. Moti Narayan*, 18 Bom. 444 (447).

Effect of registration of prior mortgage:—In some of the cases cited above, it was contended by the first mortgagee (who was held to be guilty of gross negligence for not having possession of title-deeds) that since his mortgage was *registered*, the subsequent mortgagee ought to have searched the registry which would have discovered the prior mortgage, and his omission in doing so amounted to negligence on *his* (subsequent mortgagee's) part, and disentitled him to get priority over the first mortgagee; but the Court held that registration did not amount to notice of the first mortgage, and the non-search of the registry was not an act of negligence on the part of the subsequent mortgagee—*Shan Maun Mull v. Madras Building Co.*, 15 Mad. 268 (288); *Madras Building Co. v. Rowlandson*, 13 Mad. 383 (388); *Nanda Lal v. Abdul Aziz*, 43 Cal. 1052 (1084); *Chettiar Firm, v. Chettiar Firm*, 4 Rang. 238, A.I.R. 1926 Rang. 195, 98 I.C. 19.

The definition of notice has now been amended, and under the new Explanation 1 added to section 3, *registration amounts to notice*. And so the Calcutta High Court has expressed an opinion (though by way of *obiter*) that where the prior mortgagee has surrendered the title-deeds to

the mortgagor, but the prior mortgage has been *registered*, and a later prospective encumbrancer by searching the register would thus be in a position, if he made reasonable enquiry, to discover its existence, the Court would be slow to hold that the prior mortgagee had been guilty of gross neglect or that the action of the prior mortgagee in failing to retain possession of the title-deeds had in any direct way caused or induced the later encumbrancer to advance money on the security of the property—*Lloyds Bank v. P. E. Guzdar & Co.*, 56 Cal. 868, A.I.R. 1930 Cal. 22 (29) 121 I.C. 625. These remarks would, however, apply to cases of gross negligence, but not where the prior mortgagee has been guilty of *fraud* or *misrepresentation*; in such cases, he cannot evade the penalty of this section by saying that his mortgage which is registered must at all events have priority over the mortgage created in favour of a subsequent mortgagee who must be deemed to have had notice of the first mortgage by reason of its registration. Fraud or misrepresentation would certainly operate as *estoppel*.

A mortgage-bond that is duly registered confers, unless displaced, a valid security in priority to all of later date, and therefore the onus lies on the person who claims under a bond of later date to displace the priority—*Cathiresam v. Natchiappa*, A.I.R. 1933 P.C. 191 (192), 143 I.C. 761.

79. If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

Mortgage to secure uncertain amount when maximum is expressed.

Illustration.

A mortgages Sultanpur to his bankers, B & Co., to secure the balance of his account with them to the extent of Rs. 10,000, A then mortgages Sultanpur to C, to secure Rs. 10,000, C having notice of the mortgage to B & Co., and C gives notice of B & Co., of the second mortgage. At the date of the second mortgage, the balance due to B & Co., does not exceed Rs. 5,000. B & Co., subsequently advance to A sums making the balance of the account against him exceed the sum of Rs. 10,000. B & Co., are entitled, to the extent of Rs. 10,000, to priority over C.

481. Scope of the section :—This section forms an exception to the rule stated in sec. 80 (now 93), under which a mortgagee making a further advance does not in respect of that advance acquire any priority as against an intermediate mortgagee. Under this section, the intermediate mortgagee having notice of the prior mortgage is postponed so far as regards further advances which are subsequently made on the security of that mortgage, provided it expresses the maximum to be secured thereby and that maximum is not exceeded—Shephard and Brown, 7th Ed., p. 337 :

Dalip Narayan v. Chait Narayan, 16 C.L.J. 394, 17 I.C. 927; *Baij Nath Goenka v. Daleep Narayan*, 1 P.L.T. 582, 58 I.C. 489.

"If made with notice of the prior mortgage" :—The priority which under this section may be acquired in respect of subsequent advances depends upon the fact that the second mortgagee over whom priority is gained had notice of the prior mortgage. If he had not notice of such mortgage, then the case will be decided according to the general principle of priority enunciated in sêc. 48 (*Que prior est tempore potior est jure*). For an instance of a second mortgage taken with notice of the prior mortgage, see *Brijmohan v. Dukhan*, 9 Pat. 816, A.I.R. 1931 Pat. 33 (37), 130 I.C. 168.

"Though made with notice of the subsequent mortgage" :—Under this section, the prior mortgagee making the subsequent advances does not lose his priority in respect of such advances by reason of the fact that he did so with notice of the intermediate mortgage. In other words, the question whether the prior mortgagee had, at the time of making the further advances, notice of the second mortgage, is immaterial.

482. Maximum :—Two questions have to be considered under this section: *first*, whether the subsequent mortgagee took with notice of the prior mortgage (and consequently with notice as to the future advances); *secondly*, whether the prior mortgage expressed the maximum secured thereby. To attract the provisions of this section it is essential that a mortgage to secure future advances must express the maximum intended to be secured thereby, and if no such maximum is fixed, this section cannot apply, and the prior mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, does not acquire any priority over the intermediate mortgagee in respect of his security for such subsequent advance (see the latter part of sec. 93). And in such a case, it is immaterial whether the intermediate mortgagee had notice (actual or constructive) of the prior mortgage—*Imperial Bank of India v. U. Rai Gyaw Thu & Co., Ltd.*, 51 Cal. 86 (98) (P.C.), 1 Rang. 637, 28 C.W.N. 470, 76 I.C. 910, A.I.R. 1923 P.C. 211. It is not necessary that the mortgage-bond should explicitly express the maximum amount secured, if the amount may be calculated from the recitals—*Dalip Narayan v. Chait Narayan*, 16 C.L.J. 394, 17 I.C. 927. Thus, where a deed stated that a lease had been granted for nine years upon an annual rental of Rs. 12,125 and that the lessees had hypothecated their properties to the lessors to secure the due payment of rent, *held* that the maximum amount secured could be determined by a simple arithmetical calculation, and that it was Rs. 1,09,125 (i.e., Rs. 12,125 × 9), though it was not expressly so stated—*Dalip Narayan v. Chait Narayan*, 16 C.L.J. 401, 17 I.C. 931; *Brijmohan v. Dukhan*, 9 Pat. 816, A.I.R. 1931 Pat. 33 (36), 130 I.C. 168. Where there is an agreement that a loan up to a certain maximum would be taken and that the deposit of title-deeds would be security for the loan up to that amount, and under such agreement title-deeds are deposited and a smaller amount is taken, and later on a further sum is taken within the stated maximum and a separate hand-note is executed therefor, there is a mortgage by deposit of title-deeds in respect of the second advance as well—*Mohini Mohan v. Deb Narain*, 40 C.W.N. 1277. Where the debtor has a running account with the creditor on the

usual cash credit system and for the repayment of all advances in this account the shop of the debtor is made collateral security subject to a maximum principal sum, the charge on the shop is not limited to the first advance, but it is to include all advances in the account—*Kesari Mal v. Tansukh Rai*, A.I.R. 1934 Lah. 765, 153 I.C. 1064. Where a mortgage is executed by way of continuing security for the payment of all debts due and thereafter may be due by the mortgagor, and a subsequent mortgagee takes the mortgage of the same property with knowledge of the prior mortgage and the prior mortgagee does not thereafter make any advances, he is entitled to priority not only in respect of the principal sum but also interest accruing on it—*Allahabad Bank v. Benares Bank*, A.I.R. 1938 All. 473, (1938) A.L.J. 658.

483. Future advance :—A further advance made to the mortgagor after he has parted with the equity of redemption cannot be tacked. A mortgagor cannot, after the sale of the equity of redemption in the property mortgaged by him, charge such property with a further advance so as to render the purchaser of the equity of redemption liable to pay such debt before he can redeem—*Bhawandas v. Shandas*, 23 All. 429. But if the conduct of the purchaser was such as to amount to a standing by and allowing the mortgagee to make further advances to the mortgagor under the supposition that the latter was still the owner of the equity of redemption, such conduct would give an equity in favour of the mortgagee. Thus, for instance, where the property was standing in the mortgagor's name in the Collector's books, and the assignee allowed it to so remain after the assignment, it would be sufficient to render him liable for the further advances—*Govindrao v. Raoji*, 12 Bom. 33 (at p. 36). Where a mortgage has been effected and a further advance is made after that date on the old security then the further advance is not a new mortgage, provided that no changes are made in the terms of the original transaction—*Sher Singh v. Daya Ram*, 13 Lah. 660 (F.B.).

484. Charge :—This section applies to mortgages as well as to charges. A partition-deed was effected between the plaintiffs, the 2nd defendant and three other persons, brothers, which provided that "the common family debts should be discharged by the respective sharers to whom they fell, as per schedule of the document, and that if any sharer failed to discharge his portion of the debt, such sharer's properties should be liable for such debts and for the losses that might happen to the family." The second defendant not having discharged a debt due by him under the partition-deed, a decree was obtained by the creditor against all the brothers. In the meantime the second defendant had mortgaged his share to the first defendant. The plaintiffs now brought a suit for a declaration that under the terms of the partition-deed a mortgage-right had been created in their favour to the extent of the decree-amount and that right had priority over the mortgage executed by the 2nd defendant in favour of the 1st defendant after the partition. *Held* that the above provision in the partition-deed was not one which merely emphasized the personal liability of the sharer to pay his share of the family debts but created a mortgage or a charge upon the property, that the case was governed by this section, and that the plaintiffs were entitled to the declaration claimed in the suit—*Sesha Iyer v. Srinivasa Ayyar*, 41 M.L.J. 282, 70 I.C. 362, A.I.R. 1921 Mad. 459.

80. * * * * *

This section has been omitted here but re-enacted as sec. 93.

'As the principle of 'tacking' is akin to subrogation, we propose to number sec. 80 as sec. 93, so as to place it after the section which relates to subrogation.'—*Report of the Special Committee.*

Marshalling and Contribution.

81. If the owner of two ^{Marshalling} properties mortgages securities, them both to one person and then mortgages one of the properties to another person who has not notice of the former mortgage, the second mortgagee is, in the absence of a contract to the contrary, entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee so far as such property will extend, but not so as to prejudice the rights of the first mortgagee or of any other person having acquired for valuable consideration an interest in either property.

81. If the owner of two ^{Marshalling} *or more* properties mortgages securities, mortgages them to one person and then mortgages one *or more* of the properties to another person, *** the *subsequent* mortgagee is, in the absence of a contract to the contrary, entitled to have the *prior* mortgage-debt satisfied out of the property *or properties* not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the *prior* mortgagee or of any other person who has for * * consideration acquired an interest in *any of the properties*.

Amendment :—This section has been amended by sec. 42 of the T. P. Amendment Act (XX of 1929). The words "or more" have been added (see Note 487), and consequently the words "first" and "second" mortgagee have been substituted by "prior" and "subsequent" mortgagee. The word "valuable" has been omitted (Note 490). The most important change is the omission of the words "who has not notice of the former mortgage" (see Note 488).

486. Principle :—The principle of the doctrine of marshalling has been thus stated in an English case: "If there are two creditors who have taken securities for their respective debts, and the security of the one is confined to both and security of the other is confined to one of those funds, the Court will arrange or marshal the assets so as to throw the person who has two funds liable to his demand on that which is not liable to the debt of the second creditor"—*Baldwin v. Belcher*, 3 Dr. & War. 173; *Aldrick v. Cooper*, 8 Ves. 382. If two properties X and Y were mortgaged to A, and afterwards X was mortgaged to B, *held* that B was entitled to have the securities marshalled, so as to throw A's mortgage in the first instance on Y—*Gibson v. Seagrim*, 20 Beav. 614. "If A has a charge on Whiteacre and Blackacre, and if B has a charge on Blackacre only, A must take payment of his charge out of Whiteacre only and must

leave Blackacre, so that B, the other creditor, may follow it, and obtain payment of his debt out of it; in other words, if two estates, Whiteacre and Blackacre, are mortgaged to one person, and subsequently one of them, Blackacre, is mortgaged to another person, then unless Blackacre is sufficient to pay both charges, the first mortgagee will be compelled to take satisfaction out of Whiteacre, in order to leave to the second mortgagee Blackacre, upon which alone he can go."—*per* Cotton, L.J. in *Webb v. Smith*, 30 Ch. D. 192 (200). In such a case the first mortgagee has no right to exhaust a security which is the sole fund for payment of the second mortgagee—*Lawrence v. Galsworthy*, 3 Jur. (N.S.) 24. Where the subsequent mortgagees who had foreclosed a property which was included in an earlier mortgage of several other properties to the prior mortgagees, applied for an order for the exclusion of the property from the sale proceedings held in execution of the decree of the prior mortgagees, held that the Court had power, in appropriate circumstances, to make such order under secs. 56 and 81—*Tara Prosanna v. Nilmoni*, 41 Cal. 418 (422). The object of this section is to protect the subsequent mortgagee from the risk of the properties mortgaged to him being sold to satisfy the dues of a prior mortgagee who has the additional security of some other properties also—*Rajkeshwar v. Md. Khalilul Rahman*, 3 Pat. 522 (530), A.I.R. 1924 Pat. 459, 78 I.C. 796.

This section does not apply to the N. W. F. Province, but its principles are applicable as principles of justice, equity and good conscience. Equity demands that the mortgagee should not be permitted to unequally distribute the mortgage-money on two different properties and to release one lightly and burden the other more than it normally should be. A *pro rata* share should be recovered from the property which has been proceeded against, if the mortgagee has released another property which was also liable for the security—*Abdul Quyum v. Mt. Turi*, A.I.R. 1941 Pesh. 49.

487. Scope of section :—The old section spoke of "two properties" only. This has now been substituted by "*two or more*" properties. The reason is thus stated :—

"Section 81 deals with the marshalling of securities. It appears from the proceedings underlying Act IV of 1882 that the section is based on the following passage in Fisher on Mortgage (Art. 1356, p. 694, 6th Edition) :—

- 'If the owner of two estates mortgaged them both to one person, and then one of them to another, without notice, the second mortgagee may insist, under the doctrine of marshalling, but without interfering with the rights of the former, that the debt of the first shall be satisfied out of the estate not mortgaged to the second, so far as that shall extend.'

Like section 56 this section provides for marshalling when there are two properties only. It is also restricted to a case when the second mortgagee intends to marshall the securities. It does not provide for the case of more than two properties nor for the case where the property has been mortgaged more than twice and a mortgagee subsequent to the second mortgagee desires to marshall the prior securities. We propose to widen the scope of the section by providing that it should apply to cases where

there are more than two properties and to all subsequent mortgagees generally."—*Report of the Special Committee.*

Marshalling implies the existence of two sets of properties one of which is subject to both the mortgages and the other is subject to only the earlier mortgage. Where at the time the doctrine is sought to be invoked, there are no two items of properties liable to be sold but only one item, the other having been released by the mortgagee, the doctrine cannot be applied—*Muthammal, in re*, A.I.R. 1938 Mad. 503, 47 M.L.W. 261. But it has been held by the Calcutta High Court that a mortgagee after relinquishing his claim on a portion of the mortgaged property cannot throw the whole burden of the mortgage-debt on the remainder of the property—*Muktakeshi v. Ramani Mohan*, A.I.R. 1927 Cal. 195, 98 I.C. 504 [following *Surjram v. Bahramideo*, 1 C.L.J. 337 and not following *Perumal v. Raman*, 40 Mad. 968 (F.B.)]. See also *Chettyar Firm v. Chettyar Firm*, A.I.R. 1937 Rang. 220 (223), 171 I.C. 168.

This section applies to mortgages of immoveable property and not to the hypothecation of moveables—*Subbiah v. Ram Sabad*, A.I.R. 1936 Rang. 266, 14 Rang. 198, 163 I.C. 444.

The benefit of this section can be claimed not only by the subsequent mortgagee but also by a purchaser of the property in execution of the mortgage-decree obtained by the subsequent mortgagee (whether that purchaser be a third person or the subsequent mortgagee himself)—*Rajkeshwar v. Md. Khalilul Rahman*, 3 Pat. 522 (531), A.I.R. 1924 Pat. 459, 78 I.C. 796; *Inderdawan v. Govind Lall*, 23 Cal. 790; *Lakhmidas v. Jamnadas*, 22 Bom. 304 (F.B.). But see *Naubat v. Mahadeo*, A.I.R. 1929 All. 309 (311), 51 All. 606, 116 I.C. 82; *Madhusudan v. Jogesh Chandra*, 42 C.W.N. 502 and *Sengava v. Perumal*, A.I.R. 1937 Mad. 965 (966), 46 M.L.W. 555.

The benefit of this section cannot be claimed by a lessee. So where some out of several mortgaged properties are subsequently leased out, and the lessee has notice of the indebtedness of the mortgagor, the lessee is not entitled to say that the mortgage-debt should be satisfied by the sale first of the properties other than those subject to the lease—*H. V. Low & Co. v. Hazarimull*, 30 C.W.N. 183 (185), A.I.R. 1926 Cal. 525, 94 I.C. 786.

"Neither in England nor in this country has the doctrine been extended to a case where *only a portion* of the property already mortgaged is subsequently sold or mortgaged. If the prior mortgagee is forced to have recourse to a portion of the mortgaged property for the recovery of his money, it may be that both he and the mortgagor will be prejudiced, and the sale of property in portions will not realise an adequate price. We do not, therefore, consider that it will be safe to extend the doctrine of marshalling to such a case."—*Report of the Special Committee.*

Where properties X and Y were mortgaged to A and subsequently property Y was mortgaged to B who obtained a decree for sale on his sale and purchased Y in execution and A then brought a suit on his mortgage impleading B and got a decree for sale in execution of which B prayed under this section that the property Y should be sold first,

it was held that no question of marshalling arose—*Jashoda v. Sumanta*, A.I.R. 1950 Dac. 9, 54 C.W.N. (2 D.R.) 287. Where a decision has been given by the Court in a suit on the issue of marshalling, the matter cannot be agitated again in the course of execution. The Court can, in its discretion during execution order the properties to be sold in a particular order, but that is not the same thing as allowing a party to claim it as a matter of law—*Kathesa Bai v. Venkiteswara*, A.I.R. 1943 Mad. 705, (1943) 1 M.L.J. 301. In a complicated case the puisne mortgagees should be directed to work out their own rights by way of suits for contribution—*ibid.* See in this connection *Satyanarayanamurti v. Official Receiver*, A.I.R. 1949 Mad. 384, (1948) 2 M.L.J. 426.

The debtor must be the same:—No marshalling ought to be enforced unless the parties between whom it is enforced are creditors of the same person, and have demands against the property of the same person—*Ex parte Kendall*, (1811) 17 Ves. 520, 1 W. & T. L. C. 46; Halsbury's Laws of England, Vol. 21, p. 304; *Gopala v. Swaminathayyan*, 12 Mad. 255; *Ramaswamy v. Madura Mills*, (1916) 1 M.W.N. 265, 34 I.C. 338. A as manager and for family purposes gave a mortgage to B. The family subsequently got divided and the mortgaged property fell to the shares of A and C. Then A again gave a mortgage of part of his share to D, who, having sued on it, bought it in Court auction in execution of his decree. B now sued on his mortgage against A, C and D. D claimed marshalling. It was held, as B and D were not creditors of the same person, no case for marshalling arose. One was a creditor of the co-parcenary, and the other a separate creditor of one of the members of the family—*Gopala v. Swaminathayyan*, 12 Mad. 255; See also *Neelamegan v. Govindan*, 14 Mad. 71.

See Note 320 under sec. 56 *ante*. Where four properties are mortgaged and three of them are in Pakistan, marshalling cannot be done as it would prejudice the rights of the mortgagee—*Jain Singh Rai v. Harmandas*, A.I.R. 1964 All. 381.

488. Notice—Old Law:—The old section contained the words "who has not notice of the former mortgage" so that the second mortgagee could claim the benefit of marshalling under this section only when he had no notice of the earlier incumbrance—*Sesha Ayyar v. Krishna*, 24 Mad. 96 (106); *Kishan Chand v. Ramsukh Das*, 86 P.R. 1916, 33 I.C. 815; *Lakshmana v. Sankara Moorthy*, 25 M.L.J. 245, 18 I.C. 199 (202); *Punjab & Sind Bank v. Amir Chand*, A.I.R. 1930 Lah. 731, 11 Lah. 694, 125 I.C. 631; *Sengava v. Perumal*, A.I.R. 1937 Mad. 965 (966, 967), 46 M.L.W. 555; *Ramaswamy v. Madura Mills*, (1916) 1 M.W.N. 265, 34 I.C. 338; *Naubat v. Mahadeo*, 51 All. 606, 27 A.L.J. 419, A.I.R. 1929 All. 309 (311), 116 I.C. 297. In order that the rule of marshalling could apply, it has to be shown that the second mortgagee obtained no notice either before or at the time of completion of his mortgage. And so there was nothing in this section to destroy the right of marshalling when the second mortgagee got the notice subsequent to the execution of his mortgage—*Inderdawn v. Gobind Lall*, 23 Cal. 790. The real question was whether the second mortgagee was aware of the prior mortgage at the time when he took his own mortgage; the fact that he came to know of the existence of the prior mortgage at the time he

purchased the property in execution of his mortgage-decree did not deprive him of the right of marshalling which he had acquired already—*Rajkeshwar v. Md. Khalilul Rahman*, 3 Pat 522 (532, 533), 78 I.C. 796, A.I.R. 1924 Pat. 459; *Inderdawn v. Govind Lall*, 23 Cal. 790. Where no question of notice was raised in the Court of first instance or in the grounds of appeal but it was suggested for the first time during the arguments that the second mortgagee had notice of the first mortgagee, the High Court disallowed the question—*Tara Prasanna v. Nilmoni*, 41 Cal. 418 (422), 25 I.C. 118.

It should be noted that in places in which this Act did not formerly apply the doctrine of marshalling was applied even though the subsequent mortgagee had notice of the prior incumbrance—*Dina v. Nathu*, 26 Bom. 538 (542); *Chunilal v. Fulchand*, 18 Bom. 160 (171); *Lakshmidas v. Jamnadas*, 22 Bom. 304 (314). Those cases were decided with reference to the English law under which the question of notice is immaterial and marshalling can be claimed in spite of it. See *Flint v. Howard*, (1893) 2 Ch. 54 (73).

Under the present section notice is immaterial :—In consonance with the rule of English law, the words referring to notice have been omitted from the present section.

489. Rights of prior mortgagee unaffected :—The rule of marshalling should not be so applied as to interfere with the rights of the first mortgagee, who ought not to be restrained from satisfying his debt out of any portion of the property mortgaged to him that is readily available—*Wallis v. Woodyear*, 2 Jur. (N.S.) 179. As a rule, marshalling cannot be enforced against a prior mortgagee where there is any doubt as to the sufficiency of the fund upon which the junior creditor has no claim, or where the prior creditor is not willing to run the risk of obtaining satisfaction out of that fund, or where the fund is of a dubious character or is one which may involve him in litigation to realise—*Jones on Mortgages*, § 1628; cited in *Krishna v. Muthukumaraswamiya*, 29 Mad. 217 (223). Where the puisne mortgagee has taken the mortgage expressly on condition of discharging certain amount due on the prior mortgage and he fails to fulfil that term, sec. 81 cannot be invoked by him—*Devatha Pullaya v. Jaldu Manikyala Rao*, A.I.R. 1962 Andh. Pra. 425.

Ordinarily, the right of selling property in execution of a mortgage-decree in a particular order rests with the decree-holder and in the absence of any contract between the parties the decree-holder may sell the property in any order he chooses. But the Court has power in the circumstances of any particular case and with regard to the equities arising in favour of the various parties, to direct the order in which the properties should be sold—*Raj Keshwar v. Md. Khalil-ul-Rahaman*, 3 Pat. 522, A.I.R. 1924 Pat. 459, 72 I.C. 796; *Venkayya v. Venkata*, A.I.R. 1930 Mad. 178 (180), 125 I.C. 86.

On the question whether the subsequent mortgagee's claim for marshalling is a right which can be exercised only against the mortgagor or against the prior mortgagee also, there is a conflict of judicial opinion. The Madras High Court and the Oudh Chief Court have held that a prior mortgagee has the undoubted right to satisfy himself out of any portion

of the security—*Thanmal v. Nathu*, A.I.R. 1928 Mad. 500, 51 Mad. 648, 110 I.C. 54. The Oudh Chief Court has applied this principle to a charge in the case of *Parshadi v. Brij Mohan*, A.I.R. 1936 Oudh 52 (54), 11 Luck. 575, 159 I.C. 117.

The Calcutta and Rangoon High Courts have on the other hand taken a contrary view. It has been held that the words "but not so as to prejudice the rights of the prior mortgagee" in this section do not entitle the prior mortgagee to have the properties mortgaged to him to be sold in any order he may prefer ; for the whole object of sec. 81 is to enable the subsequent mortgagee to call upon the prior mortgagee to exercise his rights, so far as they can be satisfied as against the properties which are not the subject-matter of the subsequent mortgagee's charge—*Annapurna v. Ram Ranjan*, 40 C.W.N. 1173 ; see also *Ram Sabad v. Subiah*, A.I.R. 1935 Rang. 139 (142), 156 I.C. 318 ; where it has further been held that the right cannot of course be exercised against the prior mortgagee so as to prejudice his right, but it cannot be said that his rights are prejudiced when he has deliberately released a part of his security which might have been readily available to him. The Allahabad High Court has also held that where any portion of the mortgaged property has not been absorbed to satisfy the prior lien, it is not open to a mortgagee from either caprice, collusion or negligence to release portions of his mortgage-security and to throw the entire burden upon the remaining property—*Murli v. Sheo Dat*, A.I.R. 1931 All. 625 (627), (1931) A.L.J. 349. On this point also the Madras High Court has recently held that the prior mortgagee has the undoubted right of releasing any portion of his security and the subsequent mortgagee cannot claim the right of marshalling—*Muthammal, in re*, A.I.R. 1938 Mad. 503 (504), 47 M.L.W. 261. The view taken by the Madras High Court does not seem to be the correct view. For an able discussion of this question and the relevant case law on the point see A.I.R. 1938 Journal, p. 98.

490. Prejudice of right of third parties or of transferees for value :—

As this section refers to the right of the second mortgagee to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee, it is clear that the time for the exercise of the right of marshalling is the time when the prior mortgagee seeks to realise his mortgage-amount. If at that time there is already a person who has acquired for valuable consideration an interest in the property not mortgaged to the second mortgagee, then the right of marshalling does not exist—*Unnamalai v. Gopalaswami*, 54 Mad. 59, A.I.R. 1931 Mad. 199, 129 I.C. 655. The rule of marshalling will never be applied in favour of a subsequent incumbrancer when that will either really prejudice the rights of the prior incumbrancer or the rights of third parties—*Chunilal v. Fulchand*, 18 Bom. 160. "It was never the intention of marshalling to defeat the rights of successive incumbrancers or of any person having acquired an interest in any one of the properties for valuable consideration. The right of a subsequent mortgagee of one of the estates to marshal, that is, to throw the prior charge of both estates upon that which is not mortgaged to him, is an equity which is not enforced against third parties, that is, against any one except the mortgagor and his legal representatives claiming as volunteers under him. It is not enforced

against a mortgagee or purchaser of the other estate"—per Hay, J. in *Flint v. Howard*, (1893) 2 Ch. 54 (at p. 73). And the right of the prior mortgagee or the purchaser not to be marshalled does not depend upon whether he had notice of the second mortgage—*Unnamalai v. Gopala-swami*, supra; Ghose's Law of Mortgage, Vol. 2, p. 812. The rule of marshalling was never intended to defeat the rights of other subsequent mortgagees. Thus, two estates (X and Y) are mortgaged to A and one (X) is afterwards mortgaged to B, the remaining estate (Y) being then mortgaged to C. Here B has no equity to throw the whole of A's mortgage on C's estate (Y) and so destroy C's security. And for the same reason C cannot marshal. In such a case, A must satisfy himself out of two estates rateably, according to the respective values of the two estates, and leave the surplus proceeds of each estate to be applied in payment of the respective incumbrances thereon—per Lord Romilly in *Gibson v. Seagrin*, 20 Beav. 614 (619). If a mortgage by A and B of their properties in favour of C is followed by a mortgage by A alone of A's property in favour of D, then B cannot say that A's property is to be sold first in execution of C's mortgage decree, because sec. 81 does not apply—*Jahan D. C. v. Mathew*, A.I.R. 1962 Ker. 106.

The word "valuable" which occurred before the word "consideration" has been omitted, because "the Indian Law does not recognize any distinction between good and valuable consideration (see sec. 25 of the Indian Contract Act and Pollock and Mulla's Contract Act, p. 34)."—*Report of the Special Committee*.

82. Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage.

82. Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date.

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mort-

gaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid.

Nothing in this section applies to a property liable under section 81 to the claim of the *subsequent mortgagee*.

Amendment :—By sec. 43 of the T. P. Amendment Act (XX of 1929) the first para of this section has been redrafted, and in the third para the word 'subsequent' has been substituted for the word 'second'. The reasons are stated below in proper places.

Application :—The principle underlying this section is applicable in the Punjab—*Gian Singh v. Atma Ram*, A.I.R. 1933 Lah. 374, 141 I.C. 596.

491. Section analysed :—The first paragraph recognizes a lien possessed by the person who being interested in one of the mortgaged properties (or in a portion of the mortgaged property) pays off the debt and so acquires a right of contribution. The second paragraph then deals with a case in which, the first mortgage having been paid off out of the only property comprised in it, it remains to be determined how the second mortgage-debt is to be borne as between the remainder of that property and another property which is also made a security for the second debt. In such a case, contribution works, not in favour of the second mortgage, but in favour of other persons interested in one or other of the two properties comprised in the mortgage—*Scsha Ayyar v. Krishna Aiyanger*, 24 Mad. 96 (106, 107).

Principle :—This section is an embodiment of the principle that a property which is equally liable with other property to pay a debt shall not escape, because the creditor has been paid out of that other property alone—*Ibn Hasan v. Brijbhukhan*, 26 All. 407 (416); *Muhammad Yahiya v. Rashiduddin*, 31 All. 65 (67); *Narayanan v. Nallammal*, A.I.R. 1942 Mad. 685 (F.B.), (1942) 2 M.L.J. 525; *Meyyappa v. Murugappa*, A.I.R. 1960 Mad. 117. Fisher on Mortgage, 6th Ed., § 1346. "If several estates (whether of one or several owners) be mortgaged for or subject equally to one debt.....the several estates shall contribute rateably to that debt; being valued for that purpose, after deducting from each estate any other incumbrances by which it is affected"—Fisher on Mortgage, 6th Edn., p. 688. The reason given for this principle is that "the law requires equality; one shall not bear the burthen in case of the rest"—per Eyre, C.B. in *Dering v. Earl of Winchelsea*, (1787) 2 W. & T.L.C. (7th Edn.), p. 535, cited in 26 All. 407 (436). It also lays down that parties who were equally bound with another to satisfy a debt and who are relieved by that other from the burden of the debt should contribute rateably towards the satisfaction of the debt—*Ibn Hasan v. Brijbhukhan*, 26 All. 407 (416). No extraneous principle to modify the liability to contribution imposed by this section can be introduced—*Isri Prasad v. Jaga Prasad*, A.I.R. 1937 Pat. 628 (629), 16 Pat. 557, 172 I.C. 187; *Purbi v. Hardeo*, A.I.R. 1936 Oudh 169, 159 I.C. 1049.

A mortgagor has a right of contribution against the property of other

co-mortgagors not only when his property has been sold, but also when he saves his own property and the property of the co-mortgagors by redeeming the mortgage—*Brij Bhukhan v. Bhagwan Dutt*, A.I.R. 1942 Oudh 449 (F.B.). But contribution cannot be claimed from a co-mortgagor whose property equally with the property of the claimant, has been sold at the instance of the mortgagee, because it has already contributed its proportion of the debt—*Ibn Hasan v. Brijbhukhan*, 26 All. 407 (411); *Hari Raj v. Ahmad-ud-din*, 19 All. 545.

Where the property of one of the mortgagors has been sold, but the sale has not satisfied the *entire* mortgage-decree, he cannot claim contribution in respect of the excess realised from his property over and above its rateable proportion of the debt. A claim for contribution cannot arise until the *whole* of the mortgage-debt has been satisfied—*Ibn Hasan v. Brijbhukhan*, 26 All. 407 (426, 427) (F.B.). But where the whole of the mortgage-money has been realised by the sale of the properties of some of the mortgagors, one of them can bring a suit for contribution against those co-mortgagors whose property has not been sold, although the mortgage-debt has not been wholly satisfied by the sale of the plaintiff's property alone—*Muhammad Yahia v. Rashiduddin*, 31 All. 65 (66); *Muhammad Main v. Bharat*, 7 O.W.N. 401, A.I.R. 1930 Oudh 260 (263), 125 I.C. 402.

The claim to contribution arises, whether the payment has been made by the claimant by a *voluntary* sale of his property or the payment has been *enforced* by sale of his property—*Ibn Hasan v. Brijbhukhan*, 26 All. 407 (F.B.); *Muhammad Main v. Bharat*, *supra*.

692. Rateable apportionment :—The equitable rule of rateable apportionment is somewhat different from marshalling and contribution. This equitable rule is in accordance with justice and fair dealing and though not the subject of any special statutory provision, is not excluded by any statutory provision, and is accordingly applicable in India. This right is one which is possessed by a mortgagee against the mortgagor. Thus, the properties A and B of equal value are mortgaged to X to secure an advance equal to the value of either, and a second mortgage on A is taken by Y and a second mortgage on B is taken by Z. In these circumstances, if X pays himself by taking the whole of A, leaving B unencumbered, it will work to the disadvantage of Y or Z. It is not, therefore, fair that such exercise of election by X should advantage the mortgagor and work to the disadvantage of the subsequent mortgagees. In such a case, X must take his debt out of the two properties A and B in the proportion of the values of the properties—*Official Assignee v. Byramshaw*, 61 M.L.J. 512, 135 I.C. 316, A.I.R. 1932 Mad. 196 (197). *Inter se* mortgagors are liable to contribution in proportion to the value of their property and not according to the extent of benefit they have received from the mortgage-money unless there is a contract to the contrary—*Jai Narain v. Rashik*, A.I.R. 1931 All. 546, 131 I.C. 545. But an oral agreement varying the terms of a document by which the mortgagors agree that the severally owned items of the hypothecation shall be rateably liable will not be admissible—*Muthukumaraswami v. Govinda*, A.I.R. 1932 Mad. 218, 137 I.C. 285; see also *Kamta v. Chaturbhuj*, A.I.R. 1934 P.C. 98 (100), 73 Pat. 310, 61 I.A. 185, 38 C.W.N. 575, 148

I.C. 486. Where a mortgagee sues his mortgagor and directs the suit at the outset against all the items of the mortgaged property, but subsequently withdraws his claim in respect of one of those items stating that that item did not belong to his mortgagor; the remaining items are liable for the full amount of the mortgage-debt and are not merely rateably liable—*Balkishan v. Mt. Bundia*, A.I.R. 1932 All. 246 (247), 136 I.C. 567. But the owners of parts of the equity of redemption cannot be deprived of their right to contribution under this section by the action of the mortgagee in releasing another portion of the mortgaged property—*Maddipatla v. Ramavarapu*, A.I.R. 1936 Mad. 293 (294), 162 I.C. 304. In a suit by the holder of a moiety of the mortgaged property for contribution against the vendee from the holder of the other moiety, the fact that the plaintiff is stranger to the contract of sale between the vendor and the vendee *inter se* is immaterial—*James v. Achaiibar*, A.I.R. 1940 Pat. 119, 21 P.L.T. 416, 185 I.C. 297 relying on *Ganeshi Lal v. Charan Singh*, 57 I.A. 189, 52 All. 358, A.I.R. 1930 P.C. 183. A suit for contribution fails *in limine* if a necessary party is not before the Court and in his absence the liabilities of the parties cannot be satisfactorily ascertained—*James v. Achaiibar*, supra.

493. Scope of section :—This section provides for contribution *inter se* by the mortgagors—*Jnanendra v. Sashi Mukhi*, 44 C.W.N. 240, A.I.R. 1940 Cal. 60, 186 I.C. 833. The contribution referred to herein is a right which exists between the owners of the mortgaged properties and does not affect the mortgagee's power to enforce his mortgage against all or any of the properties mortgaged to him—*Arunagiri v. Radhakrishna*, A.I.R. 1942 Mad. 44 (46), (1941) 2 M.L.J. 520. Although this section does not in terms apply to a mortgagee who happens to acquire a share of the equity of redemption, the general rule laid down therein applies, and therefore for the purpose of determining the extent to which the mortgagee's right to recover the money under his mortgage has been extinguished by his purchasing the equity of redemption in some of the properties mortgaged to him, the value of the mortgaged properties, as they existed at the date of the mortgage, should be considered and not the value as it existed on the date on which some of the mortgaged properties were purchased by the mortgagee, the date of the institution of the suit being entirely immaterial—*Ibid* at pp. 46 and 47.

The question of contribution does not concern the mortgagee. Hence the mortgagor cannot claim contribution in a suit for foreclosure. He must file a separate suit—*Delansingh v. Darbarilal*, A.I.R. 1949 Nag. 346, I.L.R. 1949 Nag. 376. Where one of two co-owners of a certain property sold his share to a third party with direction to pay a portion of the consideration to a mortgagee in possession, and the other co-owner brought a suit for possession against the purchaser who claimed contribution in respect of the plaintiff's liability under the mortgage, it was held that the payment made by the purchaser to the mortgagee was merely as the agent of his vendor, and consequently he could not claim contribution under this section—*Raj Bahadur v. Sitta Prasad*, A.I.R. 1951 All. 596.

Where the mortgagee decree-holder applies in execution to sell one of the two properties, but the judgment-debtors claim that both the pro-

parties are liable to contribute rateably under this section, the question of rateable contribution is one of adjustment of equities between the parties—*Pandurang v. Shrihari*, A.I.R. 1949 Nag. 155, I.L.R. 1948 Nag. 595.

Both sec. 43 Contract Act and the present section deal with the question of contribution. Where the question arises out of a mortgage, this section must exclude sec. 43 on the principle that the general law is excluded by the special law—*Kedar Mal v. Hari Lal*, A.I.R. 1952 S.C. 47. Having regard to the difference in language in secs. 82 and 92, it is not necessary that the whole of the common mortgage should be paid off before a claim for contribution can be advanced by a person who has been made to pay more towards the common mortgage—*Manjappa v. Pacha*, A.I.R. 1947 Mad. 276, (1946) 2 M.L.J. 276. A co-mortgagor who paid the whole mortgage debt may under this section sue for contribution and he may be subrogated to the rights of the mortgagee under sec. 92. He also acquire a charge under secs. 82 and 100—*Rameswar v. Ramnath*, A.I.R. 1950 Pat. 174, 28 Pat. 955. See also *Copinath v. Raghubans*, A.I.R. 1949 Pat. 522, 30 P.L.T. 277; *Ayyappan Raman v. Kunju-Vakki*, A.I.R. 1958 Ker. 386. The obligation under sec. 82 is not personal—*Rameswar v. Ramnath*, supra.

Application:—This section can apply while the mortgage is still subsisting, but it applies even more when the mortgage has been paid off out of some only of the properties mortgaged, and the owner or the person interested in the properties from which the mortgage has been paid off then has a right to claim contribution from the owner of other properties which were liable under the mortgage but which were not called upon to pay it off—*Baswanneva v. Dodgowda*, A.I.R. 1942 Bom. 95, 44 Bom. L.R. 15 relying on *Rama Sankar v. Ghulam Husain*, 43 All. 589, 19 A.L.J. 584, A.I.R. 1921 All. 323. Where the decree makes the mortgagor and the mortgage security liable for costs as well, contribution can be allowed in respect of those costs—*Ayyappan Raman v. Kunju Vakki*, A.I.R. 1958 Ker. 386.

As the present Act is not in force in the Punjab, secs. 82, 92 and 100 do not in terms apply there. The principles underlying those sections are however applicable as rules of justice, equity and good conscience—*Ganeshi Lal v. Joti Parshad*, A.I.R. 1949 E.P. 254.

Mortgagee's right to proceed against all the properties:—This section defines the relations of the mortgagors *inter se*, and there is nothing in the language of the section which supports the conclusion that the mortgagee must distribute his debt in a certain manner, or that he is unable to enforce it against each and every part of the property made security for the mortgage—*Timaji Krishna v. Rama*, 20 Bom. L.R. 175, 45 I.C. 862; *Raghunath v. Harlal* 18 Cal. 320; *Abdul Rahim v. Abdul*, 22 S.L.R. 243, 106 I.C. 872, A.I.R. 1933 Sind 101 (103). The mortgagee's right to be paid the whole of his debt from whatever portion of the mortgaged properties he wishes to comprise in his suit, cannot be questioned—*Krishna Muthu v. Kumaraswamiya*, 29 Mad. 217 (225). A mortgagee may release a portion of the security and claim the whole amount from the rest unless he exhibits an intention to break the integrity of

the mortgage—*M. Ramanna v. C. Butchamma*, A.I.R. 1958 Andh. Pra. 598. Ordinarily, if two properties are jointly mortgaged for the same debt, each of these properties is liable for the whole, and it is open to the mortgagee either to proceed against the whole mortgaged property or against a part of such property—*Ghasi Khan v. Thakur Kishori*, 1929 A.L.J. 846, A.I.R. 1929 All. 380 (381), 119-I.C. 437. The remedy of any particular judgment-debtor is to recover any excess himself from the others—*Punjab National Bank v. Ram Karan*, I.L.R. 1941 Lah. 1 (F.B.), 42 P.L.R. 669, A.I.R. 1940 Lah 370 (F.B.). There is nothing in this Act to support the view that as between a mortgagee and the holders of the equity of redemption, the former is bound to distribute his debt rateably upon the mortgaged properties—*Hara Kumari v. Eastern Mortgage and Agency Co.*, 7 C.L.J. 274; *Abdul Rahim v. Abdul*, *supra*. Therefore, where upon a suit being brought on a mortgage by the mortgagee, the several purchasers of the mortgaged properties sought to be permitted to pay off the mortgage-debt in shares proportionate to the property purchased by each of them, it was held that the section did not authorise the splitting up of the lien of the mortgagee in this manner but that its object was merely to fix the liability of the mortgagors or their purchasers *inter se*, and that therefore the mortgagee was entitled to proceed against all the mortgaged properties leaving it to any of the defendants who might have to pay more than his rateable share to recover it from his co-debtors in accordance with this section—*Raghu Nath v. Harlal*, 18 Cal. 320 (321, 322); *Sant Lal v. Nanku Lal*, A.I.R. 1924 Pat. 174, 75 I.C. 96. A mortgage executed by several persons of their shares in different properties cannot be treated as so many entirely separate mortgages under this section, either before or after the amendment of 1929. Where some of these persons assign their equity of redemption and this is not known to the mortgagee till too late to sue the assignees, the mortgagee is entitled to recover the whole debt out of one or all the properties which he is able to reach—*Rajani v. Sourendra*, A.I.R. 1934 Cal. 421 (424), 38 C.W.N. 124, 151 I.C. 454. No subsequent transferee can insist on the properties other than his own being sold to satisfy the mortgage unless the doctrine of marshalling can be made applicable—*Mirza Quaser Beg v. Sheo Shankar*, A.I.R. 1932 All. 85 (86), 53 All. 391, 129 I.C. 708. With due regard to the mortgagee's right to have his claim satisfied by sale of every part of the mortgaged property, and apart from it, he is not entitled to dictate to the Court the order in which the mortgaged properties should be sold. A decree under O. 34, r. 5, C. P. C. directs the sale of all the mortgaged properties and so long as rights of the mortgagee are not prejudiced, the Court executing the decree has full power to regulate the order in which and the condition subject to which the mortgaged properties should be sold in order to do justice between two subsequent transferees. It may for that purpose apply the rule of contribution as between such transferees by postponing the sale of one of the properties on payment by the subsequent transferee interested in it of the proportionate amount charged on it, till the remaining properties are sold and the remaining amount is satisfied by the sale-proceeds thereof in which case the property may be proceeded against for recovery of the balance—*Ibid*, at p. 87. The Court should frustrate any attempt on the mortgagee's part to throw most of the burden on one only of the mort-

gaged properties.—*Ibid*, at p. 88. But so long as the integrity of the mortgage is not broken, the mortgagee is entitled to insist on payment of whole of the amount due before any property is released from liability and the Court has no power to compel him to submit to piece-meal redemption.—*Ibid*, per Sulaiman, J. at p. 90. The intention of this section is not that the lien of the mortgagee should be divided, but simply to determine the liability of the purchasers of the property *inter se*—*Wan Taik v. Chettyar Firm*, A.I.R. 1935 Rang. 26, 155 I.C. 954.

If, however, by the laches of the mortgagee, his claim against some of the mortgagors has become time-barred, he cannot claim to throw the entire burden upon the rest of the properties. In such a case any owner of a portion of the mortgaged properties is legitimately entitled to ask that not more than a rateable part of the mortgaged debt should be thrown upon the property in his hands—*Iman Ali v. Baij Nath*, 33 Cal. 613 (621); *Budhamal v. Rama*, 44 Bom. 223 (226). But see *Ayyappan Raman v. Kunju Vakki*, A.I.R. 1958 Ker. 386 where it has been held that the discharge of one mortgagor by limitation or otherwise does not affect his liability for contribution. Similarly, a mortgagee cannot release a portion of the property from the mortgage-debt, so as to increase the burden upon the other portions, without the privity and consent of the persons affected. The owners of the properties not released are entitled to insist that not more than a proportionate share of the mortgaged-debt shall be levied upon the properties in their hands—*Imam Ali v. Baij Nath*, 33 Cal. 613 (622), following *Surjiram v. Barhmdeo*, 1 C.L.J. 337 and 2 C.L.J. 202, and dissenting from *Sheo Prasad v. Behary*, 25 All. 79. The release of part of the mortgaged property by the mortgagee does not take away, as regards that part, the liability to contribute which this section imposes upon the different parts—*Shah Ram Chand v. Parbhu Dayal*, A.I.R. 1942 P.C. 50 (53).

If the mortgage dues of a puisne mortgagee could not be satisfied out of the mortgaged properties, recourse may be had to the property liable to contribute. The joining of a claim for contribution in a suit for sale does not amount to misjoinder of causes of action—*Chunilal v. Srinivasa*, A.I.R. 1944 Mad. 276, 1944 M.W.N. 49. The fact that the earlier mortgage was not redeemed by the puisne mortgagee does not debar him from suing for contribution when the former was satisfied by execution sale—*ibid*. A charge-holder is not concerned with contribution—*Hussain v. Raghubar*, A.I.R. 1947 Oudh 122, 22 Luck. 37.

“Contract to the contrary” :—The mortgaged properties are liable to contribute rateably to a mortgage-debt only in the absence of a contract to the contrary. Where it is intended by the different owners of several properties that each and every item should be liable to contribute in a manner different from the one described in sec. 82, it would be open to them to agree among themselves to that effect. This section enunciates a rule to be applied only where the mortgagors among themselves did not come to any terms. But the Legislature leave it to the parties to the transaction to lay down any different rules for themselves if they wanted any such different rule—*Aziz Ahmad v. Chhote Lal*, 50 All. 569, 109 I.C. 38, 26 A.L.J. 298, A.I.R. 1928 All. 241 (247). The rule under this section may be modified by the terms of a contract refusing contribution.

Thus, although all the properties may be originally equally liable for the mortgage-debt, this liability may be altered by mortgage-decree or by an arrangement made between the parties by which the burden of the debt may be thrown primarily on some of the properties, and the other properties may be made liable only if the debt is not realised by the sale of the first-named properties—*Satyakripal v. Gopikishore*, 6 C.W.N. 583; see also *Induru v. Kakarala*, (1940) 2 M.L.J. 484, 1941 Mad. 66, 1940 M.W.N. 1002. Where a mortgaged property is sold in two portions to two purchasers, one of whom purchases without notice of the mortgage and with a covenant against incumbrances, and the other person purchases with an *express undertaking to pay off the entire mortgage*, the latter purchaser, if he discharge the entire incumbrance, is not entitled to obtain contribution from the other purchaser—*Kamala v. Chaturbhuj*, 8 Pat. 585, A.I.R. 1929 Pat. 664 (676), 120 I.C. 17. A mortgaged properties X and Y to B. Subsequently, A sold property X to C and out of the consideration left sufficient money with the vendee to redeem B's mortgage. Afterwards the property Y was sold in execution of a decree against A and was purchased by D. C failed to redeem B's mortgage, and B brought a suit on his mortgage and got a decree; C paid the decretal amount and sued D for contribution. *Held* that C was entitled to contribution as against D. D was not entitled to enforce the agreement between C and A to redeem B's mortgage, being a stranger to the agreement. The auction sale to D gave rise to no covenant attaching to the property which could pass upon a sale of that property—*Charan Singh v. Ganeshi Lal*, 24 A.L.J. 401, 94 I.C. 1048, A.I.R. 1926 All. 352, affirmed by the Privy Council in *Ganeshi Lal v. Charan Singh*, 52 All. 358 (P.C.). 1930 A.L.J. 753, 24 C.W.N. 661 (666), 124 I.C. 911, A.I.R. 1930 P.C. 183. See also *Mohamed Inamulla v. Aisha Bibi*, 24 A.L.J. 714, 96 I.C. 765; *Sonaji v. Krishna Rao*, 27 N.L.R. 258, A.I.R. 1931 Nag. 172. In the case of *Ganeshi Lal v. Charan Singh*, *supra*, the purchaser purchased the property subject to the mortgage and paid the price on that footing and the benefit of the contract between A and C did not pass to him, the purchaser being no party to the contract (see pp. 184 and 185 of A.I.R. 1931 P.C. p. 183). But had the purchaser purchased the property from the mortgagor free from incumbrance the position would have been different, that is, he would not be liable to contribute as the benefit of the mortgagor's contract would have passed to the purchaser, and it would have been a "contract to the contrary" within the meaning of this section—see *Isri Prasad v. Jagat Prasad*, A.I.R. 1937 Pat. 628 (630), 16 Pat. 557, 172 I.C. 187 and *Ganeshi Lal v. Charan Singh*, *supra*, at p. 185. But see *R. Ananthuya Holla v. Thimaju*, A.I.R. 1956 Mad. 293 where it has been held that the contract runs with the land.

The words "in the absence of a contract to the contrary" as they stood before the amendment in 1929 relate to a contract to which the mortgagee is a party. Such a contract between co-mortgagors only would not excude the operation of this section. The amendment has not altered the law—*Damodarasami v. Govindarajulu*, A.I.R. 1943 Mad. 429 (F.B.). (1943) 1 M.L.J. 291. These words mean the contract between a mortgagor and a mortgagee. Thus where in a mortgage jointly executed by A and B there is a provision that the entire debt shall be recoverable from A's property first, and if it is not sufficient, then from B's property,

it amounts to a "contract to the contrary". In such a case if the entire debt is satisfied from A's property, there can be no contribution from B—*Official Receiver v. Murali Mohan*, A.I.R. 1949 Mad. 19, (1949) 1 M.L.J. 473. Where there was no personal covenant as between the mortgagors or any "contract to the contrary", the plaintiff could not claim separate personal reliefs against the defendants—*Kedar Lal v. Hari Lal*, A.I.R. 1952 S.C. 47. See the next case where it has been held that the expression "contract to the contrary" is not necessarily a contract between the mortgagor and the mortgagee. The expression is general and may refer to any contract. In a majority of cases the mortgagee has no interest at all in the question of contribution. Where in a mortgage-deed executed by three persons there is an agreement between the mortgagors that the money borrowed should go to the two mortgagors and the third mortgagor was merely in the position of a surety, and the debt is paid off by one of the two mortgagors, he is not entitled to contribution from the third mortgagor—*Khudawand v. Narendra*, A.I.R. 1936 All. 258 (263), 58 All. 548, 163 I.C. 117; *Thoppai v. Venkatarama*, A.I.R. 1936 Mad. 106, 59 Mad. 121, 162 I.C. 977. The expression "contract to the contrary" includes a contract between the mortgagor and purchaser of the equity of redemption of another portion of the mortgaged property, if the benefit of the contract has been assigned to him—*Muthusami v. Arasayee*, A.I.R. 1936 Mad. 901 (903), 44 M.L.W. 447; *Bava Sahib v. Krishna Boyan*, A.I.R. 1936 Mad. 898. The words "contract to the contrary" apply also to contracts between the mortgagor and mortgagee—contracts for example, under which some of the mortgaged properties were to be liable in the first instance and others were only to be liable in the event of the security of those properties proving insufficient—*Subramania v. Natesa*, A.I.R. 1936 Mad. 113, 160 I.C. 686. Out of several properties covered by the same mortgage one was sold to a person who agreed that he would pay off the entire mortgage and out of the consideration retained sufficient money to pay off the dues. The mortgagee subsequently purchased from the mortgagor another of the mortgaged properties but in the conveyance it was not stated that he was purchasing the property subject to incumbrance, on the contrary it was stated that the first purchaser had undertaken to pay off the entire mortgage-debt and the mortgagee was entitled to have the money from him, and it also appeared that the mortgagee had paid the full value of the property. The first purchaser made delay in payment and the consequence was that a larger amount was due on the mortgage than was retained by him: *held* that the first purchaser was not personally liable for the debt, but the property which he had purchased from the original mortgagor was liable for the entire mortgage-debt and neither the mortgagee nor the owners of the other properties which had been mortgaged were liable to contribute—*Nirupama v. Surabala*, 42 C.W.N. 1004, A.I.R. 1938 Cal. 618; *Rambhadrachar v. Srinivasa*, 24 Mad. 85; *Sonaji v. Krishnarao*, supra. The contract may be entered into either at the time of the mortgage or afterwards—*Rama v. Manak*, 7 Bom. L.R. 191.

A mere decision of an executing court settling in a sale proclamation the order in which the mortgaged properties are to be sold is not a contract to the contrary, hence such decision cannot alter the statutory liability under this section—*Subbiah Chettiar v. Seeranga Chet-*

tiar, A.I.R. 1955 Mad. 557. P, the purchaser of a part of a property with two encumbrances, viz., a decree debt in favour of K and a mortgage debt in favour of M, agreed to discharge both the debts. P did not discharge the mortgage of M and to discharge the decree debt of K executed another mortgage in favour of K. In execution of K's mortgage decree the portion sold to P was purchased by K. M's assignee in execution of the decree on M's mortgage threatened to put to sale the unsold portion in hands of the vendor, who paid off the decretal amount and thereafter sued K and the heirs of P to recover the amount so paid: *Held* that the vendor was entitled to recover the entire amount from K because P, whose interest was acquired by K agreed to pay off the mortgage of M—*Ummini Amma v. Koshy Iype*, A.I.R. 1967 Ker. 77.

494. First para :—This para has been amended in order to apply the rule of contribution where a mortgaged property is subsequently subdivided.

The words "shares in" are intended to make it clear that this para applies to cases where property is owned by several owners but has not been physically partitioned—*Report of the Select Committee* (1929).

In other words, the rule of contribution applies not only where several properties are mortgaged and the owner of one of them is compelled to satisfy the whole mortgage-debt, but it also applies where only one property held by several co-owners is mortgaged and the portion of one co-owner is made to satisfy the mortgage.

In this para two improvements have been made by the amendment of 1929: *First* the section has been made to apply not only where several properties are mortgaged, but where the mortgaged property is subsequently divided; and *secondly* it fixes the date of the mortgage as the date at which the required valuation should be made—*Damodarasami v. Govindarajalu*, A.I.R. 1943 Mad. 429 (F.B.), (1943) 1 M.L.J. 29. Where several properties belonging to different mortgagors are mortgaged a person acquiring the interest of one or more of the mortgagors will be bound by an agreement between the mortgagors *inter se*—*ibid*. Where the mortgaged property is owned by several persons having separate rights, the release of a part does not exempt that part from the liability to contribute—*Shah Ram Chand v. Parbhu Dayal*, 47 C.W.N. (P.C.), A.I.R. 1942 P.C. 50.

Where in a proceeding under the U. P. Encumbered Estates Act the entire mortgage debt has been realised from one of the judgment-debtors, a suit by him for contribution against his co-debtors maintainable, although he has not impleaded them to get the debt apportioned in the said proceedings—*Sheodan v. Ramesh*, A.I.R. 1950 All. 53, 1949 A.L.J. 469. If the effect of the mortgagee releasing a portion of the mortgaged property is to place extra burden on one of the mortgagors, he can sue for contribution—*Nripendra v. Naumoni*, A.I.R. 1953 Ass. 82, I.L.R. (1952) 4 Ass. 118. A co-mortgagor redeeming a simple mortgage and suing the other mortgagors for contribution can stand on the redeemed mortgage, and if he cannot, he may rely on a charge—*Sheosaran v. Amla C. C. Society*, A.I.R. 1945 Pat. 192, 23 Pat. 953. Where one co-mortgagor redeems the mortgaged property by paying less than the amount

actually due, the other co-mortgagors can claim possession of their share by paying the proportionate share of the amount actually paid—*Ganeshi Lal v. Joti Parshad*, A.I.R. 1949 E.P. 254. See in this connection *Rameshwar v. Devendra*, A.I.R. 1944 Pat. 179, 22 Pat. 637.

Where the original mortgagor died and the property came into the hands of his representatives, and one of them satisfied the entire mortgage-decree obtained by the mortgagee, it was held under the old section that his suit for contribution against the other representatives did not fall under this section, as there was but *one* property mortgaged—*Nawab Jahanara v. Mirza Shujauddin*, 9 C.W.N. 865 (867). This is no longer good law in view of the above amendment.

This section refers expressly to a case where the mortgaged property is subsequently divided into shares held separately and not merely to a case where several properties are mortgaged—*Narayanan v. Nallammal*, A.I.R. 1942 Mad. 685 (F.B.), (1942) 2 M.L.J. 525.

The rule of contribution enunciated in this section is akin to the rule contained in sec. 95, with this difference that the former section supposes a case where the mortgage-debt is realised by the mortgagee by a forced sale of the property of one of several co-owners, whereas in the latter section (95) the case is one of redemption of the mortgaged property by one of several co-owners in the usual way. But the right to claim contribution is the same in both cases. See *Dhakeshwar v. Harihar*, 21 C.L.J. 104, 27 I.C. 780 (783).

Where the owner of a portion of the property comprised in a mortgage, in order to save his share from sale, has satisfied a decree obtained by the mortgagee on the mortgage, he is entitled to claim contribution from the owner of another portion of the mortgaged property—*Chagandas v. Gansing*, 20 Bom. 615; *Purbi v. Hardeo*, A.I.R. 1936 Oudh 169 (170), 159 I.C. 1049; *Md. Mian v. Bharat Singh*, A.I.R. 1930 Oudh 260 (264), 5 Luck. 727, 125 I.C. 402. The purchaser of a share in a mortgaged estate, who has paid off the whole mortgage-debt in order to save the estate from foreclosure or sale, can claim from each of the other co-mortgagors a contribution proportionate to his interest in the property—*Hira Chand v. Abdul*, 1 All. 455 (456); *Danappa v. Yamnappa*, 26 Bom. 379. Where persons are suing as owners of one property subject, with property of other persons, to a common mortgage, they are, having paid off the mortgage entitled to call on the owners of the other property to bear their proportion of the burden. It is, however, essential for the plaintiffs to allege and prove a mortgage affecting both their lands and also lands of the defendants—*Kamta v. Chaturbhuj*, A.I.R. 1934 P.C. 98 (100), 13 Pat. 310, 61 I.A. 185, 38 C.W.N. 575, 148 I.C. 486.

A, an eight-anna co-sharer in a tenure, mortgaged his interest to the landlord who obtained a mortgage-decree against that half share. He also obtained rent-decrees against A and his co-sharer B for rent of the entire tenure and when he executed the mortgage-decree, he put up the half share of A to sale and notified at the time of the sale that the properties were being sold subject to a charge for rent under the rent decrees. The decree-holder himself purchased that 8 as. share and thereafter he applied to execute the rent-decree against the half share of B

for the full amount of the decrees: *held*, the result of the whole amount of the rent charge having been notified in the sale proclamation was not that the whole liability passed to the property auction-purchased so as to relieve the other property from liability. The rent-decree should be deemed to have been satisfied to the extent of one-half. But if the whole charge was enforced against either of the properties, the holder of that property would have the right of contribution to the extent of half against the holder of the other property—*Prabhu Ram v. Kameshwar*, 19 Pat. 524, A.I.R. 1940 Pat. 420, 21 P.L.T. 227.

A person executed a simple mortgage of some properties including village C. Subsequently the mortgagor again mortgaged the same properties together with village D in favour of the same mortgagee. The mortgagee obtained a mortgage-decree on the foot of the subsequent mortgage and in execution purchased all the mortgaged properties himself with the exception of village C which was purchased by another person. It was specifically mentioned in the sale proclamation that the properties were subject to the earlier mortgage. Then the mortgagee brought a suit against the purchaser of C village for contribution: *Held*, that the effect of purchase by the mortgagee was to break up the integrity of the mortgage and a portion of the debt which bore the same ratio to the whole amount of debt as the value of the property purchased by the mortgagee bore to the value of the whole property comprised in the mortgage was discharged. It did not follow that the entire liability under the mortgage was wiped off because the mortgagee himself purchased some items of the mortgaged property. The purchaser of C village was therefore liable for contribution—*Md. Abdul v. Baldeo*, A.I.R. 1939 All. 86. (87).

A purchaser of one of the mortgaged properties getting a subsequent mortgage-sale in respect of all the properties set aside can sue for contribution for the amount which he has paid to satisfy the mortgage-debt which is the amount in the sale proclamation, so that the interest included therein is also payable, but not the 5 per cent. paid to the disappointed purchaser as it cannot come under this section—*Krishnaswami v. Janakalaxmi*, A.I.R. 1934 Mad. 189, 148 I.C. 217.

Where several parcels of property are mortgaged to secure one debt, every parcel is liable to the mortgagee for the whole amount of the debt; but as between themselves each parcel is liable to contribute to the debt in the proportion which its value bears to the value of the whole property comprised in the mortgage. So also, every person who purchases one of those properties incurs a liability to that extent—*Bisheshur v. Ram Sarup*, 22 All. 284 (289) (F.B.). If the mortgagee purchases the equity of redemption (either by private sale or at Court sale) in a portion of the mortgaged property, he cannot proceed against the remaining properties in respect of the full amount of the debt, but the portion purchased by him must contribute towards the debt, *i.e.*, must be chargeable with a proportionate part of the debt. The purchase will discharge a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the entire property comprised in the mortgage—*Bisheshur v. Ramsarup*, 22 All. 284 (F.B.); *Ponnambala v. Annamalai*, 43 Mad. 372 (379) (F.B.); *Lakshmidas*

v. *Jamnadas*, 22 Bom. 304; *Krishna Chandra v. Pabna Model Co.*, 59 Cal. 76, 137 I.C. 260, A.I.R. 1932 Cal. 319; *Mir Eusuff Ali v. Panchanan*, 15 C.W.N. 800 (803), 6 I.C. 842; *Sabir v. Rirasat*, 1929 A.L.J. 1162, A.I.R. 1929 All. 696 (697); *Gian Singh v. Atma Ram*, 34 P.L.R. 532, A.I.R. 1933 Lah. 374; *Murli v. Sheo Dat*, A.I.R. 1931 All. 625 (627), 1931 A.L.J. 349. For the application of the doctrine of contribution it is immaterial whether the payment in respect of which contribution is claimed has been made voluntarily to avert a legal process or has been enforced by sale of the claimant's property—*Md. Mian v. Bharat Singh*, A.I.R. 1930 Oudh 260 (264), 5 Luck. 727, 125 I.C. 402.

Where of the two mortgagors both are made liable in respect of a particular sum, and one of them only for the balance, and the other discharges the joint liability in its entirety, he acquires the right to contribution by reason of such discharge notwithstanding that the liability of the other in respect of the balance remains undischarged. In working out this right of contribution and arriving at the actual amount payable, regard must be had to the principle laid down in *Faqir v. Aziz*, A.I.R. 1932 P.C. 74, 54 All. 199, 136 I.C. 751 (see Note 457, 3rd para)—*Sreeramulu v. Rama Krishnayya*, A.I.R. 1936 Mad. 500, 70 M.L.J. 532, 162 I.C. 828.

A subsequent mortgagee of a portion of the property purchasing under his decree cannot plead that the property in the hands of the mortgagor alone is responsible for the payment of the full amount of a prior mortgage; but the subsequent mortgagee-purchaser and the mortgagor must contribute rateably—*Naubat v. Mahadeo*, 51 All. 606, 1929 A.L.J. 419, 116 I.C. 297, A.I.R. 1929 All. 309 (311), following 22 All. 284 above. The question in such a case is whether the purchase of the property was subject to the entire encumbrance or only to a proportionate charge. The circumstance that the purchase was made at much below its market value has by itself no effect on the right to contribution, but is of evidential value in deciding the question—*Gulzari v. Ali Ahsan*, A.I.R. 1933 All. 929 (931), 147 I.C. 521.

Where several properties are mortgaged, and the sum actually advanced is less than that mentioned in the deed, the equitable method of dealing with the case would be to distribute the reductions of principal over each item of property covered by the mortgage—*Shib Chandra v. Lachmi*, 33 C.W.N. 1091 (1095) (P.C.), A.I.R. 1929 P.C. 243, 119 I.C. 612.

Where part of the mortgaged properties was purchased, subject to the mortgage, at an auction-sale in execution of a simple money-decree against the mortgagor, and then the mortgagee brought a suit on the mortgage and realised the mortgage-debt from the property remaining in the hands of the mortgagor, *held* that the mortgagor had a right of contribution, under this section, as against the auction-purchaser in respect of the amount which the property in his hand had contributed in excess of its rateable share of the liability—*Rama Sankar v. Ghulam Hussain*, 43 All. 589, 63 I.C. 209. Three mortgages were created on the property in 1880, 1889 and 1891. The mortgagor then died and his sons partitioned the mortgaged property into several mahals. The first

mortgagee brought a suit for sale on his mortgage of 1880, obtained a decree, brought to sale the share of H, (one of the brothers) and the mortgage was discharged. Thereafter H brought a suit for contribution and obtained a decree. The other brothers then discharged the later mortgages of 1889 and 1891, and brought the present suit against H, claiming that they also had a charge under sec. 82. *Held* that the plaintiffs were not entitled to a charge; because firstly, it was useless to them to claim any charge against the mahal of H, which had already been sold in discharge of the first mortgage, and secondly, as H's charge took priority from the date of the mortgage of 1880, the plaintiffs, who stood in the shoes of the mortgagees under the mortgages of 1889 and 1891, were puisne to H—*Kashi Ram v. Het Singh*, 37 All. 101 (103,104). Certain properties including a house were mortgaged. Subsequently, the defendant purchased half of the house from the mortgagor who then conveyed the equity of redemption in respect of all the mortgaged properties to the mortgagee. In a suit by the latter to enforce his mortgage by sale of the mortgaged properties, *held* that having regard to the terms of this section, it was improper to order the property to be sold without fixing the proportion of the mortgage-debt chargeable on the house purchased by the defendant—*Maharaja Ramnarain v. Ram Kumar*, 1 P.L.J. 228 (230), 36 I.C. 208.

A second mortgagee does not stand in the shoes of the mortgagor. Therefore, where a portion of the property is sold and the sale-proceeds are sufficient to pay off the mortgage over the entire property, the subsequent mortgagee of the portion sold is entitled to sue the holder of the unsold portion for contribution whether he pays cash to discharge the first mortgage or not—*Narayanan v. Nallammal*, A.I.R. 1942 Mad. 685 (F.B.), (1942) 2 M.L.J. 525 overruling *Sesha Ayyar v. Krishna Iyengar*, 24 Mad. 96; *Ayyappan Ramian v. Kunju Vakki*, A.I.R. 1958 Ker. 386.

Where an assignment of a part of the mortgaged properties is made *free from incumbrances*, the assignee is not liable to contribute, as against the assignor, to the payment of the mortgage-debt. To entitle one to contribution from another, the equities must be equal. If, for instance, there was any obligation on the person who paid the encumbrance to discharge it as a debt of his own, he cannot claim anything from that other; and similarly if a mortgagor sells a part of an encumbered estate with a covenant against incumbrance, he cannot claim contribution from the purchaser, because he is himself liable for the whole debt—*Visva Natha v. Vengama*, 19 L.W. 567, A.I.R. 1924 Mad. 749 (753), 78 I.C. 52. See Ghose's Law of Mortgage, 5th Edn., pp. 399, 400.

Interest:—Even if the payment of interest to a person claiming contribution does not come under any specific provision of law, still if general equitable considerations justify the award of interest it is quite open to the Court to award it. The claim being founded in equity, it is within the Court's discretion to decide the rate. Where there has been unnecessary delay to ask for the amount, the claimant is entitled to interest only from the date of his demand—*Kambala v. Goteti*, A.I.R. 1936 Mad. 910, 71 M.L.J. 651. See in this connection *Sheosaran v. Amba C. C. Society*, A.I.R. 1945 Pat. 192, 23 Pat. 953.

495. Ascertainment of value :—This section contemplates that the properties are liable to contribute rateably according to their values at the date of the mortgage and not at a future date—*Narayanan v. Nallam-mal*, A.I.R. 1942 Mad. 685 (F.B.), (1942) 2 M.L.J. 525; *Mardan Singh v. Sheo Dayal*, 27 All. 549; *Gobind Chandra v. Kailash*, 25 C.L.J. 354, 40 I.C. 230; *Jugdeo v. Habibulla*, 12 C.W.N. 107; *Shankar v. Latafat*, 14 A.L.J. 713, 35 I.C. 600; *Bhagwan v. Muhammad Muzhar*, 36 All. 272, 23 I.C. 339; *Md. Abdul Rahman v. Baldeo Sahai*, A.I.R. 1939 All. 86, 180 I.C. 696. If any other date than the date of the mortgage was to be taken as the time at which the properties were to be valued for the purpose of this section, it would follow that a party who being the owner of a portion of the mortgaged property had expended money and labour in improving his property would thereby render himself liable to pay a larger contribution by reason of the fact that he had increased the value of his property. This obviously would be inequitable—*Mardan Singh v. Sheo Dayal*, 27 All. 549. But the Rangoon High Court did not adopt this hard and fast rule and remarked that it might similarly be argued that to take the date as the date of the mortgage would operate hardly on an owner whose property through no fault of his own had very seriously depreciated since the mortgage. Each case must be considered on its special circumstances—*Nyaunglebin Co-operative Bank v. Maung Ba*, 6 Rang. 417, 144 I.C. 290, A.I.R. 1928 Rang. 266. The Bombay High Court laid down that the value would be as at the date of purchase—*Fakiraya v. Gudigaya*, 26 Bom. 88 (98). The prices of the mortgaged properties are to be fixed with respect to the date when the properties were mortgaged—*Rajo Kuer v. Brij Bihari Prasad*, A.I.R. 1962 Pat. 236.

The Legislature has adopted the Allahabad view and amended the section accordingly. "There is some difference of opinion as to whether for the purposes of contribution the value of the different properties or the portions of one property should be calculated as at the date of the original mortgage or at the date of the subsequent transfer. In some cases it has been held that valuation is to be made as at the date of the mortgage irrespective of the price that may have been paid by the purchaser (see 12 C.W.N. 107, 745; 27 All. 549). In a Bombay case, however, the valuation at the date of the sale was adopted (I.L.R. 26 Bom. 88). We propose to provide that the value taken shall be the value as at the date of the original mortgage. This rule has the support of the Judicial Committee who, in assessing contribution to a decree for mean profits, assessed liability at the date of the decree (31 Cal. 597, L.R. 31 I.A. 94)"—*Report of the Special Committee*.

To arrive at the value for contribution purposes of each of several properties on which a particular mortgage is secured, the amount of all prior incumbrances upon such properties must be ascertained and deducted. Where properties A, B and C are all made security for one mortgage, and the property A is subject to a prior incumbrance jointly with properties X, Y and Z, the rateable share to be attributed to A under the prior incumbrance must necessarily be assessed in order to ascertain its value for the purposes of the mortgage. It is incorrect to say that it is only necessary in such case to see what was the total amount of the prior incumbrance to which A was liable irrespective of the ques-

tion whether that liability was to be shared by X, Y and Z—*Faqir Chand v. Aziz Ahmad*, 54 All. 199 (P.C.), 36 C.W.N. 437, 136 I.C. 751, A.I.R. 1932 P.C. 74. See also *Kempe Gowda v. Lakegowda*, A.I.R. 1952 Mys. 99. When a co-mortgagor is suing the other co-mortgagor for contribution upon the allegation that the portion of the mortgaged property in which he is interested has been made to discharge more than its proper share of liability under the mortgage, the Court in assessing contribution has first to ascertain the various items of property in question as they stood at the date of the mortgage; next, the rateable liability of each item for the amount payable under the decree; next, how much each item has contributed to the payment of the decretal amount, disregarding any purchase-money which any of the purchaser has paid or retained, and it should then proceed to apportion the liability between the different items of property—*Bhagwan Singh v. Md. Mazhar Ali*, 36 All. 272.

Where at the date of the mortgage, there was no house on the site but a building had only been begun, and the mortgage-deed described the property as "a house with five rooms, kitchen etc." held, under the special circumstances of the case that the value of the house, though not existing at the date of the mortgage, must be considered in determining the proportionate amounts to be charged on the various mortgaged properties—*Nyaunglebin Co-operative Bank*, supra.

For the purpose of satisfactorily ascertaining the value of the different items of property, all persons in whom the mortgaged property is vested should be made parties in a suit for contribution—*Shankar Lal v. Latafat Ali*, 14 A.L.J. 713, 35 I.C. 600; and the plaintiff ought to ask for a definement of the respective liabilities of the several defendants. He is not entitled to a decree for a consolidated amount against the defendants jointly—*Murli v. Sheo Dat*, A.I.R. 1931 All. 625 (628), (1931) A.L.J. 349. Section 82 has solely to do with distribution of the burden on the properties in a case where no other question as to who had the benefit of the money in the beginning or similar complication arises. The question how much money one man owes another must be first determined with reference to the transactions between them, and one has next to see on which item it can be made a charge with reference to this section—*Thoppai v. Venkatarama*, A.I.R. 1936 Mad. 106 (109), 59 Mad. 121, 163 I.C. 977.

The word 'incumbrance' in the old section has been replaced by the words "mortgage or charge". 'Incumbrance' was nowhere defined in this Act, and in *Aziz Ahmad v. Chhote Lal*, 50 All. 569, 109 I.C. 38, A.I.R. 1928 All. 241 (246), it was interpreted as having a larger meaning than a mere mortgage; it might mean any claim, lien or liability, so as to include, say, a permanent lease carved out of a mortgaged property. The words "amount of any other incumbrance" did not necessarily mean the proportionate mortgage-money according to the rule of contribution.

496. Para 2 :—It is not the law that this section applies only where the mortgages are made by the same person. It says that at the time when one of the properties is sold and this section is sought to be invoked, the two properties should be owned by the same person—*Chunilal v. Srinivasa*, A.I.R. 1944 Mad. 276, 1944 M.W.N. 49. The obligation

under this section is not personal but is attached to the properties. The owner thereof has the option either to pay his rateable share to let it be realised from the properties—*Gopinath v. Raghubans*, A.I.R. 1949 Pat. 522, 30 P.L.T. 277; *Cheeru Elayachi v. Seemon Chacko*, A.I.R. 1966 Ker. 139. Any reduction of the liability of the mortgage by the appropriation of the rateable value fixed under this section would not enure to the benefit of the mortgagor—*Sathiraju v. Venkata Rao*, A.I.R. 1953 Mad. 873. Where there is no fraud the purchase by the mortgagee of some of the mortgaged properties discharges that part of the mortgage debt which bears the same ratio to the whole mortgage-debt as the value of the items purchased bears to the value of the entire mortgaged properties—*Raghavachariar v. Kandaswami*, A.I.R. 1947 Mad. 277, (1947) 1 M.L.J. 105. See in this connection *Pandurang v. Shrihari*, A.I.R. 1949 Nag. 155, I.L.R. 1948 Nag. 595.

Where of two properties belonging to same owner, one is mortgaged to secure one debt, and then both are mortgaged to secure another debt, for the purpose of apportioning the liability of the respective properties in regard to the subsequent mortgage, the value of the two properties must be taken into account and credit given for the amount due upon the earlier mortgage out of the value of the property comprised in the subsequent mortgage. Where the amount due under the earlier mortgage exceeds the value of the property comprised in that mortgage, the necessary result is that the whole of the amount of the second mortgage is recoverable from the other property comprised in the latter mortgage—*Ghulam Hazrat v. Gobardhan*, 33 All. 387, 9 I.C. 933. Where a person as owner of one of several properties subject to a charge pays the amount due thereunder, he can recover from the rest of the charged properties the proportionate share of the amount which they are liable to contribute under this section—*Maddipatla v. Ramvarapu*, A.I.R. 1936 Mad. 293, 162 I.C. 304.

Last Para :—The last para declares that the right of contribution shall be subject to the rule of marshalling. That is, where marshalling and contribution might conflict with each other, marshalling is to prevail. Shephard and Brown, 7th Edn., p. 346.

The word 'second' has been replaced by the word 'subsequent'. This is consequential to a similar amendment made in sec. 81 (*Report of the Special Committee*).

497. Contribution whether creates a charge :—Para 1 of this section enunciates the general rule as regards the apportionment of liability between the several properties whether belonging to one or several owners when they are mortgaged to secure one debt. The provision that the properties are liable to contribute rateably clearly implies that their liability constitutes a charge upon such properties. Further the provisions of sec. 82 read with sec. 100 clearly give rise to a charge against such portions of the mortgaged property as have not discharged their proportionate share of the liability—*Nisar v. Manzur*, A.I.R. 1935 Oudh 245 (248), 153 I.C. 267. Where on a partition among brothers a mortgage-debt due by the family is apportioned and there is a covenant by which a defaulting member's share will be liable for any excess amount paid by another

member, a charge is created over the property of the former for such amount paid by the latter and he can enforce the charge against a purchaser of the former's property who has actual or constructive notice of the covenant—*Abdul v. Abdul*, A.I.R. 1933 Mad. 715, 65 M.L.J. 390. The liability to contribute to the common burden attaches to the properties subject to that burden, and not personally to the owners of these properties. Consequently, these properties are made security for the payment of the amount of re-imbursement, and a charge is created on them as defined in sec. 100—*Ibn Hasan v. Brijbhukhan*, 26 All. 407 (443, 444); *Bhagwan Das v. Karam Husain*, 33 All. 708 (716) (F.B.); *Danappa v. Yamappa*, 26 Bom. 379; *Sesha v. Krishna*, 24 Mad. 96 (107); *Har Prasad v. Raghunandan*, 31 All. 166 (168); *Sabir v. Rirasat*, 1929 A.L.J. 1162, A.I.R. 1929 All. 695 (698); *Muhammad Mian v. Bharat*, 7 O.W.N. 401, A.I.R. 1930 Oudh 260 (263), 125 I.C. 402. A contrary view has been taken in *Nawab Jahanara v. Mirza Shujaiddin*, 9 C.W.N. 865 (867). Both before the amendment in 1929 and now the liability to contribute is a liability which is imposed upon the land and therefore is not a personal liability—*Narayanan v. Nallammal*, A.I.R. 1942 Mad. 685 (F.B.), (1942) 2 M.L.J. 525. Since the liability to contribute is not a personal liability, but is made a charge on the other properties which have not discharged their own share of the debt, a purchaser of a portion of such properties is liable to contribute rateably—*Mumammad Mian v. Bharat*, supra.

But where the sale of the property of one of the co-mortgagors has not satisfied the entire mortgage-debt, he has no right to claim contribution, and consequently has no charge on the properties of the other co-mortgagors in respect of the excess realised by sale of his property over and above its rateable share of the debt—*Ibn Hasan v. Brijbhukhan*, 26 All. 407 (432, 433) (F.B.). But if the properties of some of the mortgagors are sold and the mortgage is fully paid off by the sales, one of the mortgagors can maintain a suit for contribution, and can claim a charge on the other properties, although the mortgage has not been satisfied by sale of his property alone—*Bhagwan Das v. Karam Husain*, 33 All. 708 (716, 717) (F.B.), following *Muhammad Yahiya v. Rashiduddin*, 31 All. 65.

If the property against which the charge is sought to be enforced has been sold, the lien is transferred to the surplus sale-proceeds—*Bhagwan Das v. Karam Husain*, 33 All. 708 (725) (F.B.).

Limitation:—For a suit for contribution under this section the period of limitation is 12 years from the date of payment and not from the date when the original mortgage money became payable—*Rameswar v. Ramnath*, A.I.R. 1950 Pat. 174, 28 Pat. 955. A co-mortgagor by paying the mortgage-money acquires independently of sec. 95 a charge under secs. 82 and 100 in regard to the amount paid by him in respect of the mortgage over their shares. Consequently, the period of limitation for a suit by one of several heirs of a mortgagor by one of the several subsequent transferees of the mortgaged property who has paid the entire mortgage-debt for contribution against the other heirs or transferees in which the sale of the defendants' share in the mortgaged property is sought, is 12 years under Art. 132 of the Limitation Act, from

the date of payment and not from the date when the original mortgage-money became payable—*Brij Bhukhan v. Bhagwan Datt*, A.I.R. 1942 Oudh 449 (F.B.).

Deposit in Court.

83. At any time after the principal money payable in respect of any mortgage has become due and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any Court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage.

The Court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition (verified in manner prescribed by law for the verification of plaints) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount and on depositing in the same Court the mortgage-deed and all documents in his possession or power relating to the mortgaged property, apply for and receive the money, and the mortgage-deed and all such other documents, so deposited shall be delivered to the mortgagor or such other person as aforesaid.

Where the mortgagee is in possession of the mortgaged property the Court shall, before paying to him the amount so deposited, direct him to deliver possession thereof to the mortgagor and at the cost of the mortgagor either to re-transfer the mortgaged property to the mortgagor or to such third person as the mortgagor may direct or to execute and (whether the mortgage has been effected by a registered instrument) have registered an acknowledgment in writing that any right in derogation of the mortgagor's interest transferred to the mortgagee has been extinguished.

Amendment :—The following amendments have been made by sec. 44 of the T. P. Amendment Act (XX of 1929) :—(1) The words "payable in respect of any mortgage has become due" have been substituted for the words "has become payable"; (2) certain words relating to documents have been added at the end of the second para; (3) the third para has been newly added. These amendments have been made to bring this section into a line with sec. 60.

497A. Object of section :—This section has been enacted in the interests of the mortgagor, so that the mortgage might be discharged by him without any litigation—*Anandi Ram v. Dur Najaf*, 13 All. 195. It confers an exceptional privilege on mortgagors, which other debtors do

not enjoy, of paying the amount of their debt into Court and so relieving themselves of any further liability—*Debendra v. Sona*, 26 All. 291.

The section deals with the right to deposit the mortgage-money in Court and not with the right to redeem by payment direct to the mortgagee or the right to bring an action for redemption—*Jagdeo v. Mahabir*, A.I.R. 1934 Pat. 127, 13 Pat. 111, 153 I.C. 602.

A mortgagor has got three remedies: He may, after the mortgage-money has become due and before his right to redeem is barred, either (1) pay or tender privately to the mortgagee, at the proper time and place, the amount due on the mortgage under section 60 and recover the mortgaged property; (2) deposit that amount in Court under section 83, and claim redemption in that way; or (3) sue for redemption under sec. 91—*Het Singh v. Bihari*, 43 All 95 (100); *Sardar Karan Singh v. Raja Muhammad Siddik*, 4 O.C. 387B.

This section is confined only to money due under a mortgage. It has no application to money due under a simple money-bond—*Eshahug Molla v. Abdul Bari*, 31 Cal. 183 (185).

Scope :—The procedure prescribed in this section is applicable in the case of a charge also—*Krishnaraya v. Sankayya*, A.I.R. 1949 Mad. 615, (1949) 1 M.L.J. 196. An inquiry as to the sum due by the mortgagor to the mortgagee is beyond the scope of this section. The mortgagor makes the deposit and the mortgagee has to say whether he accepts the money in full discharge of the mortgage or not—*Ramakrishnaiah v. Sri Krushi Vidyalaya Sangam*, A.I.R. 1945 Mad. 46.

498. Deposit :—The deposit under this section must be made unconditionally. Where the mortgagor says that the money should not be paid unless the mortgagee produces certain deeds, it is not a valid deposit—*Nanu v. Manchee*, 14 Mad. 49. Where the mortgagor deposited the amount in Court but did not admit that the plaintiff was the person entitled to the money, and prayed that the amount should be paid to the plaintiff if it was proved to the satisfaction of the Court that he was the person entitled to recover the mortgage-debt, held that the tender into Court amounted to a conditional tender and not therefore valid in law—*Anandrao v. Durgabai*, 22 Bom. 761. But a deposit made under this section is good when made in good faith for being taken over by the mortgagees, although the mortgagors in their application purported to reserve their rights to dispute whether the mortgagees were entitled to the entire amount deposited—*Salik Ram v. Ashiq Hussain*, 4 O.C. 355. That is, a tender made under protest reserving the right of the debtor to dispute the amount due (and not the title of the creditor to receive the amount) is a good tender, if it does not impose any condition on the creditor—*Greenwood v. Sutcliffe*, (1892) 1 Ch. 1. A deposit accompanied by a petition that the money might be retained in Court until the disposal of certain objection made by the mortgagor, is not a valid tender—*Goluckmonee v. Nubungo*, W.R. Special Number (F.B.) 14. But a deposit accompanied with a demand for a registered receipt (to which the mortgagee agrees) and the restoration of certain title-deeds, is not a conditional deposit, and is therefore valid—*Kora Naya v. Ramappa*, 17 Mad. 267. But a condition requiring a return of certain documents to which the mortgagor is not entitled, attached to a deposit

under this section, vitiates the tender—*In re Achath Sankaran*, 29 I.C. 586. This section does not contemplate a conditional deposit; but if the deposit is considered valid, it cannot be treated as if the condition attached did not exist. Hence a mortgagee is entitled to accept the money deposited subject to the condition imposed by the mortgagor—*Dhanukdhari v. Jethan Singh*, A.I.R. 1940 Pat. 18, 184 I.C. 225.

As stated above, a deposit made under protest is not invalid if it merely reserves the right of the debtor to dispute the amount due—*Greenwood v. Sutcliffe*, [1892] 1 Ch. 1. But where the mortgagor in making the deposit denies the mortgagee altogether and threatens to sue to recover back the money so deposited, the deposit cannot be held to be valid—*Abdoor Rahman v. Kistotal*, 6 W.R. 225. Where the deposit is accompanied with a denial of the mortgagee's right to receive it, and with a threat that legal proceedings will be taken against him if he takes the money out of Court, the tender is invalid and does not prevent a foreclosure—*Makhan Kuar v. Jasoda*, 6 All. 399; *Prannath v. Rookia Begum*, 7 M.I.A. 323 (343). But where in depositing the money the mortgagor informs the Court that he has other claims against the mortgagee, unconnected with the mortgage, in respect of which he can take legal proceedings, the validity of the deposit is not affected—*Salik Ram v. Ashiq Hussain*, 4 O.C. 355.

This section shows that just as the right to make the deposit is optional with the mortgagor, so it is optional with the mortgagee to accept it in satisfaction of his dues. It is only when the mortgagee has done so the deposit becomes effective for the purpose of extinguishing the liability of the one party and the right of the other. The mortgagee is not bound to accept the deposit, and if, and so far as, that is not done, the mortgage necessarily subsists—*Haray Krishna v. Sashi Bhusan*, A.I.R. 1941 Cal. 18 (*per* Biswas, J.). The words "as hereinafter provided" in sec. 67, *ante*, make it perfectly clear that a deposit under sec. 83, in so far as it is contemplated in sec. 67 must mean a deposit which has been accepted and acted on by the mortgagee in terms of sec. 83 and not a mere deposit irrespective of how it is disposed of—*Ibid*.

The stipulation in the mortgage-bond was that the mortgage could be discharged only by payment beyond the fruit season and the deposit was made in Court while the fruit season was still on: *held*, the deposit was valid inasmuch as it was quite open to the mortgagee to wait till the fruit season was over before he withdrew the deposit in absence of proof that the mortgagor made a condition of the deposit that the mortgagee was to take out the money forthwith in satisfaction of his dues—*Ibid*.

Where a deposit is made by two mortgagors jointly and severally liable to pay the mortgage-debt, no presumption arises that both of them paid equally or that one of them paid the whole amount, and it is for the claimant to prove what share of money he is entitled to receive—*Lal Behary v. Bimala*, A.I.R. 1935 Cal. 782, 159 I.C. 420.

Where a transaction is an out and out sale with a condition of repurchase within a stipulated time, a deposit in Court under this section on the footing that the transaction is a mortgage by way of conditional sale whereupon notices are issued on the vendee, fulfils the requirements of a valid tender through Court—*Bijoy Gopal v. Nabin Bala*, 43 C.W.N. 423.

Tender :—Mere readiness to pay the debt is not sufficient. The mortgagor must deposit the money in Court—*Gopiram v. Shankar*, A.I.R. 1950 M. B. 72. The mortgagee is not entitled to refuse tender of the mortgage amount made by the purchaser of the equity of redemption on the ground that the purchaser has not paid the full price to the mortgagor—*Venkatd Perumal v. Ratnasabha*, A.I.R. 1953 Mad. 821. The mortgagee was deemed to have waived the actual production of the money when he insisted that he would not accept it and denied the mortgagor's right to redeem before expiry of 3 years. Hence there was a legal tender in this case—*Bhagwat v. Ganga Din*, A.I.R. 1947 All. 68, I.L.R. 1947 All. 25. See also *Narain v. Rikhob*, A.I.R. 1952 Raj. 72.

499. Deposit, when can be made :—Depositing the money due on a bond in Court, *before* the due date, is no valid tender of the debt—*Eshahuq Molla v. Abdul Bari*, 31 Cal. 183.

According to the terms of this section, the deposit is to be made "at any time after the principal money has become due", and as these words occur also in sec. 60, it follows that the right of deposit arises only when the right of redemption accrues. Where, therefore, a consent-decree provided that if the mortgagor committed default in the payment of a fixed amount within a particular date, the mortgagee should be entitled to take possession; default was made in payment on that date, but the mortgagee did not obtain possession on that date but on a subsequent date, before which however, the mortgagor deposited the amount in Court; held that since according to the consent-decree the right to redeem could only accrue after the mortgagor had delivered possession to the mortgagee, the mortgagor could not defeat the right of possession which had accrued to the mortgagee, by making a deposit of the mortgage-amount before delivery of possession. The deposit was therefore premature and invalid, and the provisions of secs. 83 and 84 could not apply to the case—*Ram Sonji v. Krishnaji*, 26 Bom. 312. This case has been followed by the Madras High Court in *Bayya Seo v. Narasinga*, 35 Mad. 209, though here the facts are somewhat different: It was provided in the mortgage-bond that the mortgagee was to remain in possession for a certain number of years and that if on a specified date (21st March 1905) at the end of the period the mortgagor failed to discharge the debt, the mortgagee was to remain in possession for a further term of five years. The mortgagor not only failed to pay the money on the due date (21st March 1905) but also took possession of the property from the mortgagee in May 1905, without discharging the debt. Subsequently he made a deposit of the money in Court under this section. The Madras High Court held that the mortgagor was not entitled to make the deposit. Since he failed to pay on the stipulated date (21st March 1905), he was bound to allow the mortgagee to remain in possession for a further period of 5 years, and he would be entitled to deposit the money after he restored possession to the mortgagee and allowed him to retain possession for that period. The deposit was therefore held to be premature and invalid. But the correctness of this ruling may now be doubted in view of the recent Privy Council decision in *Muhammad Sher Khan v. Seth Swami Dayal*, 44 All. 185. See this case cited in Note 362—(9), *ante*, under sec. 60. Applying the principle of that decision to the Madras case it would follow that the mortgagor had a statutory right of

redemption after the expiry of the stipulated date (21st March 1905) and was entitled to deposit the money on any day after that date, without waiting for a further period of five years according to the stipulation contained in the deed. The deposit was therefore *not premature*, in the light of the Privy Council ruling.

500. Who can deposit :—Under this section, a deposit may be made by the mortgagor or by any person "entitled to institute a suit for redemption". An owner of a share of the mortgaged property is entitled to deposit the mortgage-debt, because he is a person entitled under sec. 91 of the Act to sue for redemption and consequently comes within the words "or any other person entitled to institute such suit". Such a person, in making a deposit under this section, is not bound by the restrictions imposed by the last para of sec. 60. Therefore, an owner of a portion of the mortgaged properties is entitled to make a deposit of the *whole* of the mortgage-debt and redeem the whole mortgage (and not *his own share alone*, as in sec. 60), inspite of the fact that the mortgagee has acquired by purchase a part of the mortgaged properties ; there is no limitation in the language of sec. 83 as in sec. 60—*Subba Rao v. Sarvarayudu*, 47 Mad. 7 (11, 20), 44 M.L.J. 534, A.I.R. 1923 Mad. 533, 72 I.C. 292.

Where the mortgagee has purchased the equity of redemption in some of the mortgaged properties, and one of the mortgagors deposits or tenders the whole mortgage amount, the mortgagee has no right to retain possession after the tender or deposit, and should be made accountable on that basis ; having regard to practical convenience and the scheme of the Transfer of Property Act, the proper course in a case like this would be to determine that amount of the mortgage-debt for which the items purchased by the mortgagee would be proportionately chargeable, and finally settle the question arising between the parties by allowing the mortgagee to retain possession of them on payment of that proportionate amount—*Ibid*, (at p. 16).

A person in whose favour there is only an agreement to sell immoveable property is a person who has no interest in the property, and is consequently not a person who is entitled to file a suit for redemption under sec. 91 ; he cannot therefore deposit any money under sec. 83—*Mayappa v. Kolandaivelu*, 1926 M.W.N. 459, A.I.R. 1926 Mad. 597, 92 I.C. 715. But if a purchaser of the mortgaged property has deposited the mortgage-money under the agreement in his sale-deed from a widow which is found to be invalid for want of registration, he is entitled to the equitable relief of claiming that amount from the reversioner before he is allowed to take possession—*Jagdeo v. Mahabir*, A.I.R. 1934 Pat. 127 (130), 13 Pat. 111, 153 I.C. 602.

501. "In any Court" :—A deposit can be made into Court even though according to the mortgage-deed the money is made payable at a certain place—*Sardar Karam v. Raja Muhammad*, 4 O.C. 387.

The deposit should be made in the Court in which he might have instituted his suit for redemption, or in which the mortgagee might have instituted his suit for enforcement of his security under sec. 67. Therefore, after one Court has taken cognizance of a suit by the mortgagee for the enforcement of his mortgage, the mortgagor cannot deposit the mortgage-

amount in another Court—*Bayya Sgo v. Narasinga*, 25 Mad. 209, 10 I.C. 393.

502. To whose credit :—Ordinarily, it is the duty of the mortgagor to find out the real mortgagee and to deposit the money to his credit. But where the latter allowed his benamdar to be recorded in the Record-of-Rights and the mortgagor made the deposit to the credit of not only the real mortgagees but also the benamdars, the deposit was valid and he was entitled to mesne profits from the date of the deposit—*Narayan v. Kishun*, A.I.R. 1934 Pat. 622, 153 I.C. 1035. Payment under this section must be made to the credit of the mortgagee alone, so that the mortgagee may, on receipt of the notice of deposit, apply to the Court by petition and forthwith obtain payment without the concurrence or sanction of any other person. A deposit of money made payable not to the mortgagee by himself but jointly to him and a third person (even though such person be the mortgagee's pleader) cannot be regarded as unconditional so as to be valid. A mortgagor who makes a payment which involves the necessity of an inquiry by the Court as to the rights of parties other than the mortgagee, cannot be said to have made a valid payment under this section—*Debendra Mohan v. Sona*, 26 All. 291 (294). A deposit of mortgage-money made by the mortgagor to the credit of several persons of whom some alone were entitled to it, while others were not, would not amount to a proper deposit so as to entitle the mortgagor to the benefit of secs. 83 and 84 of this Act, inasmuch as even the persons really entitled could not draw it by themselves—*Madhavi v. Kunhi*, 23 Mad. 510 ; *Ganeshi Lal v. Rohini*, 50 All. 655, 108 I.C. 570, A.I.R. 1928 All. 311 (313). A deposit to be good must be one which would enable the persons entitled to withdraw the money forthwith. Where it is found that one of the persons in whose names the deposit was made is not interested in the mortgage-money, then the deposit cannot be regarded as a valid deposit—*Dulhin Anupa Kuar v. Kameshwar Nath*, A.I.R. 1939 Pat. 415, 20 P.L.T. 167, 183 I.C. 454. If in such a case the mortgage is a usufructuary mortgage and the persons interested refuse to deliver possession on the ground that the deposit is not good; and the person making the deposit files a suit for possession, then since the interested persons cannot withdraw the amount without the consent of the uninterested person, the former are entitled to retain possession until the matter has been judicially determined, and cannot therefore be saddled with mesne profits up to the date of decree in such suit—*Ibid.* Even the fact that the mortgagor *bona fide* believed that the other persons were also entitled to the money, would not protect him.

Under this section the question of good faith cannot arise when it is duty of the mortgagor to deposit the money to the credit of the *real* mortgagees—*Ganeshi Lal v. Rohini*, *supra*. But if there is a dispute among the co-mortgagees as to who is entitled to receive the money and give a valid discharge, and the dispute is of such a nature that it cannot be determined by a layman, the mortgagor can deposit the money and ask the Court to decide and pay the amount to the person who may be entitled. But where there is no such dispute, the mortgagor cannot make any such prayer—*Ottur v. Velia*, A.I.R. 1926 Mad. 1087, 97 I.C. 735. The expression "mortgagee", in this section includes the legal representa-

tives and assigns of the mortgagee. A sub-mortgage is in substance an assignment of the mortgage; a deposit by the mortgagor of the mortgage-money as payable both to the legal representatives of the deceased mortgagee and his sub-mortgagee is valid—*Subba Rao v. Ponnammal*, 46 M.L.J. 74, A.I.R. 1924 Mad. 453 (454, 455), 80 I.C. 363. See sec. 59A.

Where the original mortgagee died and there was a dispute as to the persons entitled to the money, the mortgagor could deposit it to the credit of all the persons claiming the money—*Ram Sumran v. Sahibzada*, 1885 A.W.N. 328. But if the payment is made only to one of the heirs of the mortgagee, it cannot amount to a valid discharge—*Sitaram v. Sridhar*, 27 Bom. 292. Where there were two mortgagees, and the amount was deposited to the credit of the two mortgagees, but one of them was dead (or alleged to be dead, not being heard of for more than 7 years), the Court should consider whether the surviving mortgagee was alone competent to withdraw the money—*Balbhaddar v. Bitto*, 51 All. 1016, A.I.R. 1929 All. 754 (755), 118 I.C. 188. Where there was nothing in the mortgage-deed to indicate that the mortgagees advanced the money otherwise than in their individual capacities and where after the death of one of the mortgagees the mortgagor made a deposit of the full amount due to the account of the surviving mortgagee and to that of the estate of the deceased mortgagee expressly or by necessary implication, impleading his sons and heirs, and it was subsequently found that one of the sons had no right to any part of the mortgage-money, interest ceased to run from the date of the deposit (or possibly from the time when the notice under this section had been served on those entitled to recover the money. On the other hand, if the deposit was made to the account of certain persons named and not to the estate of the deceased mortgagee in such a way that only the persons named would recover the amount deposited, interest would not cease to run if some of the persons named were not entitled to the money—*Ram Gopal v. Lachman*, A.I.R. 1938 All. 423 (426) (F.B.), 176 I.C. 509, (1938) A.L.J. 617.

Where the mortgagee or any one of the mortgagees is a minor incapable of receiving by himself the notice of the deposit by the mortgagor under this section, it is the duty of the latter to get a guardian *ad litem* appointed under sec. 103, and in the absence of such a guardian there can be no valid deposit under this section—*Pandurang v. Mahadaji*, 27 Bom. 23; *Sheo Saran v. Ram Lagan*, 44 All. 64, A.I.R. 1922 All. 355, 64 I.C. 413, 19 A.L.J. 852; *Shivnath v. Manohar*, 22 I.C. 245, 16 O.C. 261; *Appu Pai v. Somu*, 49 M.L.J. 327, A.I.R. 1925 Mad. 1017, 90 I.C. 754; *Gokul v. Chandra Sekhar*, 48 All. 611, A.I.R. 1926 All. 665, 24 A.L.J. 769, 96 I.C. 1; *Kannu v. Indrapal*, 44 All. 102 on appeal 45 All. 273. A deposit in such cases becomes effective only from the date when the minor is properly represented by a guardian—*Suppan v. Rangan*, A.I.R. 1934 Mad. 405 (408), 1938) M.W.N. 356.

503. Amount of deposit :—The mortgagor must deposit the amount remaining due on the mortgage. If he deposits more than the amount due, the deposit is not invalid, on the principle, "*omne majus continet in se minus*" (the greater includes the less)—*Wade's Case*, (1601) 5 Coke's Rep. 114; *Baikunta v. Benode*, 29 C.L.J. 256, 51 I.C. 13; *Subramania v. Narayanaśwami*, 34 M.L.J. 439, 45 I.C. 638. But if the amount deposited is

less than the amount due, the mortgagee is at liberty to ignore it, and it will not have the effect of stopping interest under sec. 84, even though the deficiency is due to a *bona fide* mistake—*Gouri Sankar v. Abu Jafar*, 34 I.C. 690 (692), 3 O.L.J. 204. A deposit is held to be insufficient, even if there is a very small deficiency (e.g., by Rs. 2 only and even though the deficiency is due to a miscalculation on the part of the pleader's clerk and not on the part of the mortgagor himself. In such a case, interest will not cease to run—*Debi Prasad v. Kedar*, 19 A.L.J. 582, 63 I.C. 563 (564). In one case, a deposit falling short by only nine pies owing to a *bona fide* mistake of calculation was held to be insufficient—*Subbai v. Palani*, 30 M.L.J. 607, 34 I.C. 825 (826). But in some cases it has been said that if the mortgagor tenders an insufficient amount in the *bona fide* belief that it is the whole amount due, the tender is not wholly ineffectual but is *valid pro tanto*—*Haji Abdul v. Haji Noor*, 16 Bom. 141 (147); and the mortgagee is entitled to claim interest only on the portion of the amount due which is not covered by the deposit—*Haji Abdul v. Haji Noor*, *supra*. See also *Narsingh v. Achaibar*, 36 All. 36 (39). If, however, the mortgagor making the deposit knew that it was less than what was due and admitted it, then of course the deposit of a less amount than what was due was wholly ineffectual—*Haji Abdul v. Haji Noor*, 16 Bom. 141 (149); *Dixon v. Clarke*, 5 C.B. 365; *Henwood v. Oliber*, (1841) 1 Q.B. 409. An unconditional tender (deposit) of a sum which turns out in the end to be less than what is really due may be valid *pro tanto* if there is a dispute as to the amount due, but a tender of only part of what is admittedly due is of no avail. Though a tender of a smaller amount than that of which an indivisible and entire claim consists may be invalid as a tender, there is nothing to prevent the creditor from accepting the amount tendered in part-payment, and his doing so will not preclude him from afterwards claiming the residue of the amount, provided that the debtor did not make it a condition of his tender that it be accepted in discharge of the whole—*Digambar v. Harendra*, 14 C.W.N. 617 (625), 11 C.L.J. 226, 5 I.C. 165, following *Bowen v. Owen*, (1845) 11 Q.B. 130, 75 R.R. 306.

The deposit must include interest on the principal money up to the date of deposit, and the fact that the mortgagee had obtained a decree for the interest is no ground for not depositing it—*Hewanchal v. Jawahir*, 16 Cal. 307 (P.C.). The mortgagor is bound to pay interest even for the day on which he makes the deposit. If he fails to pay it, the deposit will be treated as insufficient—*Subbai v. Palani*, 30 M.L.J. 607, 34 I.C. 825. (Contra—*Raghub v. Bhobui*, 8 C.W.N. 216, where it has been held that interest cannot be charged for the day on which the money is deposited). Where the mortgagor put in a petition under this section on 3rd August, but actually deposited the money on the 10th August, the interest must be paid up to the latter date. If the interest is paid up to the 3rd August, the deposit is insufficient and invalid, and cannot stop the running of interest under sec. 84—*Mahammadunni v. Parambil*, 2 L.W. 408, 29 I.C. 145. If the deposit is a valid deposit on the date on which it was made, namely, that if interest had been calculated up till the date of the deposit, then all that the mortgagee can say, when notice is served on him, is that some more interest should be allowed to him till the date of the notice and that the amount should also be paid to

him. If the mortgagor refused to pay the amount, the mortgagee might be entitled to refuse to accept the amount; but he cannot refuse to accept the deposit on the ground that the initial deposit was short—*Kushal Singh v. Ram Kishun*, A.I.R. 1937 All. 706 (708), (1937) A.L.J. 757, 171 I.C. 813. The interest to be deposited is the original rate of interest stipulated in the bond, not the enhanced or penal rate of interest stipulated to be paid in case of default in paying the money in due time. This section does not require the deposit of an amount calculated in accordance with the penal provision of a bond—*Ayyakutti v. Periyaswami*, 39 Mad. 579, 30 I.C. 497. *Tara Chand v. Narayan*, 18 N.L.R. 47, A.I.R. 1922 Nag. 199 (200), 65 I.C. 174; *Ram Rao v. Gopala*, 28 N.L.R. 149, A.I.R. 1932 Nag. 169. Where the provision of enhanced interest was found to be penal, the mortgagee was entitled to claim only a reasonable compensation in lieu of interest. It was open to the Court to accept the amount calculated at the original compound interest less 6 pies (by which the amount of deposit fell short) as being reasonable compensation—*Narayanaswami v. Ramaswami*, (1939) M.L.J. 324, A.I.R. 1939 Mad. 503, 1939 M.W.N. 455 relying on *Subramania v. Narayanaswami*, 34 M.L.J. 439, 45 I.C. 638 (*de minimus non curat lex*).

If any interest remains due, the deposit of the principal money alone is not a valid deposit. But if the mortgage is usufructuary and the amount of interest due has to be calculated by taking accounts of the profits under sec. 76, then until the mortgagee in possession gives accounts, the deposit of the principal money only is a valid deposit, and the interest will cease to run thereafter. But the mortgagee will be entitled to be paid the balance of interest preceding the deposit after accounting for the profits received by him—*Bhavani Charan v. Kadambini*, 33 C.W.N. 279 (281), A.I.R. 1929 Cal. 304, 119 I.C. 292.

The deposit must also include such other sums which the mortgagee is entitled to add to the mortgage-money (sec. 72). This section speaks of the "amount remaining due on the mortgage" and not merely "mortgage-money" as referred to in sec. 60. The expression "amount remaining due on the mortgage" is a very wide one and covers any just allowance or costs which can be tacked on under the ordinary law of mortgage—*Nadershaw v. Shirinbai*, 25 Bom. L.R. 839, A.I.R. 1924 Bom. 264 (266), 87 I.C. 129. Thus, where the mortgagees in possession have paid the Government revenue for the mortgagor, they are entitled to treat it as part of the mortgage-money (under sec. 72), and to insist on its being deposited along with the actual mortgage-amount deposited under this section—*Anandi Ram v. Dur Najaf Ali*, 13 All. 195. But money paid by the mortgagee to avert a sale for arrears of rent under sec. 171 of the Bengal Tenancy Act does not become a part of the mortgage-money and the mortgagor is not bound to deposit it also under this section—*Manmatha v. Sarat*, 21 C.L.J. 429, 29 I.C. 929. So also, the mortgagee is not entitled to claim that the compensation or interest which is due to him by the mortgagor on account of the latter's failure to give possession should be deposited along with the mortgage-money under this section—*Allah Baksh v. Sada Baksh*, 8 All. 182; nor is the mortgagor bound to deposit the mesne profits to which the mortgagee may have been entitled owing to his being kept out of possession by the wrongful act of the mortgagor.

—*Rameshar v. Kanahia*, 3 All. 653 (F.B.). So again, the mortgagor need not deposit the value of improvements made by the mortgagee—*Chami v. Anu*, (1916) 1 M.W.N. 160, 32 I.C. 861. A property was mortgaged successively to X, Y and Z for fixed periods. Y did not redeem when he was entitled to do so. Thereupon, Z redeemed the mortgage. Subsequently, Y sued for redemption and got a decree, but obtained possession only through Court. On the expiry of Y's term, Z deposited the mortgage-amount in Court but as Y did not accept the amount, Z sued for redemption. Y contended that the deposit was insufficient as the mesne profits between the date of his redemption-decree and recovery of possession was not also deposited, and in any event sought to enforce it against Z: *held* (i) that Y could not tack on the mesne profits due to him from the first mortgagee to the mortgage-money merely because Z happened to have redeemed the first mortgage; (ii) that granting that the amount could be claimed, it could not be enforced against Z as it was not a covenant running with the land, but only an equity available against the owner personally—*Suppan v. Rangan*, A.I.R. 1938 Mad. 405 (412), (1938) M.W.N. 356.

Where during the pendency of an appeal by the mortgagee from a preliminary decree for sale, a purchaser of the equity of redemption makes a deposit under this section, the sufficiency of such deposit must be justified by the state of things at its date, irrespective of the result of the appeal—*Shib Chandra v. Lachmi*, 51 All. 686 (P.C.), 33 C.W.N. 1091 (1095), A.I.R. 1929 P.C. 243, 119 I.C. 612.

A deposit cannot be made by *instalments*. In the absence of a supulation made between the contracting parties as to the repayment of the sum by instalments, the lender is entitled to decline to receive payment of the sum due to him in instalments, and he can claim that the whole sum due be paid at one and the same time—*Behari Lal v. Ram Ghulam*, 24 All. 461. Even if the mortgagor deposits the money in instalments, the mortgagee is not bound to accept it until the whole amount is thus deposited. Were he to accept any instalment, he would be bound to deliver up the mortgage-deed and thus lose his claim to the balance. See *Balaram v. Nanuram*, 1 C.P.L.R. 154.

504. Notice :—Until the mortgagee gets the notice under this section or the knowledge of the deposit, he has the right to sue to enforce his security. Hence where the mortgagor paid money into Court one day previous to the institution of the suit by the mortgagee, but the notice was not served on the latter before he filed his plaint, and he was unaware of the deposit at the time of filing it, *held* that he was not precluded from proceeding with the suit and obtaining a decree—*Sitaramayya v. Venkataramanna*, 11 Mad. 371.

Service of notice :—Where a mortgagor makes a deposit under this section, it is the duty of the Court to see that the notice of the deposit is duly served upon the mortgagee; it is not the business of the mortgagor to see that this is done—*Nibaran v. Parbati*, 35 C.L.J. 202, 60 I.C. 454. Where the serving peon hands the notice to the mortgagee who reads it but refuses to grant a receipt, the notice is deemed to have been duly served, even if the peon did not suspend a copy as required by O. 5, r.

17 C. P. Code—*Dandbahadur v. Durga Prasad*, A.I.R. 1953 Pat. 346. So long as a guardian *ad litem* is not appointed for a minor, there cannot be any valid service of notice upon the minor—*Jagdeo Mahton v. Ram Bahadur Singh*, A.I.R. 1959 Pat. 457.

Where there is a covenant in a usufructuary mortgage that the mortgagor would redeem the mortgage on the last day of Jeth (22nd June), then, if the mortgagor deposits the mortgage-money in Court, the notice must reach the mortgagee on or before the 22nd June. If, therefore, the deposit was made on the 17th June and the notice of deposit could not be issued by the Court before the 27th June, *held* that the deposit was ineffectual, and the mortgagee was entitled to possession till the last day of Jeth of the next year—*Dwarka Pershad v. Sheoambar*, 15 I.C. 592 (All.). So also, in case of an exactly similar mortgage containing a similar covenant the mortgagor deposited the amount in Court on the last day of Jeth and notice could not therefore have been given to the mortgagee within the month of Jeth; *held* that the deposit was ineffectual, and the decree in the redemption suit brought by the mortgagor would be passed with effect from the last day of Jeth of the next year—*Saiyid Ahmad v. Dharmun*, 43 All. 424 (426), 60 I.C. 760, 19 A.L.J. 259.

Deposit made under this section will operate as a valid tender of the mortgage money only when the notice of the deposit is given to the mortgagee—*Janaki v. Mathiri*, A.I.R. 1952 Tr.-Coch. 236.

505. Deposit made after suit :—A deposit under this section is invalid if made after the institution of a suit by the mortgagee for the recovery of the money due under the mortgage—*Brij Gopal v. Masuda Begam*, A.I.R. 1935 Oudh 93 (94), 10 Luck. 350, 153 I.C. 378; *Rajakrishna Menon v. Sundaran Pillai*, 1963 Ker. L.T. 1031. The fact that the deposit was made before the mortgagor received notice of the institution of the suit, does not make any difference—*Thiagaraja v. Ramaswami*, 35 M.L.J. 605, 48 I.C. 693. Even assuming that deposit could be made after the institution of the suit, it must include the costs incurred by the mortgagee in filing the suit—*Ibid*, followed in *Bala Chengiah v. Subbayya*, A.I.R. 1939 Mad. 200 (202), 1939 M.W.N. 76, 183 I.C. 871, where the deposit had been made by the mortgagor after the mortgagee had filed a suit on the mortgage with a 4 annas Court-fee stamp and before the deficit Court-fee had been paid. But a deposit made after the mortgagee brings a suit to *recover possession* according to the terms of the mortgage-deed is not invalid, and the mortgagor can be allowed to redeem—*Ram Dayal v. Arjun Singh*, 50 I.C. 332 (Oudh).

If the mortgagee brings a *money suit* to recover the amount due on the mortgage and then the mortgagor pays into Court a certain sum in satisfaction of the claim, O. 24, r. 3 of the C. P. Code comes into operation, and interest on the amount deposited ceases as soon as the plaintiff receives notice of the deposit—*Thevaraya v. Venkatachalam*, 40 Mad. 804, 37 I.C. 444.

506. Effect of deposit :—The making of a deposit under this section does not *ipso facto* extinguish the mortgage where the mortgagee has refused to accept the deposit. If the deposit is refused, the mortgage is not extinguished, and the parties remain in the relationship of mortgagor

and mortgagee to each other. It is for the mortgagor dissatisfied with the action of the mortgagee in refusing the deposit, to bring a suit for the enforcement of his legal rights; and unless and until he does so successfully, the mortgage still subsists—*Ahmadulla v. Abdul Rahim*, 45 All. 592, 73 I.C. 763, A.I.R. 1924 All. 26; *S. S. Abohala Sastriar v. S. P. Kalimuthu Pillai*, A.I.R. 1962 Mad. 308.

As soon as a deposit is made, interest ceases on the mortgage from that date. See sec. 84. Where a deposit was made in favour of the mortgagee but it could not be withdrawn by the person entitled to it on account of a dispute between rival claimants to the mortgagee's estate, the interest ceased to run from the date of the deposit—*Munna Lal v. Chatan Prakash*, I.L.R. 1940 All. 79, A.I.R. 1940 All. 65, 1939 A.L.J. 1099. But where the deposit by the mortgagor was withdrawn by the mortgagee's pleader without his authority and paid to some other person so that the deposit was not available to the mortgagee when he applied for it, the deposit was held not to be legal within the meaning of this section—*Haran Krishna v. Sashi Bhusan*, A.I.R. 1941 Cal. 18. Where a deposit is once duly made, the fact that the executors of the mortgagee have not yet taken probate and are therefore not yet qualified to withdraw the amount does not affect the mortgagor, for the interest will cease to run from the date of deposit, whether there is any one competent to accept the money or not—*Pundurang v. Dadabhoy*, 26 Bom. 643. But the case is different if the mortgagee is a minor. In such a case, it is the duty of the mortgagor making the deposit to see that a proper person is appointed as guardian (sec. 103); until he does so, he is not exempt from the payment of interest—*Pandurang v. Mahadaji*, 27 Bom. 23 (29); *Shivnath v. Manohar*, 16 O.C. 261, 22 I.C. 245; *Sheo Saran v. Ram Lagan*, 44 All. 64 (65), 64 I.C. 413, A.I.R. 1922 All. 355; *Kannu Mal v. Inderpal*, 44 All. 102, affirmed in 45 All. 273; *Gokul v. Chandra Sekhar*, 48 All. 611 A.I.R. 1926 All. 665; 96 I.C. 1.

Another effect of a deposit is that the mortgagee in possession is liable to the mortgagor to account for all the receipts of the mortgaged property, and cannot deduct any expenses incurred in connection with the property. See sec. 76 (i) and Note 473 thereunder. The deposit, unless it is accepted by the mortgagee, has not the effect of extinguishing the mortgage. Therefore, a mortgagee who rejects the deposit and retains possession continues as mortgagee, but with a statutory *liability to account* for the profit; received by him from the date of deposit. He is not then a mere trespasser but a mortgagee still holding the property as a kind of trustee for the mortgagor and as such accountable to the latter for the profit—*Rukmibai v. Venkatesh*, 31 Bom. 527; *Ma Nyo v. Mg. Hla*, 2 Rang. 382, 84 I.C. 395, A.I.R. 1925 Rang. 13; *Harbans Narayan Singh v. Ramdhari*, A.I.R. 1960 Pat. 51. After a valid deposit by the mortgagor, the mortgagee becomes liable not only for the total amount of rents and profits actually collected by him but also for the amount left uncollected by him on account of his failure to make the best endeavours to collect them under sec. 76 (b)—*Subha Rao v. Sarvarayudu*, 47 Mad. 7 (26), A.I.R. 1923 Mad. 533, 72 I.C. 292; *Narayan v. Kishun*, A.I.R. 1934 Pat. 622, 153 I.C. 1035. Institution of a suit for the redemption of a usufructuary mortgage cannot be regarded as tender of the mortgage money; hence on deposit in Court

after the preliminary decree mesne profits can be awarded only from the date of deposit and not from the date of the institution of the suit—*Rajballan Lal v. Ram Autar Rout*, A.I.R. 1962 Pat. 203.

If the mortgagee refuses to accept the deposit money and to give over possession of the property, the mortgagor is entitled to sue for the same—*Rugad Singh v. Sat Narain*, 27 All. 178. On mortgagee's refusal to accept the mortgage amount the court does not become *functus officio* and can consider the mortgagee's subsequent request to receive the mortgage amount—*Nachiappan v. Muthiah Ambalam*, A.I.R. 1966 Mad. 77.

507. Mortgagee's right to receive the money :—As soon as the mortgagor deposits the money into Court, it is no longer his, and the mortgagee is entitled to draw the money from the Court. The mortgagor cannot object to it—*Motavengattil v. Kezathath*, 25 I.C. 369. The mortgagee's right to receive the money depends upon the compliance of certain formalities prescribed in this section, *viz.*, the presenting of a verified petition, stating the amount due on his mortgage and his willingness to accept the sum deposited in full discharge of his debt, and the depositing of the mortgage-deed and other documents connected with the property in Court. (See para 2 of this section). If the mortgagee does not comply with these formalities and refuses to accept the amount, claiming a larger sum than that deposited, the money stands to the credit of the mortgagor, by whom it can be withdrawn at any time, and the Court has no jurisdiction to allow it to be attached by the creditors of the mortgagee—*Dal Singh v. Pitam Singh*, 25 All. 179. Where a subsequent mortgagee deposited the mortgage-amount to the credit of the prior mortgagee who did not take any notice of such payment; in a suit by the former to enforce his mortgage it was contended that the subsequent mortgagee was entitled to interest on this amount: *held* that the money so deposited remained the property of the plaintiff and the defendant (prior mortgage), was not liable to pay interest on that amount—*Ahammad v. Surya Kumar*, 42 C.W.N. 1177. If the mortgagee refuses to accept the deposit in full satisfaction, then the mortgagor can withdraw the money in view of sec. 84. The mere fact of making a deposit or tender does not merge the money in the mortgaged property and the money does not cease to be the property of the mortgagor—*Gupteswar v. Radha Mohan*, *infra*; *Ahammad v. Surya Kumar*, 42 C.W.N. 1177. If, on the other hand, the mortgagee complies with the above formalities, the money deposited by the mortgagor becomes the property of the mortgagee so as to be liable to be attached by the latter's creditors—*Mothiar v. Ahmatty*, 29 Mad. 232.

508. Acceptance of deposit by the mortgagee—Effect :—After the mortgagee accepts the tender under this section, he is not entitled to claim any further relief as against the mortgagor or the person making the deposit. He is bound to accept the deposit in full satisfaction of all his claims. If he is not prepared to do it, then he ought to decline to accept the amount deposited—*Minakshi v. Janki*, A.I.R. 1942 Mad. 592, (1942) 2 M.L.J. 124, 55 M.L.W. 413. If the mortgagee withdraws the amount deposited, the withdrawal must be deemed to have been made in full discharge of the mortgage-debt and the mortgage becomes extinguished—*Gupteshwar v. Radha Mohan*, A.I.R. 1937 Pat. 253, 170 I.C. 99. Therefore, he cannot withdraw the money and at the same time claim

a larger sum than that deposited. Thus, where a deposit having been made under this section, the mortgagee refused to accept the money, claiming a larger sum, and after a redemption decree was passed against him, he filed an appeal similarly claiming a larger amount, but during the pendency of the appeal, applied for and withdrew the deposit-amount, *held* that the mortgagee must be deemed to have received the money in full discharge of the mortgage-claim, and he had no right to prosecute the appeal in which he claimed a larger amount—*Dal Singh v. Pitam Singh*, 25 All. 179. So also, where upon a deposit made by the mortgagor, the mortgagee informed the Court that the amount deposited was insufficient, and requested the Court to require the mortgagor to deposit the balance of the amount due, but after several months the money was somehow or other drawn out by the mortgagee's agent, *held* that the money so drawn out must be held to have been drawn out in full discharge of the mortgagor's liability; that the section provided that the money lodged "in full discharge" of a liability could only be drawn out by a creditor in full discharge of that liability, and that it could not be assumed that the agent drew out the money in part satisfaction of the mortgagor's liability—*Ram Chandra v. Keshobati*, 36 Cal. 840 (P.C.). But where some money was deposited under this section for payment to a mortgagee, and on objection being raised by the mortgagees as to the insufficiency of the amount, *the mortgagor agreed to pay the balance* which was found due from him, and at the request of the pleader for the mortgagor the Court paid the money deposited to the mortgagees and endorsed payment on the back of the deed and returned it to the mortgagees; *held* that the mortgagees did not take the money in full discharge of the mortgage as provided by this section. Since the mortgagor himself admitted that the amount was not in full discharge of the debt, and thus waived one of the conditions implied by this section, he could permit the mortgagee to withdraw the money without prejudice to the latter's claim for a larger amount—*Hardayal v. Prithi Singh*, 32 All. 142. Acceptance by a prior mortgagee of a deposit made by the subsequent mortgagee in full satisfaction of the mortgage-debt precludes the prior mortgagee from contending that the payment was made on behalf of the mortgagor and that para 1 of sec. 92 did not apply—*Vishnu Balkrishna v. Shankareppa*, A.I.R. 1942 Bom. 227, 44 Bom. L.R. 415.

It has been stated before that the deposit under this section should include the sums spent by the mortgagee in possession under sec. 72 and which he can add to the mortgage-money under this section, *e.g.*, Government revenue paid by the mortgagee to save the estate from sale. If, however, the mortgagor deposits only the principal and interest, without depositing the amount of revenue, and the mortgagee accepts the deposit-money, gives up possession and returns the mortgage-deed, the mortgage is thereby extinguished, and the mortgagee has no longer any lien on the mortgaged property for the amount of revenue and cannot sue to recover the amount by sale of the property. He can only bring a simple money suit for the amount subject to the law of limitation—*Anandi Ram v. Dar Najaf Ali*, 13 All. 195.

If the mortgagee refuses to accept the money deposited, the mortgagor is entitled to withdraw the money from the Court. And if the Court

gives him permission to withdraw the money owing to the mortgagee's refusal to accept it in satisfaction of his dues, it is no longer competent for the mortgagee to change his mind and to take out the money, even though it has not yet been actually withdrawn by the mortgagor. After the Court gives permission to the mortgagor to withdraw, the money is the mortgagor's money, and the tender is no longer open, so the Court cannot direct the money to be paid to the mortgagee—*Ratna Koeri v. Nanhaki*, 4 P.L.T. 720, A.I.R. 1924 Pat. 41 (42), 73 I.C. 1053.

This section does not authorise the Court to take any security bond from any party on making payment to him of the money deposited—*Ratna Koeri v. Nanhaki*, *supra*. The mortgagee after accepting the money deposited cannot later claim damages on the ground that he was not given possession of the mortgaged property—*Dulari Singh v. Bijendra Singh*, A.I.R. 1963 Pat. 324.

84. When the mortgagor or such other person as aforesaid has tendered or deposited in Court under section 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or *in the case of a deposit, where no previous tender of such amount has been made*, as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, *and the notice required by section 83 has been served on the mortgagee :*

Provided that, where the mortgagor has deposited such amount without having made a previous tender thereof and has subsequently withdrawn the same or any part thereof, interest on the principal money shall be payable from the date of such withdrawal.

Nothing in this section or in section 83 shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to reasonable notice before payment or tender of the mortgage-money *and such notice has not been given before the making of the tender or deposit, as the case may be.*

Amendment :—The italicised words have been added by sec. 45 of the T. P. Amendment Act (XX of 1929).

Whether retrospective :—Although this section is not specifically referred to in sec. 63 of the T. P. Amendment Act XX of 1929, it has been held by Bennet and Verma, JJ. of the Allahabad High Court in *Munna Lal v. Chhatan Prakash*, A.I.R. 1940 All. 65, (1939) A.L.J. 1099 that the amendment made in the present section is not retrospective. It does not appear that the Full Bench decision in *Hira Singh v. Jai Singh*, I.L.R. 1937 All. 880 was brought to the notice of their Lordships. Moreover the same learned Judges have held in *Mangal Sen v. Kewal Ram*, A.I.R. 1940 All. 75, 187 I.C. 274 that the amended sec. 92 is retrospective on the ground that it is not specifically referred to in sec. 63 of Act XX of 1929.

509. Tender :—See Note 367 under sec. 60, and Note 498 under the heading "Tender".

This section confers an exceptional privilege on mortgagors which cannot be availed of by ordinary debtors. In case of ordinary money-claims not based on mortgage, a tender before suit must be followed by payment into Court in order to stop the running of interest. But in case of mortgages, the rule is different, and a tender alone has the effect of stopping interest from the date of tender—*Arunachallam v. Govindasami*, 55 Mad. 458, A.I.R. 1932 Mad. 109 (111), 135 I.C. 907. This section shows that absence of notice of the intention to redeem is no bar to a tender—*Som Nath v. Desai*, A.I.R. 1951 Punj. 404, I.L.R. 1950 Punj. 271.

A tender to be valid under this section must be made to the party entitled or to a properly authorised agent on his behalf. A tender made to a person who disclaims authority to receive it, is made at the maker's risk—*Bai Ruttonbai v. Fraser Ice Factory*, 32 Bom. 521.

The tender must be made at the mortgagor's place, if no particular place of payment is specified in the mortgage-bound; and it is the duty of the mortgagor to seek the mortgagee out—*Mahadaji v. Pairia*, 2 N.L.R. 62. If the mortgagor asks the mortgagee to come to his (mortgagor's) place and take the money, it cannot be a valid tender—*Mgung Po v. Daw Shere*, A.I.R. 1929 Rang. 271 (272).

The mortgagor gave the defendant-mortgagees notice to redeem on a certain date. To that notice the defendants replied that the deed was really one of sale and not of mortgage, but at the same time they set forth the sum which they claimed. The mortgagor never asked for further details of the defendants' claim and made no counter offer. He sued nearly two years later and did not offer any specified sum in the plaint nor paid anything in Court. Held that the mortgagor had made no legal tender under sec. 84, and was bound to pay interest till the date of redemption—*Budhu Ram v. Niamat*, A.I.R. 1923 Lah. 632, 75 I.C. 375, 4 Lah. 406. (This portion of the judgment is not given in 4 Lah. 406).

In order to have the effect of cessation of interest, it is necessary that the money should have been *actually produced* unless the person entitled to payment waived the condition. A mere offer by letter or notice expressing willingness to pay the mortgage-money is not sufficient—*Chetan Das v. Govind*, 36 All. 139, 12 A.L.J. 111, 22 I.C. 659; *Muhammad Mushtaq v. Bankey Lal*, 42 All. 420; *Kamaya v. Devappa*, 22 Bom. 440. In some other cases, however, it is held that actual production of the money is not necessary to constitute a tender, if the money is ready for payment; see *Pestonjee v. Hormasji* 5 Bom. L.R. 387 cited in Note 368 under sec. 60. But at any rate, it must be shown that the mortgagor was in a position to pay the money *immediately*. Therefore a mere readiness and willingness to pay, not communicated to the creditor and without the accompanying circumstances of the debtor being willing to pay immediately if the offer is accepted, does not amount to a valid tender—*Sheoratan v. Behari Lal*, 45 I.C. 106 (Oudh). A telegram from the mortgagor to the mortgagee asking him to refrain from filing suit and promising to pay by a fixed date (which was *three months later*), or a subsequent telegram expressing willingness to pay and informing that the amount is ready, does not of itself

constitute a valid tender. But the latter telegram immediately followed by the mortgagor's actually going to the mortgagee's place and offering the money, amounts to a valid tender—*Joti Lal v. Fateh Bahadur*, A.I.R. 1929 Pat. 397 (398). Where the mortgagor wrote to the usufructuary mortgagee asking the latter to give him an account of what was due on the mortgage, and expressed his willingness to pay what was due, whereupon the mortgagee mentioned the balance of amount due, and it was found that the mortgagor had not the money with him to make the payment, *held* that the interest on the mortgage would not cease to run under this section—*Venkataramanim v. Venkata Subhadrayamma*, 34 M.L.J. 488, 45 I.C. 437. In order that a tender may be valid, it is necessary that the money should be always kept ready for payment to the mortgagee—*Jag Sahu v. Ram Sawhi*, 1 Pat. 350 (354), A.I.R. 1922 Pat. 167, 3 P.L.T. 332, 65 I.C. 666.

But actual production of the money is not necessary where the mortgagee refuses to accept it. In such a case, the readiness of the mortgagor to pay would be equivalent to sufficient tender. "Actual production of money may be dispensed with by the express declaration or equivalent act of the creditor if the tender be otherwise sufficient; so that if the debtor says that he has the sum ready in his pocket (stating the amount) and brought it for the purpose of satisfying the demand, or being in the house, offers to go and fetch it from another part of the house, but the creditor desires him not to trouble himself to produce or fetch the money as he will not take it, or if the creditor and communicating personally with the debtor refuses to authorise his agent to take the money, or to take it himself, the tender will be good."—*Fisher on Mortgage*, 5th Edn., p. 719. Where the mortgagor had in his Bank the full amount which was due to the mortgagee, and went with his cheque-book ready to give the mortgagee a cheque, or to cash the cheque at once if the mortgagee wanted cash, but the mortgagee prevented him from doing so by refusing to have any dealings with him, *held* that there was a valid tender, and interest would cease to run—*Venkatarama v. Gopalakrishna*, 52 Mad. 322, 56 M.L.J. 255, A.I.R. 1929 Mad. 230 (231), 116 I.C. 844. In a Privy Council case it has been held that if a mortgagee unequivocally refuses a proposed payment of the amount due, the mortgagor is not bound to make a formal tender of it, and the mortgagee cannot recover interest accruing subsequently, even if he proves that the mortgagor *had not the money* or the control of it—*Chalikani Venkataramanim v. Zamindar of Tuni*, 46 Mad. 108 (116) (P.C.), 28 C.W.N. 25, 71 I.C. 1035, A.I.R. 1923 P.C. 26. "The practice of the Courts is not to require a party to make a formal tender where from the facts stated in the bill or from the evidence it appears that the tender would have been a mere form and that the party to whom it was made would have refused to accept the money"—*per* Wigram, V. C. in *Hunter v. Daniel*, (1845) 4 Hare 420. See also *Bhagawantrilayya v. Venkadhoja*, A.I.R. 1941 Mad. 484 (F.B.), 1941 M.W.N. 460, 53 M.L.W. 647. Specific objection to a tender amounts to an implied waiver of any other objection there may be, consequently the refusal of a tender, not because the amount tendered is short, but because the mortgagee considered that he was entitled to wait until the date fixed for payment in the mortgage-deed, which meant more interest for him, amounts to a waiver of any objection to the amount being short—*Ibid.* Where the principal and interest in a mortgage-bond was payable "by" a fixed date, the word "by" meant on or

before the fixed date—*Ibid.* Where a valid tender of the entire amount was made, and a request was made that the mortgagee should accept what was just on accounts being taken, but the mortgagee not merely disputed the accounts but refused to make any account and rushed to Court, *held* that his conduct was such as not to entitle him to any interest accruing after the date of tender—*Joti Lal v. Fateh Bahadur*, A.I.R. 1929 Pat. 397 (399).

The Madras High Court has said that a tender in order to be effectual to stop running of interest must be followed by deposit in Court when the creditor sues for the money, because it is the best way in which he can prove his ability and willingness to pay—*Arunachallam v. Govindaswami*, 55 Mad. 548, A.I.R. 1932 Mad. 109 (111), 135 I.C. 907. This view was also taken by the Bombay High Court in *Haji Abdul v. Haji Noor*, 16 Bom. 141, and by the Calcutta High Court in *Rakhal v. Baikuntha*, 32 C.W.N. 1082 A.I.R. 1928 Cal. 874. But there is nothing in sec. 84 to support this proposition and the Calcutta High Court refused to accede to this view in *Gajendra v. Sita Nath*, A.I.R. 1926 Cal. 310, 90 I.C. 637. The Rangoon High Court is also of opinion that if the mortgagor asks the mortgagee to accept the mortgage-money, and the mortgagee refuses to accept it, there is a valid tender, and no interest is chargeable thereafter, and a subsequent mortgagee seeking to redeem a prior mortgage can take advantage of the tender made by the mortgagor to the prior mortgagee, and so would not be liable to pay any interest for the period subsequent to the date of such tender—*Chettyar Firm v. Chettyar Firm*, A.I.R. 1930 Rang. 255 (257), 127 I.C. 594.

A tender should ordinarily be made in current coin. A tender by cheque is not a legal tender—*Jagat Tarini v. Naba Gopal*, 34 Cal. 305. A cheque even of a man of credit is not a valid tender, and need not be accepted, but if it is once accepted, then the payee is bound by it unless it is dishonoured—*Johnstone v. Boys*, (1899) 2 Ch. 73. But whether the tender of a cheque is a valid tender or not, if the mortgagee refuses to have any dealings with the mortgagor, (*i.e.*, refuses to take payment in *any form* either in cash or in cheque), he is not entitled afterwards to say that the tender by cheque was not a valid tender. In other words, where his objection was not to the form of the payment but to payment in any form, he cannot afterwards be heard to object to the form of the payment—*Venkatarama v. Gopalakrishna*, 52 Mad. 322, 56 M.L.J. 255, A.I.R. 1929 Mad. 230 (232), 116 I.C. 844; *Jagat Tarini v. Naba Gopal*, 34 Cal. 305; *Polglass v. Oliver*, 2 Cr. & Jer. 15; *Jones v. Arthur*, 8 Dow. 422, 59 R.R. 833; *Hira Lal v. Khizar*, A.I.R. 1936 Lah. 168, 161 I.C. 251. Where the mortgagor sent a single cheque for two items, only one of which was due at the time, it was held that the cheque being one and indivisible could be accepted as a whole or not at all and that the tender of one of the items by that cheque was not a good one and the mortgagee was within his rights in rejecting it—*Ibid.*, at p. 175.

A tender cannot be made by a set-off. Thus, where the mortgagor proposed that the money due by the mortgagee to the mortgagor on another account between them should be deducted in satisfaction of the mortgage-debt, *held* that such a proposal would not stop the running of interest—*Church v. Bishop*, 2 Ves. 371.

The tender should be of the whole amount due on the mortgage—*Nadershaw v. Srinibai*, A.I.R. 1924 Bom. 264, 25 Bom. L.R. 839. The mortgagor may tender *more* and such a tender is not invalid—*Baikuntha v. Benode*, 29 C.L.J. 256, 51 I.C. 13. As regards a tender of a *less* amount, compare the cases cited in Note 503 under sec. 83.

A tender is not vitiated because a receipt is asked for it—*Jagat Tarini v. Naba Gopal*, 34 Cal. 305.

A mortgagee who refuses a valid tender does so at his risk, and the risk which he incurs is twofold, namely: in the first place, he has to account for all the receipts from the mortgaged property from the date of the tender (section 76, clause i), and in the second place, interest ceases to run on the principal money from the date of tender—*Satyabadi v. Harabati*, 34 Cal. 223 (228). A mortgagee-in-possession who has refused to give any accounts under sec. 76, cannot refuse the tender made by the mortgagor on the ground that it is less than the amount due—*Ramlal v. Narayanarao*, A.I.R. 1927 Nag. 138, 99 I.C. 630.

510. Cessation of interest :—According to the Calcutta High Court a proper tender will stop the running of interest, if the mortgagor keeps the money unemployed, *i.e.*, keeps the money always ready to pay over to the mortgagee, and does not afterwards make any profit of it—*Satyabadi v. Harabati*, 34 Cal. 223 (229); *Ram Nath v. Gopal Chandra*, 8 C.W.N. 153. See also *Jag Sahu v. Ram Sakhi*, 1 Pat. 350 (354), A.I.R. 1922 Pat. 167, 65 I.C. 666. This is also the law in England. See *Bank of New South Wales v. O'Connor*, 14 App. Cas. 273; *Geyles v. Hall*, 2 P. Wms. 377. The Madras High Court has, however, drawn a distinction between a tender and a deposit, and holds that in case of a tender it is not necessary that the money should be always kept ready for payment; therefore where after making a tender which was refused by the mortgagee the mortgagor employed the money to other uses, and was afterwards unable to pay, *held* that the interest ceased to run from the date of tender—*Velayudu v. Hyder Hossein*, 33 Mad. 100.

The interest on the principal money ceases when the mortgagor has duly made a deposit of *all* that is due on the mortgage. If at first he had deposited an inadequate amount, and subsequently made a further deposit paying off all that was due, interest would cease only from the latter date—*Deo Dat v. Ram Autar*, 8 All. 502. The tender or deposit of a less amount, even if made under a *bona fide* mistake does not stop the running of interest—*Gaurishankar v. Abu Jafar*, 3 O.L.J. 204, 34 I.C. 690; *Subbai v. Palani*, 30 M.L.J. 607, 34 I.C. 825. But see *Ramgopal v. Lachman*, A.I.R. 1938 All. 423 (426) (F.B.), (1938) A.L.J. 617, 176 I.C. 509. In two earlier cases of Bombay and Allahabad High Courts, however, a deficient deposit made under the *bona fide* belief that it was the whole amount due, was held to be valid *pro tanto* and the interest also ceased *pro tanto*—*Haji Abdul v. Haji Noor*, 16 Bom. 141; *Narasingha v. Acchaibar*, 36 All. 36. See also *Bhabani v. Kadambini*, A.I.R. 1929 Cal. 304 (306), 33 C.W.N. 279, 119 I.C. 292. Where it has been held that the deposit by a purchaser who could not have known whether any interest was due was a valid deposit and interest ceased to run from the date of the deposit. But where a mortgagor brought into Court the whole sum *found due by the Court* of first instance,

and upon an appeal by the mortgagee, the Appellate Court determined a larger sum to be due: *held* that the sum deposited operated as payment *pro tanto* and interest would cease to that extent—*Digambar v. Harendra*, 14 C.W.N. 617, 11 C.L.J. 226, 5 I.C. 165.

From the mere fact of withdrawal by the mortgagor of deposit *per se* it cannot be said that interest would not cease to run. The deposit operates as a tender and it should be seen whether the mortgagor notwithstanding his withdrawal remained ready and willing to pay throughout. The burden is cast upon the creditor to show that he was either not willing or not able to pay, because he had utilized the moneys for other purposes—*Narayanaswami v. Ramaswami*, (1939) 1 M.L.J. 324, A.I.R. 1939 Mad. 503, 1939 M.W.N. 455 relying on *Ramabhadra v. Arunachalam*, 49 Mad. 609 (F.B.), 50 M.L.J. 468, A.I.R. 1926 Mad. 601. The case was governed by sec. 83 before the amendment in 1929 and 1930.

There is a diversity of opinion as to whether interest ceases from the day of deposit, or whether the mortgagee is entitled to interest for that day also. According to the Calcutta High Court, interest cannot be charged for the day on which the money was deposited—*Raghub v. Bhobui*, 8 C.W.N. 216. But the Madras High Court is of opinion that the mortgagor at the time of making the deposit under sec. 83 must include in the amount deposited the interest for the day of deposit also—*Subbai v. Palani*, 30 M.L.J. 607, 34 I.C. 825.

510A. Effect of withdrawal of deposit :—In order that a deposit may have the effect of cessation of interest, it is necessary that the money must be always kept in Court; and if the mortgagor subsequently *withdraws the money*, on the mortgagee's refusal to accept the amount deposited, interest will again commence to run—*Krishnaswami v. Ramaswami*, 35 Mad. 44 (45), 8 I.C. 763; *Thevarayya v. Venkatachalam*, 40 Mad. 804 (806), 37 I.C. 444; *Debi Sahai v. Narayan*, 3 O.W.N. 942, A.I.R. 1927 Oudh 103, 99 I.C. 147. Where the assignee of a mortgagor who had mortgaged his property with possession deposited the mortgage-amount, but on the mortgagee's refusal to accept the money withdrew the same from the Court and it was found that he was unable to produce it even at the time of the suit for redemption, it was *held* that he was entitled to mesne profits only during the period the amount was in deposit, but not of the subsequent period—*Suppan v. Rangan*, A.I.R. 1938 Mad. 405 (413), (1938) M.W.N. 356. If the mortgagor withdrawing the deposit redeposits it in pursuance of a preliminary decree passed on a subsequent suit for redemption he is entitled to mesne profits from the date of the original deposit and the interest shall cease from that date—*Nachiappan v. Muthiah Ambalam*, A.I.R. 1966 Mad. 77.

This is clearly laid down in the new *proviso*. A Full Bench of the Madras High Court had dissented from the above view and had observed: "The only question properly arising was whether the mortgagor, notwithstanding his withdrawal, remained ready and willing to pay throughout. The better opinion seems to be that the fact of the tender (deposit) raises the presumption that the debtor continued ready and willing to pay, and that the burden is cast upon the creditor to show that the debtor was either not willing to pay or not able to pay because he had utilized the

money for other purposes"—*Ramabhadra v. Arunachalam*, 49 Mad. 609 (F.B.), 95 I.C. 108, A.I.R. 1926 Mad. 601. See also the opinion of Phillips, J., in *Thevarayya v. Venkatachalam*, 40 Mad. 804 (808). The Allahabad High Court held that where the full amount due on a mortgage was paid into Court, and notice was properly issued, and the mortgagee appeared but definitely refused to accept the amount whereupon the mortgagor withdrew it out of Court, the interest ceased to run from the date of deposit as the mortgagor had done all that could be done under this section—*Hukam Singh v. Babu Lal*, 44 All. 198 (200), 64 I.C. 971, A.I.R. 1922 All. 181. But these rulings are no longer correct.

511. "Mortgagor has done all that has to be done" :—The Legislature has drawn a distinction between the case of a tender and the case of a deposit as to the date from which interest shall cease to run. In the case of a tender, interest shall cease from the date of the tender; but in the case of a deposit, the interest only ceases when the mortgagor has done all that has to be done by him to enable the mortgagee to take the amount out of Court; that is to say, he must do something more than make a deposit—*Pandurang v. Mahadaji*, 27 Bom. 23 (27). But neither this section nor sec. 83 states expressly what are all the things that the mortgagor has to do—*Krishnasami v. Ramasami*, 35 Mad. 44 (45).

A mortgagor is not liable to pay interest for future after he has deposited the money and taken all the steps necessary to pay the money to the person entitled to it, and if through the fault of the person or persons entitled to it, it is not clear exactly to whom the money is to be paid, the mortgagor cannot be deprived of the right conferred on him by this section on account of the omissions and errors of such persons—*Harihar v. Sheo Singh*, 19 O.C. 145, 36 I.C. 814; *Shyam Sundar v. Seth Balmukand*, A.I.R. 1964 All. 370. Where the mortgagor deposited the sum due in Court and did all he could to enable the mortgagee to draw the amount, but the same was not done because of a dispute among the mortgagee's heirs, interest ceased to run from the date of deposit—*Nagathal v. Arumugan*, 44 M.L.J. 362, 79 I.C. 40, A.I.R. 1923 Mad. 354; *Baluswami v. Krishnaswami*, A.I.R. 1924 Mad. 559, 46 M.L.J. 497, 84 I.C. 698. Where the mortgagor deposited the money in Court as payable to the mortgagee and his sub-mortgagee, the mortgagor did all that was required to be done to enable the mortgagee to receive the money, and the mortgagor would not suffer if by reason of disputes between the mortgagee and his sub-mortgagee as to the right to the money, the money was not paid to anybody but remained in Court—*Subba Rao v. Ponnammal*, 46 M.L.J. 74, A.I.R. 1924 Mad. 453 (455), 80 I.C. 363. Where the mortgagor paid the money into Court and issued notices to the four sons of the mortgagee, but before all of them could be served, he requested the Court to dismiss the petition, *held* that the mortgagor had not done all that had to be done to enable the mortgagee to take the amount, and interest did not therefore cease to run—*Venkateswaradu v. Bala Tripurasundari*, 1915 M.W.N. 763, 30 I.C. 769. Where the mortgagee was dead, and the mortgagor, being unable to ascertain as to who were the persons entitled to succeed, deposited the mortgage-money in Court, but withdrew it before the rightful heirs were ascertained, he could not be said to have done all that he could do to enable the heirs to receive the money. In

such a case the mortgagor could not claim cessation of interest—*Thevarayya v. Venkatachalam*, 40 Mad. 804 (807), 37 I.C. 444. Where the mortgagee is a minor, it is the duty of the mortgagor making a deposit to apply for the appointment of a guardian *ad litem* for the purpose of receiving notice of the deposit and taking the money out of Court, and to see that a guardian *ad litem* is appointed (see sec. 103). Until he does so, it cannot be said that he has done all that has to be done to enable the mortgagee to take the money out of Court—*Pandurang v. Mahadaji*, 27 Bom. 23 (29). Where a mortgagor deposited money in Court and joined a minor mortgagee as a party with a major mortgagee, but he failed to see that the minor was properly represented by the appointment of a guardian, in order that the Court might be able to order the money to be paid, *held* that the mortgagor had not performed what the law requires to be performed when a deposit is made under sec. 83, and that the deposit was not a valid deposit—*Appa Pai v. Somu*, 49 M.L.J. 327, 90 I.C. 754, A.I.R. 1925 Mad. 1017. Where two of the mortgagees being minors, the mortgagor, after depositing the amount in Court, applied for appointment of guardians *ad litem* for those minors under sec. 103, and proposed the names of two guardians, and after much difficulty notices were served on them and they were ultimately appointed guardians, *held (per Lindsay, J.)* that the interest ceased to run only from the date when the Court finally appointed the guardians—*Kannu Mal v. Inderpal*, 44 All. 102, (107, 108), 64 I.C. 907, A.I.R. 1922 All. 147, affirmed on appeal in *Kannu Mal v. Inderpal*, 45 All. 273, A.I.R. 1923 All. 183, 71 I.C. 278.

Service of notice :—The amendment made at the end of the 1st para requires that notice of the deposit should be served on the mortgagee. It was formerly held that when the mortgagor deposited in Court the amount due upon the mortgage and paid *batta* for the notice with the proper address of the mortgagee, he had done all that had to be done by him, and interest ceased to run thereafter—*Subbai v. Palani*, 30 M.L.J. 607, 34 I.C. 825, and the fact that the notice was not actually served on the mortgagee till after a long time, was no fault of the mortgagor; because the duty of getting the service of notice effected on the mortgagee was not part of the duty of the mortgagor. As soon as he applied for the issue of notice to the mortgagee, and gave the correct address, he had done all that could be done to enable the mortgagee to take the money out of Court, and interest ceased to run therefrom—*Pandit Jiva Ram v. Thakurain Khem Koer*, 70 I.C. 811, A.I.R. 1923 All. 24. But this view is no longer correct. Under the present section notice must be *actually served* upon the mortgagee, before interest will cease to run.

85 to 90.—[*Repealed by Act V of 1908*].

See Rules 1—6 of O. XXXIV, C. P. Code, printed in the Appendix.

Redemption.

<p>91. Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property :—</p>	<p>91. Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely :—</p>
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- (a) Any person (other than the mortgagee of the interest sought to be redeemed) having any interest in, or charge upon the property ;
- (b) any person having any interest in, or charge upon, the right to redeem the property ;
- (c) any surety for the payment of the mortgage-debt or any part thereof ;
- (d) the guardian of the property of a minor mortgagor on behalf of such minor ;
- (e) the committee or other legal curator of a lunatic or idiot mortgagor on behalf of such lunatic or idiot ;
- (f) the judgment-creditor of the mortgagor, when he has obtained execution by attachment of the mortgagor's interest in the property ;
- (g) a creditor of the mortgagor who has in a suit for the administration of his estate, obtained a decree for sale of the mortgaged property.

Amendment :—This section has been redrafted by sec. 46 of the T. P. Amendment Act (XX of 1929). The old clauses (a) and (b) have been combined into one clause (a); old clauses (c) and (g) are now clauses (b) and (c) respectively; and the old clauses (d), (e) and (f) have been omitted.

511A. Suit for redemption :—In a suit by the puisne mortgagee for redemption of a prior mortgagee the plaintiff must prove due execution of his own puisne mortgage-deed although the mortgagor admitted due execution—*Mt. Mohammadi v. Kashi*, A.I.R. 1926 All. 725 (726), 96 I.C. 775; *Gouri Shankar v. Lata*, A.I.R. 1938 Oudh 16, 171 I.C. 437. Where a plaintiff seeks to redeem a mortgage alleged to have been executed before 30 years and it is proved that the defendants are the mortgagees, though no specific mortgage has been proved by the plaintiffs they are

entitled to succeed on proving the defendants to be the mortgagees—*Kailash v. Mt. Jaga Koer*, A.I.R. 1931 Pat. 295 (296), 10 Pat. 417, 133 I.C. 678.

In a suit for possession of mortgaged property challenging the mortgage-decree on the ground of collusion, if no prayer is made for the relief of redemption and necessary issues are not tried, redemption cannot be allowed—*Lalit v. Hardat*, A.I.R. 1939 Lah. 146, 41 P.L.R. 629.

In a suit for redemption the mortgagor can, to his claim for redemption, join a claim for rent paid by him to the mortgagee's use—*Subedar Mian v. Sheo Shankar*, A.I.R. 1940 Pat. 579, 189 I.C. 109.

Unless the plaintiff in a redemption suit gives *prima facie* evidence that the suit is brought within limitation, he fails to show that he has a subsisting right to the property in suit or in other words he fails to prove his title—*Prem Singh v. Md. Khurshid*, A.I.R. 1927 Lah. 574 (576), 103 I.C. 215. A second mortgagee having allowed the period of limitation to expire is not entitled to enforce his mortgage by redeeming and a purchase by him in a suit brought by him against the mortgagor without making the first mortgagee a party does not give him a fresh starting period for limitation—*Appaya v. Venkataramayya*, A.I.R. 1925 Mad. 150 (151), 80 I.C. 864; *Nidhiram v. Sarbessur*, 14 C.W.N. 439; *Lakshmanam v. Sella Muthu*, A.I.R. 1925 Mad. 76, 84 I.C. 301.

Subject to the safeguarding of the equal right to redeem of any other person who has a right of redemption, one of several mortgagors is entitled to redeem the entire mortgage, unless something has happened to extinguish the mortgage in whole or in part, or unless the conduct of the mortgagor has estopped him from asserting what would normally have been his rights—*Promotha v. Ram Kishun*, A.I.R. 1927 Pat. 25, 97 I.C. 386. Where the integrity of the mortgage has been broken by the mortgagee purchasing an item of the mortgaged property, a suit may be brought for partial redemption—*Ouseph v. Parmeswaran*, A.I.R. 1951 Tr.-Coch. 212 (2). But where the interest of the mortgagees has been divided by a gift or an assignment between more than one co-sharer, a mortgagor cannot at his pleasure bring a separate redemption suit for redemption of a single mortgage-debt—*Parsottam v. Isub Mahammad*, A.I.R. 1927 Bom. 513, 29 Bom. L.R. 1052, 104 I.C. 648.

A mortgagor who has failed to comply with terms of the decree in a redemption suit filed by him is not entitled during the continuance of that suit or before the final decree in that suit has become incapable of execution, to maintain a second suit for redemption of the same mortgage—*Abdul v. Durga Prasad*, A.I.R. 1927 All. 305, 100 I.C. 324. See, however, *Palpa Kara v. Pulipre Tarwad*, A.I.R. 1937 Mad. 214 (216) (F.B.), I.L.R. (1937) Mad. 545, 168 I.C. 110. But where in a suit against the mortgagee the claim of the plaintiff is founded upon an absolute title treating the mortgagee as a trespasser and no question of the plaintiff's right of redemption is raised, a subsequent suit by the plaintiff, on the dismissal of the prior one, for redemption is not barred—*Kali Nath v. Manindra*, I.L.R. (1940) 1 Cal. 544, A.I.R. 1940 Cal. 550, 191 I.C. 398. Where in a suit for redemption the mortgagee continues to be in possession of a part of the mortgaged property even after deposit of the amount

fixed for redemption by the trial Court and the appeal by the mortgagee is dismissed, the mortgagor is not entitled to a direction from the appellate Court for taking further accounts—*Ibid.*

A mortgagor who is entitled to bring a suit for redemption can sue not merely for accounts—*Gordhan Lal v. Radha Kant*, A.I.R. 1943 All. 109.

Parties:—If a mortgagee leaves out a puisne mortgagee or a person interested in the equity of redemption and obtains a decree, the security is not merged in the decree and extinguished. If a sale takes place in execution of the decree of such a defectively constituted suit, the purchaser at the Court-sale acquires the rights of the mortgagee and of the defendants-mortgagors, provided that the equity of redemption were not entirely unrepresented in the suit—*Sailendra v. Amarendra*, I.L.R. (1941) 1 Cal. 514, 45 C.W.N. 530, A.I.R. 1941 Cal. 484 (486); *Kurumpa Kochika v. Narayana Pillai*, A.I.R. 1959 Ker. 56. The rights of the puisne mortgagee not impleaded in the prior mortgagee's suit remains unaffected by such suit and subsequent auction sale. His right under this section to redeem the prior mortgage is not taken away by such decree and sale. This suit is governed by Art. 148 and not Art. 132 Limitation Act—*A. M. A. Firm v. Marudachalam*, A.I.R. 1948 Mad. 412, (1948) 1 M.L.J. 284. See also *Nagu v. Gopal*, A.I.R. 1953 Bom. 405; *Ulahannan v. Raman*, A.I.R. 1953 Tr.-Coch. 554. Where a puisne mortgagee was not a party to the prior mortgagee's suit the amount payable by the puisne mortgagee for redeeming the prior mortgage must be calculated not on the footing of the prior mortgagee's decree or of the price paid by the auction purchaser, but on the security, subject to statutory restrictions that amount must be outstanding principal together with interest calculated at the bond-rate up to the date fixed for redemption—*Ibid.* As to the direction given in a decree in puisne mortgagee's suit on his mortgage for redemption of the prior mortgage and as to the accountability of the auction-purchaser in execution of the prior mortgagee's decree on his simple mortgage to the puisne mortgagee for profits obtained by the auction-purchaser from the mortgaged properties, see this case. See also *Harekrishna v. Gojendra*, I.L.R. (1938) 2 Cal. 643, A.I.R. 1939 Cal. 15, 188 I.C. 612. The mortgagor's right of redemption does not revive on the puisne mortgagee paying off the prior mortgagee who brought the mortgaged property to sale without impleading the puisne mortgagee—*Kurumpa Kochika v. Narayana Pillai*, A.I.R. 1959 Ker. 56.

In a redemption suit, the mortgagor is entitled to make not only the mortgagee but all persons who have deprived title from the mortgagee as parties to the action and the Court is not debarred from granting relief against them including the sub-mortgagee—*Venkataramani v. Rangaswami*, A.I.R. 1927 Mad. 703 (704), 101 I.C. 728. Where a sub-mortgage, which was simple, was effected within 60 years of the original mortgage, but the sub-mortgagee got a decree and bought the property in auction after 60 years had elapsed when he was impleaded as defendant in a suit for redemption of the original mortgage, it was held that the suit was barred as against the sub-mortgagee—*Sanwal Das v. Sayid Ali*, A.I.R. 1925 All. 174, 22 A.L.J. 1018, 85 I.C. 330. Where a lessee from the

mortgagor is not impleaded in a suit for sale on a mortgage, his right to redeem remains unaffected, and a subsequent suit by the mortgagee for declaration that the lease is not binding on him is not maintainable—*Surya Kumar v. Girish*, A.I.R. 1951 Ass. 101.

Though an attaching creditor as such is not a necessary party to a mortgage-suit and an order striking his name out in so far as he purports to assert a paramount claim and raises questions of priority is also correct, yet by virtue of the statutory right of redemption conferred by sec. 91 (f) (before the amendment), he will be a proper party to the suit and it is not open to the Court to strike out the name of a party as unnecessary party if he is otherwise a proper party. Even apart from sec. 91 an attaching creditor may in certain cases be permitted to intervene and be made a proper party for the purpose of safeguarding his rights—*Annamalai v. Srinivasaraghava*, A.I.R. 1938 Mad. 293, (1938) M.W.N. 73. But if the attaching creditor proceeds to sell the property in execution of his decree, the Court-sale releases the property altogether from attachment and with it the right of redemption. Thereafter he can only agitate such rights as the judgment-debtor has. The fact that the attaching creditor himself becomes the purchaser is immaterial—*Ibid* at pp. 294, 295.

Costs:—Ordinarily the mortgagor is liable to pay the costs of the mortgagee in a redemption suit—*Elatath v. Etacheri*, A.I.R. 1942 Mad. 307, (1942) 1 M.L.J. 166, 55 M.L.W. 18.

Court-fee:—Where the mortgagee in an appeal against a decree in a redemption suit contests not only the finding of the lower Court as to the amount payable by the mortgagor before he can redeem the mortgage, but also that the transaction is a sale and not a mortgage as held by the lower Court the Court-fee on the appeal is payable on the principal sum secured on the mortgage and not on the amount claimed—*Abdul v. Rahamat*, A.I.R. 1933 Lah. 155.

512. Clause (a)—Persons having interest in or charge on the right to redeem :—This section is not confined to persons who have an interest in the property, but extends also to persons having any interest in the right to redeem the property. So, a sub-mortgagee may redeem. Thus, where a sub-mortgagor left a portion of the consideration money in the hands of the sub-mortgagee for redeeming a prior mortgage in respect of the property, the sub-mortgagee was entitled to redeem the prior mortgage—*Ramsubhag v. Nursingh*, 27 All. 472. A subsequent mortgagee is entitled to redeem a prior mortgage—*Gobinda Menon v. Chathu Menon*, 22 I.C. 907; *Radhabai v. Shamray*, 8 Bom. 168; *Abdul Hamid v. Ram Kumar*, A.I.R. 1942 Oudh 260 (F.B.), (1942) O.W.N. 165. See sec. 92.

Where the property charged by a maintenance decree is mortgaged, the mortgagee can redeem and pay off the charge-decree, so long as the sale under the charge-decree is not confirmed—*Venkatachala v. Rajagopal*, A.I.R. 1946 Mad. 51 (1945) 2 M.L.J. 388. A mortgagee cannot get rid of his liability as a mortgagee to the purchaser of the equity of redemption by allowing the mortgagor to redeem. In such a case, the decree for redemption can be passed against both the mortgagor and the mortgagee—*Chaluvegowda v. Chennegowda*, A.I.R. 1952 Mys. 12. Where

under the law a landlord is given a first charge on the holding of his tenant for rent, the prior encumbrancers have a subsequent right of suit—*Shamzav v. Kamalnayan*, A.I.R. 1948 Nag. 316, I.L.R. 1947 Nag. 912. The purchaser of certain mortgaged property paying off the mortgage had sufficient interest within the meaning of this section though he was found to have acquired no title on account of a prior sale deed, though registered after his purchase—*Ramakrishna v. Venkatasami*, A.I.R. 1945 Mad. 175, (1945) 1 M.L.J. 154. See also *Perumal v. Suppiah*, A.I.R. 1945 Mad. 500, (1945) 1 M.L.J. 341.

A landlord has no such interest as would entitle him to redeem a mortgage of his holding made by a tenant—*Ganpat v. Bhangi*, 15 C.P.L.R. 175. But the Bombay High Court has held that where a permanent tenant effects a mortgage, the landlord has an interest in the mortgaged property within this section and is therefore entitled to redeem when the mortgagor tenant dies without any heirs—*Venkatesh v. Bhujaballi*, A.I.R. 1933 Bom. 97 (99), 57 Bom. 194, 142 I.C. 481. So in U. P., if a fixed-rate tenant dies without heirs, the tenancy comes to an end and the land goes back to the Zemindar. Therefore a Zemindar has a right to redeem a mortgage of the holding made by a tenant at fixed rate who has died without heirs—*Tulshi Ram v. Gurdial*, 33 All. 111 (F.B.) (overruling *Ramdiyal v. Maharaja of Vizianagram*, 30 All. 488). See also 1932 A.L.J. 474 cited in Note 513 below.

The words “interest in or charge upon” must obviously mean a subsisting interest or charge. Where a puisne mortgagee has been unsuccessful in his suit for possession and has failed to enforce his mortgage by foreclosure within the period of limitation, he has no subsisting interest in or charge upon the property; and although his right as a mortgagee cannot be said to have extinguished under the terms of sec. 28 of the Limitation Act, yet he cannot be regarded as a person entitled to sue for redemption of a prior mortgage within the meaning of the present section—*Ram Adhar v. Shankar Baksh*, A.I.R. 1935 Oudh 139 (141), 10 Luck. 531 I.C. 808. See also *Pitram v. Lalit*, A.I.R. 1951 Ass. 68. This rule of having subsisting interest has however an exception, where the mortgagor is sued upon a personal covenant to pay the mortgage money. In such a case a new right to redeem arises to himself subject to the rights of the persons interested in the equity of redemption—*Raj Kumar v. Mritunjay*, A.I.R. 1951 Cal. 202.

The word ‘interest’ is not necessarily confined to rights of ownership but is sufficiently large to include any minor interest such as that of a tenant. A *varumpattom* tenant in Malabar claiming under a lease executed by the *ottidar* is entitled to redeem the prior *kanom*—*Paya Matathil v. Kovamel Amina*, 19 Mad. 151. A lessee of the mortgaged property from the mortgagor for a term of years is a person interested within the meaning of this section—*Tulshi Ram v. Mt. Muna Kuar*, A.I.R. 1937 Oudh 146 (148), 12 Luck. 161, 162 I.C. 225.

Where the mortgagor’s equity of redemption happens to have vested by purchase in a person who is also a prior mortgagee, and that person as owner of the equity of redemption wants to redeem a puisne mortgage, while at the same time the puisne mortgagee wants to redeem the prior

mortgage, the claim of the prior mortgagee, not as a prior mortgagee but as owner of the equity of redemption, will be preferred—*Ram Baran v. Bhagwati*, 47 All. 751, 89 I.C. 295, A.I.R. 1925 All. 804 (807). Where properties are sold in execution of the prior mortgagee's decree, the purchaser is entitled to redeem the purchaser in the puisne mortgagee's decree even though the puisne mortgagee had obtained his decree before the institution of the prior mortgagee's suit—*Chinnasami v. Darmalinga*, A.I.R. 1932 Mad. 566, 56 Mad. 115, 139 I.C. 309; *Rowther Abdur Rahman v. Mathevan Pillai Narayana Pillai*, A.I.R. 1957 Ker. 45. Where three properties were once mortgaged to one and then again to another and the second mortgagee was a party to the first suit by the first mortgagee and failed to exercise his right of redemption, he can have no rights against such properties which pass away to the purchaser in execution of the first decree free of both the mortgages. Where therefore instead of an actual Court-sale the property is sold to the first mortgagee, the same result is attained. The effect of the first suit is not that a suit by the second mortgagee against the mortgagor is not maintainable at all, but that he has no rights to pursue against the common mortgaged items—*Ramasami v. Narayanasami*, A.I.R. 1925 Mad. 483 (486), 86 I.C. 548. It is however settled law that when a prior mortgagee brings the mortgaged property to sale in execution of the decree on his mortgage and a second mortgagee is not joined as a party to the prior mortgagee's suit, the rights of the second mortgagee are unaffected—*Maung Shwe v. Karambu*, A.I.R. 1928 Rang. 127, 6 Rang. 122, 110 I.C. 701. But where the subsequent mortgagee is impleaded in the suit of the intermediate mortgagee and is given an opportunity to redeem the latter, but he refrains from doing so, he cannot subsequently obtain a decree on his subsequent mortgage for sale subject to the intermediate mortgage—*Mt. Anpurnā v. Ram*, A.I.R. 1927 All. 417 (418), 49 All. 430, 100 I.C. 670. Where the puisne mortgagee has already obtained a decree for sale on his mortgage without making a prior mortgagee a party, he is entitled to redeem the prior mortgage in a subsequent suit—*Sayamali v. Anisuddin*, A.I.R. 1929 Cal. 609 (F.B.), 33 C.W.N. 1067, 50 C.L.J. 152, 119 I.C. 135.

An auction-purchaser in execution of a simple money-decree of property already mortgaged is entitled to redeem—*Fatima v. Bansidhar*, A.I.R. 1932 All. 356, (1932) A.L.J. 289, 136 I.C. 840. The purchaser in execution of a mortgage-decree acquires not only the interest of the mortgagee, but also the equity of redemption of the mortgagor, and he is entitled to redeem other mortgages in the same property created by the mortgagor—*Mt. Azizunnissa v. Komal Singh*, A.I.R. 1930 Pat. 579 (581), 9 Pat. 930. The purchaser cannot redeem upon payment of the amount decreed in the mortgage-suit, he must pay the amount to be found due under the original mortgage-bond giving deduction for the profits made by the mortgagee auction-purchaser from the date of taking possession of the property—*Ibid* at p. 584. A vendee is entitled to redeem as the purchaser of a widow's interest in the properties mortgaged in the absence of proof that the widow had no interest to convey—*Rangayya v. Basana*, A.I.R. 1926 Mad. 594, 94 I.C. 639. An assignee of subsequent mortgagee is entitled to redeem the prior mortgage by paying the amount due under it to the purchaser of the property under the decree based on the prior mortgage—*Mt. Sheoratan v. Kamta Prasad*,

A.I.R. 1932 Pat. 270 (271), 11 Pat. 415, 139 I.C. 78. A prior simple mortgagee having obtained a decree for sale against the mortgagor has an interest in the mortgaged property and in the right to redeem under this section in spite of the dismissal of his suit against a subsequent mortgagee—*Sheo Prasad v. Prakash Rani*, A.I.R. 1938 Oudh 10, (1937) O.W.N. 1118, 171 I.C. 434.

513. Persons having interest in or charge on property :—It is a general principle that no person is entitled to redeem unless he can show a title to the estate of the mortgagor. The person claiming redemption must prove that he has an interest in it—*Dam Dihal v. Maharaja of Vizianagram*, 30 All. 488. A person claiming to be the heir of the original mortgagor is not entitled to redeem unless he is the heir according to the law of inheritance applicable to the property. Thus, the brothers and nephews are not heirs to an occupancy holding under sec. 9 of the U. P. Tenancy Act, 1881, if they did not share in the cultivation jointly with the deceased, and they cannot redeem the mortgage of the holding created by the deceased—*Ram Singh v. Baldeo*, 1932 A.L.J. 605, A.I.R. 1932 All. 643 (647). This clause refers to a person having an interest in or charge upon the property which is affected by the mortgage, and a *raiyyati* interest is not such an interest. Consequently the purchaser of a *raiyyati* interest in the mortgaged property is not entitled to redeem it—*Girish Chandra v. Juramani*, 5 C.W.N. 83. Clauses (a) and (b) of sec. 91 do not cover the interest in property held by a tenant or yearly lessee to whom it is given for cultivation; such a tenant or lessee has no right to redeem the property—*Kalu Singh v. Hansraj*, 78 I.C. 47, A.I.R. 1925 Oudh 270 (271). But the permanent lessee of the mortgagor has the right to redeem—*Raghunandan v. Ambika*, 29 All. 679; *Shankar v. Hukumchand*, 14 N.L.R. 117, 47 I.C. 99; *Sakharam v. Pandurang*, A.I.R. 1953 Bom. 315, 55 Bom. L.R. 286. But permanent lessees on the land prior to the mortgage are not affected by it—*ibid.* An auction purchaser of an agricultural holding in a sale in execution of a rent decree found to be void has been held to be entitled to redeem the mortgage on such holding—*Sarat v. Jamuna*, A.I.R. 1945 Pat. 289, 24 Pat. 263. The Nagpur Court is of opinion that even a lessee for a term of years is a person having an interest in the property and is entitled to redeem—*Pannalal v. Rajaram*, 23 N.L.R. 128, A.I.R. 1926 Nag. 496, 96 I.C. 973; *Ghulam Nabi v. Kanhai*, 16 N.L.R. 180, 50 I.C. 511; *Sheoram v. Jamnabai*, 19 N.L.R. 18, A.I.R. 1923 Nag. 273. The lessor of the mortgagor can redeem if enforcement is sought against leasehold rights—*Piarelal Khuman v. Bhagwati Prasad*, A.I.R. 1969 Madh. Pra. 35. A mortgagor is entitled to redeem a sub-mortgage—*Easwari Pillai v. Krishna Pillai*, A.I.R. 1969 Ker. 73. But where the lease is granted by the mortgagor in the ordinary course of management and is thus binding on the mortgagee, the lessee's interest not being jeopardised by the mortgage, he is not entitled to redeem it—*Pawankumar v. Jagdeo*, A.I.R. 1947 Nag. 210, I.L.R. 1947 Nag. 740. Where however the lease executed by the mortgagor is void and wholly inoperative, the lessee has no right to redeem—*Kamakshya v. Ramzan*, A.I.R. 1945 Pat. 106, 23 Pat. 648. Where a lease is binding on the mortgagor, whether it is so on the mortgagee or not, he is still a necessary party to the mortgagee's suit, and if he is not made a party, his right

to redeem is not affected by the mortgage decree and sale in execution—*ibid.*

On the death of a tenant or sub-tenant without heirs, his right reverts to the landlord and does not escheat to the Crown. It is open to the landlord in such a case to redeem a mortgage made by the tenant or sub-tenant—*Tulsi Ram v. Gur Dayal*, 33 All. 111; followed in *Arjun Singh v. Maheshanand*, 1932 A.L.J. 474, A.I.R. 1932 All. 437 (438), 138 I.C. 366. An ex-proprietary tenant has a right to redemption under this clause. Thus, the owner of certain *sir* plots executed a usufructuary mortgage, and afterwards his proprietary rights were sold and purchased by the defendants, who subsequently acquired the mortgagee-rights also. The mortgagor then brought the present suit for redemption. *Held* that upon the sale of proprietary rights, the mortgagor became entitled to occupy the *sir* lands as ex-proprietary tenant, and as such he had an "interest in the property", which enabled him to redeem the mortgage—*Mahomed Husain v. Hanuman*, 16 A.L.J. 796, 47 I.C. 861.

A trespasser, before his title is perfected, can not redeem. If the mortgagee allows him to redeem, the true owner is not affected—*Kisan Janu v. Prayagbai*, A.I.R. 1953 Nag. 4. See also *Anantha v. Arunachalam*, A.I.R. 1952 Tr.-Coch. 105. Where by the prior sale deed executed by the mortgagor title did not pass to the vendee, the subsequent transferee of the mortgaged property is entitled to redeem—*Pradyaman v. Mahadeo*, A.I.R. 1950 Pat. 85. Where a property subject to a usufructuary mortgage is purchased by a person at court sale and thereafter the mortgagee purchases the equity of redemption from the mortgagor the purchaser at court sale is entitled to bring a suit for redemption within 12 years of the mortgagee's purchase even though the mortgagee has remained in possession for more than 12 years—*Raghunath Prasad v. Gyani Rai*, A.I.R. 1962 Pat. 177. Where A purchases a property subject to usufructuary mortgage in execution of a money decree and R purchases the self-same property before the execution sale from the mortgagor judgment-debtor and discharges the mortgage, R is subrogated to the rights of the mortgagee and can obstruct delivery of possession to A—*Champalal v. Y. Nabi Khan*, A.I.R. 1960 Mys. 289.

Where there are several mortgagors each and every one of the mortgagors is interested in the payment of the mortgage-money and the redemption of the mortgaged estate, and each and every one of them has a right by payment of the money to redeem the entire estate, seeking contribution from others—*Norender v. Dwarka Lal*, 3 Cal. 397 (P.C.); *Pearce v. Morris*, L.R. 5 Ch. 227. Under this section, the smallest interest in the equity of redemption will entitle a person to redeem, and he is entitled (and bound) to redeem the whole property. So, an owner of a portion of the equity of redemption is entitled to redeem the entire property—*Shankar v. Bhikaji*, 53 Bom. 353, 116 I.C. 225, A.I.R. 1929 Bom. 139 (141); *Fakir Chand v. Babu Lal*, 39 All. 719 (721); *Rugad Singh v. Sat Narain*, 27 All. 178 (182); *Baikuntha v. Mahesh*, 22 C.W.N. 128 (129), 41 I.C. 77; *Pratap Chandra v. Peary Mohan*, 22 C.W.N. 800 (802), 48 I.C. 669; *Huthasanani v. Parameshwaran*, 22 Mad. 209 (211). A person who has purchased a portion of the equity of redemption is entitled to sue for redemption of the whole mortgage—*Nainappa v. Chidambaram*,

21 Mad. 18 (26); *Huthasanam v. Parameshwaran*, 28 Mad. 209 (212); *Yadalli v. Tukaram*, 48 Cal. 22 (28) (P.C.). *Shankar v. Bhikaji*, supra. But where the mortgage has been split up by the act of the mortgagee, neither a co-mortgagor nor a transferee from him can redeem more than his share of the mortgaged property. See this subject discussed in Notes 375 and 376 under sec. 60. The purchaser of the right, title and interest of the mortgagor in the mortgaged property at an execution-sale is entitled to redeem the mortgage—*Periandi v. Angappa*, 7 Mad. 423; *Radha Kishun v. Hem Chandra*, 11 C.W.N. 495. So also, a purchaser *pendente lite* from the mortgagor is entitled to redeem—*Har Sankar v. Sheo Gobind*, 26 Cal. 966; *Sheo Narain v. Chunilal*, 1900 A.W.N. 51. Where a prior mortgagee purchases the mortgaged property in execution of a decree obtained by him in a suit to which the puisne mortgagee was not a party, he is entitled to redeem the puisne mortgage—*Dhanwanti v. Hargobind*, 3 Pat. 435 (441) following *Devendra Nath v. Ram Taran*, 30 Cal. 599 (F.B.). Where a puisne mortgagee fails to implead in a suit on his mortgage a prior mortgagee who has purchased a part of the property in satisfaction of his own mortgage, the latter is entitled to redeem the puisne mortgage so far as it affects the part of the property purchased by him—*Birinchi v. Saroda*, 3 Pat. 114 (118), 5 P.L.T. 95, A.I.R. 1924 Pat. 452.

Where a co-sharer puisne mortgagee of the entire property institutes a suit to redeem a prior mortgage, but finding that the mortgagee had purchased half share in the property mortgaged, redeems the other half on payment of the proportionate mortgage-debt, the other co-sharer mortgagors cannot redeem more than their proper share of the mortgaged property—*Amba Prasad v. Moonga Ram*, A.I.R. 1930 All. 523 (524), 128 I.C. 235. Where the purchaser under a puisne mortgagee's decree brought a suit for possession against the purchaser under the first mortgagee's decree, it was held that the rights of the parties should be determined in the same suit and the plaintiff should be allowed to redeem the defendant—*Bhodai v. Barada*, A.I.R. 1928 Cal. 116 (117), 55 Cal. 602, 107 I.C. 355.

A member of a Hindu family who has merely a personal right to maintenance, has no charge on the property within the meaning of this clause; consequently he is not entitled to redeem a mortgage made by an owner of the estate—*Balwant Singh v. Roshan Singh*, 18 All. 253. A daughter-in-law of a Hindu entitled to maintenance has not such an interest in the family property within the meaning of this section as would entitle her to redeem—*Gajadhar v. Thula*, 12 O.C. 37 (39), 1 I.C. 690. But if a charge for maintenance has been obtained on the property by a contract or decree, it will then enable the charge-holder to exercise the right of redemption—*Roshan Singh v. Balwant*, 22 All. 191 (P.C.). Where joint family property has been mortgaged, the son has as much as his father a right to redeem the whole property as their rights are necessarily undetermined until partition—*Ananda v. Uttam*, A.I.R. 1933 Nag. 44, 144 I.C. 521.

Under Malabar law, except in very special circumstances where the Karnavan is proved to be guilty of gross misconduct and collusion, it is not competent to the junior members of a tarwad to sue for redemp-

tion of a Kanom granted by their Karnavan—*Sooji v. Mariyoma*, 43 Mad. 393. But see *Neelkanta v. Sivarama*, 1958 Ker. L.J. 72.

A person in whose favour there is only an agreement to sell immoveable property has no interest in the property, and is consequently not entitled to file a suit for redemption of that property—*Mayappa v. Kolan-daivelu*, 1926 M.W.N. 459, A.I.R. 1926 Mad. 597 (598), 92 I.C. 715.

A person having an inchoate right may not redeem until the completion of his title but if a person whose title is to some extent imperfect seeks to redeem, and is able to prove a perfect title at the hearing of his case, he should have a right to redemption—*Krishnaji v. Ganesh*, 6 Bom. 139; *Tukaram v. Satvaji*, 5 Bom. 206 (207).

A mortgagor who subsequently parts with the equity of redemption in the mortgaged property in favour of a third party by a sale-deed which reserves part of the consideration with the vendee is nevertheless entitled to redeem the mortgage—*Ratnam Pillai v. Kamalambal*, 48 M.L.J. 213, 86 I.C. 793, A.I.R. 1923 Mad. 778. A mortgagor who has conveyed the land subject to the mortgage and has expressly reserved a lien for the purchase-money may redeem by virtue of such interest—*Jones on Mortgages*, Vol. 2, § 1056. If a debt is scaled down under the Madras Agriculturists' Relief Act at the instance of a mortgagor who is an agriculturist and the properties are purchased by persons who are not agriculturists, the properties can be proceeded against only for the scaled down amount—*Kasamma, A. v. Bramuramba, P.* (1967) 2 Andh. L. T. 273.

The interest referred to in this clause is a *present* interest, i.e., an interest in existence at the time the suit is instituted, and not a mere contingent interest such as a reversioner possesses—*Ramchandra v. Kallu*, 30 All. 497. And so, a person who has absolutely no present interest at all, e.g., a reversioner, is not entitled to redeem during the life-time of the widow—*Ramchandra v. Kallu*, 30 All. 497; *Narayana v. Pechiammal*, 36 Mad. 426 (435); *Chhote Singh v. Surat Singh*, A.I.R. 1930 Oudh 294 (298), 5 Luck. 691 123 I.C. 211; *Mitru v. Gurubari*, A.I.R. 1950 Or. 150, 16 Cut. L.T. 64; *Bhag Singh v. Mt. Santi*, A.I.R. 1952 Pepsu. 74; *Thayammal v. Adhimoolam*, A.I.R. 1956 Mad. 304; *Mohanlal v. Jit Singh*, 1968 Cur. L.J. 268. (Contra—*Gumani v. Chakkar*, 8 O.C. 349, and *Basavan v. Natha*, 1 O.W.N. 319, 82 I.C. 747, A.I.R. 1925 Oudh 30, at p. 33, where a reversioner was held to be entitled to redeem during the widow's life-time). But although a reversioner cannot voluntarily claim to redeem a mortgage made by the last male holder, still if a suit is instituted by the mortgagee for sale, a reversioner has sufficient interest in the property to entitle him to discharge the mortgage to prevent loss of the property to which he would be entitled to succeed on the death of the widow. In such a case, the reversioner would be entitled to be reimbursed by the widow under sec. 69, Contract Act, in respect of the money paid—*Narayana v. Pechiammal*, 36 Mad. 426 (436).

A sub-mortgagee has both an interest in and charge on the mortgaged property. He is therefore entitled to redeem—*Venkatanarayana-sami v. Kani*, 1913 M.W.N. 903, 21 I.C. 560; *Muthi v. Venkatachellam*, 20 Mad. 35; *Ram Subhag v. Nursingh*, 27 All. 472.

514. Clause (b)—Surety :—The right of the surety to redeem is a part of his general right as surety as defined in sections 140 and 141 of the Indian Contract Act. When a surety has paid off the debts of the principal debtor, he stands in the place of the original creditor and can proceed against the mortgagor upon the mortgage-deed, and can use against the latter every remedy which the original creditor himself could have used—*Heeralal v. Syed Oozir*, 21 W.R. 347 (348); *Graythorn v. Swinburn*, 14 Ves. 160; *In re Wrexham*, (1889) 1 Ch. 440; *Nicholas v. Ridley*, (1904) 1 Ch. 192.

Attaching Judgment-creditor :—Under the old clause (f) a judgment-creditor (money-decree-holder) of the mortgagor, when he obtained execution by attachment of the mortgagor's interest in the property, was entitled to redeem—*Lakhpur v. Fakiruddin*, 39 All. 536, 41 I.C. 190; *Ghulam Husain v. Dinanath*, 23 All. 467; *Venkata v. Venkataramayya*, 37 Mad. 418; *Meghraj v. Kesho Gopal*, A.I.R. 1923 Nag. 311, 73 I.C. 8. But see *Baiju Lal v. Thakur Prasad*, *infra*, and *Madan Lal v. Ghasiram*, A.I.R. 1951 Pat. 234, 30 Pat. 613 where it has been held that such an attaching decree-holder is not a necessary party to the mortgage-suit even under the old section; because though such a decree-holder may have a right to redeem the mortgage under the old section, it cannot be said that he has an interest in the right of redemption within the meaning of Rule 1 of Order 34, Civil Procedure Code. So too, the person who purchased the mortgaged property at the sale held in execution of that creditor's decree was entitled to redeem—*Lakhpur v. Fakiruddin*, 39 All. 536. A contrary view was however taken in *Peacock v. Madan Gopal*, 29 Cal. 428 and *Zemindar of Karvetnagar v. Tirumalai*, 32 Mad. 429. But if, subsequent to the attachment by the decree-holder, the mortgagee filed a suit upon his mortgage (whether with or without impleading the attaching decree-holder, it is immaterial) and brought the mortgaged property to sale, held that the right to redeem conferred on the decree-holder by the old clause (f) ceased to be available to him after the property had been sold away in execution of the mortgage-decree—*Subramanian v. Sinnammal*, 53 Mad. 881, 59 M.L.J. 634, A.I.R. 1930 Mad. 801 (807), 127 I.C. 624; *Veyindra v. Mayanadan*, 43 Mad. 696. See also *Kiernander v. Beni Madhab*, A.I.R. 1931 Cal. 763, 58 Cal. 598, 134 I.C. 561; *Kova Mal v. Raghubir*, A.I.R. 1929 All. 861, 122 I.C. 766 and *Alliance Bank v. Powel*, A.I.R. 1938 All. 651; *Baiju Lal v. Thakur Prasad*, A.I.R. 1939 Pat. 7, 19 P.L.T. 781.

The provision of cl. (f) was in the nature of an exception specially applied to the case of mortgages. This exception should not be extended to a charge in perpetuity—*Matlub v. Mt. Kalawati*, A.I.R. 1933 All. 934 (938).

Under the present section the right of the judgment-creditor to redeem has been taken away under all circumstances. For reason see the *Report of the Special Committee*, cited *ante*. See also *Subramanian v. Sinnammal*, *supra*. An attaching creditor does not, by reason of the attachment, obtain any lien or charge on the attached property, and therefore he cannot hand on any such charge to the auction-purchaser; nor can he retain in himself the right to redeem by purchasing the pro-

perty himself at such auction—*Kiernander v. Benimadhab*, 58 Cal. 598, 134 I.C. 561, A.I.R. 1931 Cal. 763 (770), dissenting from 39 All. 536.

The rights already acquired before the Amending Act, XX of 1929 came into force were specifically saved by sec. 63 of the Act; hence the right accrued to an attaching creditor under cl. (f) of the old section is not destroyed by the Amending Act—*Amardar v. Jailalsao*, A.I.R. 1936 Nag. 209 (210), 165 I.C. 939. In such a case the attaching decree-holder does not acquire any interest in or charge on the mortgaged property which he attaches and as such he is not a necessary party to a mortgagee's suit on the mortgage, although it is open to the attaching creditor to come into the mortgage-suit and claim redemption before the Court—sale puts an end to his attachment—Ibid, at p. 213. The attaching creditor is not entitled to redeem the mortgage after the purchases the property in execution of his own decree simply on the strength of his attachment where his purchase is subsequent to a final decree for foreclosure obtained by the mortgagee—Ibid. Where during the pendency of a suit on mortgage by a creditor the property was attached and sold by another creditor, the latter was entitled as a transferee of the mortgagor's rights under this section (before amendment) to come to Court and claim his right of redemption. If he had not done so, the mortgagee in his mortgage-suit was entitled to work out his decree unaffected by the attachment and sale—*Gharbhoya v. Deodatta*, A.I.R. 1937 Nag. 400 (401), 172 I.C. 389.

Subrogation.

74. Any second or other subsequent mortgagee may, at any time after the amount due on the next prior mortgage has become payable, tender such amount to the next prior mortgagee, and such mortgagee is bound to accept such tender and to give a receipt for such amount; and (subject to the provisions of the law for the time being in force regulating the registration of documents) the subsequent mortgagee shall, on obtaining such receipt, acquire, in respect of the property, all the rights and powers of the mortgagee as such, to whom he has made such tender.

92. Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who has advanced to a mortgagor money with which the mortgage has been

redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.

Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

Amendment :—This section has been amended in or to give the right of subrogation to all persons who have an interest in the mortgaged property or in the right of redemption, except the mortgagor.

Thus, the present section is more comprehensive than the old section which applied only to the case of a subsequent mortgagee redeeming a prior mortgage.

514A. Amended section, whether retrospective :—As to whether the amended section is retrospective there is a great divergence of judicial opinion. Generally speaking, the Madras, Rangoon, Patna and Nagpur High Courts have held that it is not retrospective, while the Allahabad, Calcutta, Bombay High Courts and the Oudh Chief Court have taken the view that the section is retrospective in effect except in proceedings pending on 1st April, 1930, on which the amending Act came into force. In the following cases it has been held that the section is not retrospective—*Pichaippa v. Govindaraju*, A.I.R. 1931 Mad. 110; 130 I.C. 506; *Jagdeo v. Mahabir*, A.I.R. 1934 Pat. 127 (129), 13 Pat. 111, 153 I.C. 602; *Chettyar Firm v. Kaliamma*, A.I.R. 1935 Rang. 423, 161 I.C. 221; *Bank of Chettinad v. Maung Aye*, A.I.R. 1938 Rang. 306 (309, 310) (F.B.) (in this case the previous cases on the point have been reviewed); *Srinivasulu v. Damodaraswami*, A.I.R. 1938 Mad. 779 (780), (1938) M.W.N. 708. On the other hand, in the following cases the section has been held to be retrospective in its operation where no action was pending on the 1st April, 1930—*Hira Singh v. Jai Singh*, A.I.R. 1937 All. 588 (597) (F.B.), I.L.R. 1937 All. 880, (1937) A.L.J. 840, 171 I.C. 158; *Isap v. Umraji*, A.I.R. 1938 Bom. 115, 39 Bom. L.R. 1309, 174 I.C. 188; *Kundan Lal v. Faquir Bakhsh*, A.I.R. 1938 Oudh 127 (128, 129) (F.B.), 174 I.C. 714; *Ram Dayal v. Chakrapani*, A.I.R. 1936 Pat. 60 (61), 160 I.C. 933—*per* Sir Courtney Terrel, C.J. and Dhavle, J.; *Padma Lochan v. Ajmaddin*, (1938) 42 C.W.N. 1106; *Munna Lal v. Chunni Lal*, A.I.R. 1945 All. 239 (F.B.), I.L.R. 1945 All. 733; *Harbham v. Parbat*, A.I.R. 1953 Sau. 43; *Sham-suddin v. Haidar Ali*, A.I.R. 1945 Cal. 194, 49 C.W.N. 104. It is submitted with respect that the view taken in these decisions is the correct view.

Since the above observations were made by the present editor in the last edition, Thomas, C.J. and Radha Krishna J. of the Oudh Chief Court have held that the amended sec. 92 is retrospective in its opera-

tion—*Krishna Gopal v. Abdul Latif*, 15 Luck. 175, A.I.R. 1940 Oudh 97 (101), 1939 O.W. N. 1045; *Brij Bhukhan v. Bhagwan Datt*, A.I.R. 1942 Oudh 449 (F.B.); so also the Bombay High Court has held in *Vishnu Balkrishna v. Shankareppa*, A.I.R. 1942 Bom. 227, 44 Bom. L.R. 415. A Full Bench of the Patna High Court has also taken the same view, Manohar Lal, J. dissenting, in *Tika Sao v. Hari Lal*, 19 Pat. 752, 21 P.L.T. 453, A.I.R. 1940 Pat. 385 overruling *Jagdeo v. Mahabir*, supra. The Allahabad High Court has again held that those sections of the Act which are not dealt with in the sections enumerated in sec. 63 of the Amending Act 20 of 1929 have retrospective effect at least where no action was pending on 1st April, 1930, and sec. 92 is not one of the sections enumerated in sec. 63 and hence has retrospective effect—*Chuni Lal v. Lakshmi Chand*, I.L.R. 1940 All. 212, 1940 A.L.J. 234 A.I.R. 1940 All. 237. Bennett and Verma JJ. of the same High Court have also held that this section is retrospective—*Mangal Sen v. Kewal Ram*, A.I.R. 1940 All. 75, 187 I.C. 274. Curiously enough, the same learned Judges have held in *Munna Lal v. Chatan Prakash*, I.L.R. 1940 All. 79, A.I.R. 1940 All. 65, 1939 A.L.J. 1099 that the amended sec. 84 is not retrospective, although that section is not enumerated in sec. 63 mentioned above. For a general discussion of the question see Note 1A ante.

The Madras High Court has held in *Ayyan Ammal v. Vellayammal*, A.I.R. 1956 Mad. 354 that this section does not provide for retrospective effect being given to the statutory right of subrogation conferred by this section on a redeeming mortgagor.

There is no doubt, however, that nothing in this section “renders invalid or in any way affects anything already done before 1st April, 1930, in any proceeding pending in a Court on that date”—see sec. 63 of Act XX of 1929 quoted in Note 1A, ante. See also *Chunilal v. Bibubai*, A.I.R. 1938 Bom. 386 (388), 40 Bom L.R. 517.

Scope :—Even before the amendment of 1929 the mortgagor's right to redeem continued till the confirmation of the sale. The amendment of 1929 gives express legislative sanction to that view. It has not the effect of making any alteration in the right of redemption which was repeatedly recognized in a long line of cases—*Jagannath v. Chuni Lal*, I.L.R. 1940 All. 580, A.I.R. 1940 All. 416, 1940 A.L.J. 511.

The privilege conferred by this section is not confined to the first person only who redeems the prior mortgagee, and can be inherited by his successors-in-interest. Every subsequent mortgagee who pays off the previous mortgagee succeeds to the entire rights possessed by his predecessors-in-interest, and if those rights include a right of priority, he will be clothed with that right too—*Mt. Ghulam Fatima v. Mt. Gopal Devi*, A.I.R. 1940 Lah. 269, 190 I.C. 599; *Gopal Devi v. Ghulam Fatima*, A.I.R. 1943 Lah. 113, 45 P.L.R. 143. This section does not however refer to a mortgagee whose mortgage has been redeemed by the mortgagor with money which has been obtained from the mortgagee himself—*Surya Narain v. Ram Tarak*, A.I.R. 1940 Pat. 64, 184 I.C. 825.

Where a person himself redeems a mortgage, i.e., pays the mortgage-money out of his own pocket and not merely discharges a contractual liability to make the payment, he is entitled to the right of subrogation

under para 1 if he is one of the persons, other than the mortgagor enumerated in sec. 91. But where the person does not himself redeem the mortgage, i.e., does not himself pay the money out of his own pocket in excess of his contractual liability, but advances money to a mortgagor, and the money is utilized for payment of a prior mortgage, whether the money is actually paid through the hands of the mortgagor or is left for such payment in the hands of the person advancing the money and it is then paid to the prior mortgagee through the hands of that person, the latter acquires the right of subrogation under para 3 only if the mortgagor has by a registered instrument agreed that he shall be so subrogated—*Vishnu Balkrishna v. Shankareppa*, A.I.R. 1942 Bom. 227 (229), 44 Bom. L.R. 415.

The right of subrogation conferred by this section is in no way narrow, but really wider than that conferred by the old sec. 74—*Alam Ali v. Beni Charan*, A.I.R. 1936 All. 33 (43) (F.B.), (1935) A.L.J. 1294, 160 I.C. 541. Section 92 applies only when some one other than the mortgagor has in fact redeemed the property—*In re Upendra Nath Kar*, A.I.R. 1937 Cal. 336 (337).

The words “on redeeming property subject to the mortgage” in this section refers both to the payment of a mortgage out of Court and the payment of a mortgage-decree—*Alam Ali v. Beni Charan*, supra, at p. 42. Before the amendment of 1929 a subsequent mortgagee who paid off the money due under decree obtained on foot of a prior mortgage was entitled to claim that money by sale of the hypothecated property—*Jagarnath v. Chuni Lal*, supra.

The provisions of the Act regarding subrogation as was laid down in sec. 74 was not exhaustive—*Punjab National Bank v. Jagadish*, A.I.R. 1936 Lah. 390 (392), 163 I.C. 114. But see *Thakurdwara v. Man Mohan*, I.L.R. 1939 All. 24, A.I.R. 1939 All. 141 (151, 153), 1939 A.L.J. 1199 where it has been held that apart from this section there is no equitable right of subrogation.

The expression “the same rights.....may have” in the first para applies even to a case where the mortgagee has already obtained a decree. Therefore a puisne mortgagee can claim the right of subrogation by payment of a decree on a prior mortgage—*Babu Lal v. Bindhyachal*, A.I.R. 1943 Pat. 305, 22 Pat. 187.

Application:—The section contains a principle of justice, equity and good conscience and hence is applicable to the Punjab and the N. W. F. Province, though the Act itself is not applicable—*Ganeshi Lal v. Joti Pershad*, A.I.R. 1953 S.C. 1; *Abdul Wahab v. Muquarrab*, A.I.R. 1939 Pesh. 27, 1939 Pesh. L.J. 35, 183 I.C. 221. If a principle is to be imported from a statute and acted upon in a Province where the statute does not apply it is not fair to pick and choose and to apply the principle denuded of all technicalities, for that would always lead to arbitrary results. The principle of subrogation as embodied in this section must be applied in the Punjab on the lines indicated therein—*Sham Lal v. Chhaju Ram*, A.I.R. 1941 Lah. 53, 42 P.L.R. 812.

515. Subrogation:—Curiously enough, the word “subrogation” was not to be found within the four corners of the Transfer of Property Act,

and has been for the first time introduced by the Amendment Act of 1929. The equitable doctrine of subrogation, however, existed in India prior to 1st April, 1930—*Bank of Chettinad v. Maung Aye*, A.I.R. 1938 Rang. 306 (311) (F.B.); *Pramatha v. Janaki*, A.I.R. 1937 Cal. 194 (199), 41 C.W.N. 472, 171 I.C. 747; *Malireddi v. Gopala*, A.I.R. 1924 P.C. 36, 47 Mad. 190, 79 I.C. 592.

Secs. 74 and 75 of the Act were based upon the principle of subrogation. Where the prior mortgagee got a decree upon his mortgage and the puisne mortgagee deposited in Court the decretal amount, he was entitled to claim the right of subrogation under sec. 74—*Shamsuddin v. Haidar Ali*, A.I.R. 1945 Cal. 194, 49 C.W.N. 104.

The essence of subrogation is that the party who pays off a mortgage, he becomes clothed with all the rights of the mortgagee. It is sometimes called an equitable assignment. The principle underlying subrogation is that the mortgage or charge is not extinguished but is kept alive and its benefit is transferred to the subrogee. It is not a new charge created by operation of law—*ibid*; *Raghavendracharya v. Vaman*, A.I.R. 1943 Bom. 191, 45 Bom. L.R. 293; *Nachappa v. Samiappa*, A.I.R. 1947 Mad. 18, (1946) 2 M.L.J. 35. Besides the right of subrogation under this section, the subrogee has a right of re-imbursement under sec 69 or sec. 70, Contract Act and it would be governed not by Art. 120 but by Art. 61 Limitation Act—*Perumal v. Suppiah*, A.I.R. 1945 Mad. 500, (1945) 1 M.L.J. 341. A subrogee has the right to split up the mortgage and distribute the liability to different items of property in the possession of different subsequent transferees—*Babu Lal v. Bendhyachal*, A.I.R. 1943 Pat. 305, 22 Pat. 187.

A covenant to exclude subrogation must be with the original mortgagor or his heir. If he pays the mortgagee, the latter cannot use it as a shield against a subsequent mortgagee—*Nachappa v. Samiappa*, supra. A covenant to exclude subrogation must be a covenant to discharge the debt of the very mortgagee against whom subrogation is claimed. If there are two mortgages, and a subsequent transferee undertakes to pay off both, but does not pay off one of them, his covenant excludes subrogation—*ibid*. Where during the pendency of a suit upon a later mortgage, the mortgaged property is sold to a third person who covenants to pay off all the earlier mortgages, the fact that the purchase becomes unavailable by virtue of sec. 52 as against the plaintiff, is no ground for excluding the right of subrogation—*ibid*.

This section enacts the rule of subrogation which means substitution by operation of law of the rights and interests of the mortgagee in the land. According to this rule, a person interested in the discharge of an incumbrance is entitled to discharge it, and he becomes thereupon subrogated, i.e., entitled to all the remedies open to the person whom he has paid off. The foundation of the right of subrogation is the well-known equitable principle of re-imbursement embodied in sec. 69, Contract Act. But the Contract Act confers a personal right only, whereas a right of subrogation involves an equitable charge on the property. When subrogation exists the previous encumbrance paid off is not at all extinguished but is kept alive and its benefit transferred to the person

who has paid off—*Hira Singh v. Jai Singh*, A.I.R. 1937 All. 588 (591) (F.B.), I.L.R. (1937) All. 880, (1937) A.L.J. 840, 171 I.C. 153. See also *Kamlapati Devi v. Jogeshwar Dayal*, 18 Pat. 342, A.I.R. 1939 Pat. 375 (377), 1939 P.W.N. 8.

Under this section a person can be substituted for the prior mortgagee and will have the same rights of foreclosure or sale against the subsequent mortgagee as the prior mortgagee would have had. The limitation for this is that applicable to the original incumbrance and does not depend on the date of payment of the person subrogating—*Totaram v. Harish Chandra*, A.I.R. 1937 Nag. 402 (406). See also *Sibanand v. Jdgmoohan*, A.I.R. 1922 Pat. 499, 1 Pat. 780, 68 I.C. 707; *Kotappa v. Raghavayya*, A.I.R. 1927 Mad. 631, 50 Mad. 626, 102 I.C. 316; *Md. Ibrahim v. Ambika*, 39 Cal. 527 (P.C.), 39 I.A. 68, 16 C.W.N. 505, 14 I.C. 496.

Before any person is entitled to the benefit of subrogation, he must pay up the mortgage-debt. The doctrine of subrogation can never be permitted where the application of it would work injustice to the rights of those having equal or superior equities—*Mulchand v. Radhakisan*, A.I.R. 1927 Nag. 150 (153), 100 I.C. 272.

Subrogation is of two kinds—(a) legal and (b) conventional. *Legal* subrogation takes place when the mortgage-debt is paid off by some person who has some interest to protect, as for instance, where the puisne mortgagee satisfies a prior incumbrance; whereas *conventional* subrogation takes place where the person who pays off the debt has no interest to protect but he advances the money under an agreement express or implied that he would be subrogated to the rights and remedies of the creditor. See *Gurdeo Singh v. Chandrika Singh*, 36 Cal. 193 (217-219) where the subject is fully explained; *Sohan Lal v. Jot Singh*, 16 O.C. 148, 20 I.C. 458; *Kamlapati Devi v. Jogeshwar Dayal*, supra at p. 379; *Appala v. Bhimalingam*, A.I.R. 1950 Mad. 186, (1949) 2 M.L.J. 520; *Shambatta v. Narayana*, A.I.R. 1951 Mad. 917, (1951) 1 M.L.J. 596; *Jagdeo v. Rambilash*, A.I.R. 1950 Pat. 13, 28 Pat. 531. The law relating to legal subrogation is contained in para 1 of this section and the law relating to conventional subrogation in para 3—*Ramgopal v. Nanakram*, A.I.R. 1936 Nag. 32 (33), 161 I.C. 551. The principle on which legal subrogation is founded is that the person making the payment has some interest of his own to protect and that the payment is made for the protection of that interest; he must either occupy the position as a surety of the debt or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security, or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected. Any one who is under no legal obligation or liability to pay the debt is a stranger, and if he pays the debt, he is a mere volunteer—*Bhola Nath v. Maharani*, A.I.R. 1936 Oudh 280 (285), 162 I.C. 362; *Appala v. Bhimalingam*, supra. As to the nature of subrogation see *Balchand v. Ratanchand*, I.L.R. 1942 Nag. 393, A.I.R. 1942 Nag. 111, 1942 N.L.J. 267, 201 I.C. 472.

The right of subrogation gives full right to enforce the previous mortgage-bonds which have been redeemed and kept 'alive'. Therefore

the persons claiming such right have full rights to enforce the earlier bonds even against property not covered by the bond in their favour—*Tika Sao v. Hari Lal*, A.I.R. 1941 Pat. 276, 19 Pat. 752 (F.B.), A.I.R. 1940 Pat. 385 (F.B.), 21 P.L.T. 453.

Where a mortgage is spilt up, it has to be looked upon as if it were in distinct parts with different considerations assigned to different portions of the property. Consequently, if there is redemption of either part in full, then the provisions of this section are complied with so far as that part is concerned. Hence the person who acquires the right of subrogation to such a part of the mortgage is entitled under Or. 22, r. 10 C. P. Code to be substituted as decree-holder to the extent of his right—*Janardan v. Madanlal*, A.I.R. 1939 Nag. 215, 1939 N.L.J. 369, 183 I.C. 651.

An officious or voluntary payment carries with it no right of reimbursement or of subrogation—*Raj Bahadur v. Nur Singh*, A.I.R. 1941 Oudh. 226, 1941 O.W.N. 113, 1941 O.L.R. 215.

Property :—The term “property” as used in this Chapter means an actual physical object and does not include mere rights relating to physical objects—*Matadin v. Kazim*, 13 All. 432 (F.B.).

No right of mortgagor :—The words “other than a mortgagor” show that it is only when the subsequent mortgagee or the other persons mentioned in this section redeem a prior mortgage that the question of subrogation arises; the doctrine has no application where the mortgagor himself redeems it. The mortgagor discharging a prior debt is not entitled to be subrogated to the rights and remedies of his creditor. The right is denied to the mortgagor because in discharging a prior incumbrance created by himself he merely performs his own obligation to his creditor—*Narain v. Narain*, 52 All. 1037, A.I.R. 1931 All. 40 (42), 1930 A.L.J. 1577; *Md. Mohsen v. Md. Abid*, 22 O.C. 72, 52 I.C. 159; *Nisar v. Manzur*, A.I.R. 1936 Oudh 47, 159 I.C. 54; *In re Upendra N. Kar*, A.I.R. 1937 Cal. 336; *Mukaram v. Md. Hossain*, A.I.R. 1936 Cal. 42 (43), 62 Cal. 677, 161 I.C. 48. Where the person discharging a prior mortgage is one personally liable to pay it, as where the payment is made by the mortgagor himself, no question of subrogation arises. In all other cases the matter is one of intention, the rule being that where there is no express evidence such intention should be ascribed to the person paying as would show that he acted according to his interest—*Srinivasulu v. Damodaraswami*, A.I.R. 1938 Mad. 779 (783), (1938) M.W.N. 708. The right of subrogation can be claimed only by a person who, though he is not primarily liable to discharge a debt, discharges it for his own protection, or at the request of the party ultimately bound; it cannot be claimed by the mortgagor or by any person who has assumed the payment of the mortgaged-debt without having any interest to protect—*Sibananda v. Jagmohan*, 1 Pat. 780 (783), A.I.R. 1922 Pat. 499, 3 P.L.T. 533, 68 I.C. 707; *Subraya v. Timmana*, A.I.R. 1938 Bom. 508, 40 Bom. L.R. 1001. A mortgagor when he redeems the mortgage does not acquire the rights of the mortgagee, because in such a case the mortgagee-rights are extinguished and what the mortgagee retransfers to the mortgagor after redemption is the property itself and not the mortgagee-rights—*Sheoaj v. Gajodhar*, A.I.R. 1942 Oudh 465 (F.B.), (1942) O.W.N. 607.

The term "mortgagor" in this section as amended in 1929 is not limited to the very person who effected the mortgage, but includes those persons deriving title from him by transfer of his equity—*Taibai v. Wasudeorao*, A.I.R. 1937 Nag. 372 (374) (F.B.), 20 N.L.J. 253, 172 I.C. 142; *Simla Banking and Industrial Co. Ltd. v. Luddar Mal Khushi Ram*, A.I.R. 1959 Punj. 490.

The entire law regarding the rights of subrogation is now contained in secs. 91, 92, 95 and 101 as amended by Act XX of 1929. A reference to sec. 59A which, whether it is to be regarded as defining the word "mortgagor" in sec. 92 or not, has to be borne in mind in construing this group of sections—*Taibai v. Wasudeorao*, supra. "We are no longer concerned" observed Sulaiman, C.J. "with equitable principles, but with statutory rights and to that extent decisions on the law as it stood before the amendment in 1929 may be misleading"—*Hira Singh v. Jai Singh*, supra, at p. 594.

As to the right of subrogation of a purchaser of the equity of redemption from a mortgagor who leaves a portion of the consideration with the purchaser for redemption of encumbrance, see Note 518A.

Difference between section 92 and section 101 :—Section 101 deals with merger. Suppose A is the mortgagor-vendor, B the first mortgagee, C the second mortgagee and D the alienee. If D acquires B's interest and then A's interest, he will be prior to C in right of B's interest and postponed to C in right of A's interest. If there be a merger of B's with A's interest, D would be postponed. Section 101 prevents merger and gives D priority. Section 92, on the other hand, is creating a right of subrogation, so that in certain circumstances D stands in B's shoes, not because he has acquired B's interest, but because out of his money B's mortgage-debt has been redeemed—*Taibai v. Wasudeorao*, supra, at p. 374. When a landlord purchases the holding in execution of his rent-decree, he does not redeem his own first charge but extinguishes it by sale. So he does not come under sec. 92; but sec. 101 comes into play and the landlord is entitled to set up his own charge—*Shamrao v. Kanalnayan*, A.I.R. 1948 Nag. 316, I.L.R. 1947 Nag. 912.

Where in a suit by the landlord to enforce his first charge on the holding, the mortgagee thereof pays off the charge, he becomes under secs. 92 and 100 subrogated to the rights of the original charge-holder and is entitled to two remedies. One is to sue under sec. 69 of the contract Act for recovery of the amount paid by him; and the other is to institute a suit to enforce his statutory charge under this section. In the latter case, he would get 12 years from the date when the rent became due, under Art. 132 of the Limitation Act—*Shrivallabh v. Laxman*, A.I.R. 1947 Nag. 43, I.L.R. 1946 Nag. 469.

Subrogation and contribution :—When a person interested only in a portion of the mortgaged property redeems the mortgage he gets two distinct rights : one for contribution and the other for subrogation. His suit as subrogee may be barred, but that cannot affect his suit for contribution filed in time—*Ayyappan Raman v. Kunju Vakki*, A.I.R. 1958 Ker. 386.

Prior mortgagee:—Where a mortgagee takes another mortgage in lieu of his prior mortgage, although the case is not strictly covered by this section, he can claim the benefit of the doctrine of subrogation and use his earlier mortgage as a shield against any claim for priority by an intermediate mortgagee. He should be presumed to have intended what was to his benefit and to have kept alive his earlier mortgage for the purpose—*Pitambar v. Durga Bakhsh*, A.I.R. 1938 Oudh 90 (91), 173 I.C. 271; *Kanhaiya Lal v. Gulab Singh*, A.I.R. 1933 Oudh 9, 138 I.C. 206, 7 Luck. 655.

But the case is otherwise if there is no such intention, and the mere fact of paying off a subsequent mortgage by the prior mortgagee at the request of the mortgagor does not create an equitable charge in favour of the prior mortgagee—*Isap v. Umedraji*, A.I.R. 1938 Bom. 115 (118), 39 Bom. L.R. 1309, 174 I.C. 188. See also *Matadin v. Kazim*, 13 All. 432 (F.B.).

The right of subrogation is acquired when the property is redeemed and not on the date of the acquisition of the right to redeem—*Umed v. Babu Ram*, A.I.R. 1934 All. 1035 (1037), (1934) A.L.J. 887, 150 I.C. 937; *Drug Narain v. Ram Kishen*, A.I.R. 1938 Oudh 22 (24), (1937) O.W.N. 1159, 172 I.C. 301.

A prior mortgagee may be redeemed, even after the decree passed on his suit till the execution sale is confirmed or the final decree for foreclosure is made. The mortgage is not extinguished by the decree—*Shamsuddin v. Haidar Ali*, A.I.R. 1945 Cal. 194, 49 C.W.N. 104. The puisne mortgagee satisfying the prior mortgage cannot continue the execution proceedings as representative of the decree-holder—*ibid*. In such a case; if the puisne mortgagee has not been made a party to the prior mortgagee's suit or the decree is not in proper form as would enable the puisne mortgagee to have his rights worked out in execution proceedings, a suit is the proper remedy for him—*ibid*, relying on *Gopi Narayan v. Banshidhar*, (1905) 27 All. 325 (P.C.), 32 I.A. 123.

Where a prior mortgagee obtaining a renewal sues the mortgagor and the puisne mortgagee, on the subsequent mortgage, the prior mortgage must apart from the renewal, be in time for the purpose of priority—*Radhakishan v. Hazarilal*, A.I.R. 1944 Nag. 163 (F.B.), I.L.R. 1944 Nag. 383.

Persons who are entitled to the right :—

516. Subsequent mortgagee:—A subsequent mortgagee who redeems a prior mortgage has a right to be subrogated to the position of the prior mortgagee—*Sarat v. Pramatha*, A.I.R. 1933 Cal. 482 (485), 37 C.W.N. 113, 145 I.C. 295; *Gangaram v. Harihar*, A.I.R. 1936 All. 336, 162 I.C. 902; *Dhancanti v. Hargobind*, A.I.R. 1924 Pat. 484 (486), 3 Pat. 435, 78 I.C. 614. He is thus entitled to subrogation against an intermediate mortgagee—*Kamalapati Devi v. Jogeshwar Dayal*, 18 Pat. 342, A.I.R. 1939 Pat. 375 (377), 1939 P.W.N. 8; see also *Ibrahim Hossain v. Ambika Pershad*, 39 Cal. 527 (P.C.), 39 I.A. 68, 16 C.W.N. 505 (P.C.); *Ishwar Dayal v. Gyan Singh*, A.I.R. 1948 All. 331 (F.B.), 1948 A.L.J. 350; *Madhavan v. Chakki*, A.I.R. 1953 Tr.-Coch. 536. A subsequent

mortgagee redeeming a prior mortgage stands in his shoes and is bound by a grant or disposition made by him even to a mortgagor—*Amar Chand v. Sardar Singh*, A.I.R. 1925 Nag. 90 (95). Where a subsequent mortgagee seeks to redeem a prior mortgage, it is necessary that the prior mortgage must be subsisting at the time. If both mortgages are usufructuary, the two cannot subsist at one and the same time, and no question of redemption of the prior mortgage arises. So also, this section does not come into operation where the language of the second mortgage clearly shows that the intention of the parties was to *extinguish* the prior mortgage by the execution of the second—*Koopmia v. Chidambaram*, 19 Mad. 105 (107); or where it is clear that the first mortgage has been extinguished and satisfied out of the money raised by the second—*Wilayet Hussain v. Karam Hussain*, 12 O.C. 185, 3 I.C. 590. A second mortgagee's right to redeem the prior mortgage is in its nature a right to consolidate the two securities into one as against the mortgagor and to hold them together until they are redeemed, and there can be no right to consolidate when the first security ceases to exist by payment or by a Court-sale which extinguished the first mortgage—*Perumal v. Kaveri*, 16 Mad. 121. Where a puisne mortgagee redeems a prior mortgage and brings a suit against the mortgagor (agriculturist) to recover the money paid by him for redemption of the prior mortgage, the suit is one on the basis of a loan as defined in sec. 2 (9) U. P. Debt Redemption Act and the agriculturist mortgagor would be entitled to claim the benefits of sec. 9 of that Act, as he would have been if the prior mortgagee had himself brought a suit on his mortgage—*Ishwar Dayal v. Gyan Singh* A.I.R. 1948 All. 331 (F.B.), 1948 A.L.J. 350.

A subsequent mortgagee can redeem a prior mortgage without redeeming an intermediate mortgage. Thus, in a case where a property is subject to three mortgages (*e.g.*, in 1911, 1912 and 1913) the third mortgagee (under the mortgage of 1913) can redeem the first mortgage of 1911, without redeeming the second mortgage of 1912, and can acquire the rights of the first mortgagee and he can thus insist on his being treated as first mortgagee whose mortgage must be paid off before the second mortgagee brings the mortgaged property to sale—*Tota Ram v. Ram Lal*, 54 All. 897 (F.B.), A.I.R. 1932 All. 489 (491); *Chhote Lal v. Bansidhar*, 24 A.L.J. 570, 95 I.C. 998, A.I.R. 1926 All. 653; *Duber v. Ram Sahai* 10 O.L.J. 305, A.I.R. 1924 Oudh 56 (59), 79 I.C. 654; *Rajani v. Enatali*, A.I.R. 1936 Cal. 313. That is, a subsequent mortgagee redeeming a first mortgage is subrogated to the rights of the first mortgagee and has priority over intermediate incumbrances subsequent to the first mortgage; and this rule equally applies if the subsequent mortgagee is the *same person* as the first mortgagee. On principle, it makes no difference whether the money raised by the subsequent mortgage is applied in satisfaction of an earlier mortgage of a third person or in satisfaction of an earlier mortgage of the *subsequent mortgagee himself*—*Kanhaiya Lal v. Gulab Singh*, 7 Luck. 655, A.I.R. 1933 Oudh 9 (12). Where a subsequent mortgagee has advanced money whereby the decree of the prior mortgagee is paid off and the intermediate mortgagee was a party to the decree, the remedy of the subsequent mortgagee to enforce his right of subrogation would be by way of suit

and not by execution after substitution in the place of the original decree-holder. The cause of action for such suit arises not from the date when the right to sue on the original mortgage accrued, but from the date when the mortgage-decree was paid off—*Kamlapati Devi v. Jogeshwar Dayal*, supra, at p. 378 relying on *Alam Ali v. Beni Charan*, 58 All. 602, A.I.R. 1936 All. 33, 1935 A.L.J. 1294; see also *Tika Sao v. Hari Lal*, 19 Pat. 752 (F.B.), A.I.R. 1940 Pat. 385, 21 P.L.T. 453. But where the mortgagor executes a third mortgage without disclosing the second mortgage and pays off the original mortgagee from out of the consideration received from the third mortgagee, the third mortgagee does not become subrogated to the rights of the original mortgagee. No question of keeping alive the original mortgage can arise as the third mortgagee had no knowledge of the intermediate mortgage—*Sham Lal v. Chhajju Ram*, A.I.R. 1941 Lah. 53, 42 P.L.R. 812. See in this connection *Rama Charan v. Raghubir*, A.I.R. 1940 All. 540, 1940 A.L.J. 806, 192 I.C. 58. Where a mortgagee from one of the three sons took possession of a house mortgaged to him under the sale in execution of his mortgage-decree after paying off a prior mortgage created by the father, it was held that the subsequent mortgagee had been subrogated to the rights of the prior mortgagee—*Ram Doyal v. Chakrapani*, A.I.R. 1936 Pat. 60 (61), 160 I.C. 933.

A subsequent mortgagee when he sues for redemption of a prior mortgage acts on his own behalf as a mortgagee and not as an agent of the mortgagor. The payment made by him cannot be considered to be a payment on behalf of the mortgagor, and consequently he is entitled to subrogation—*Raghunandan v. Ajodhya*, 1931 A.L.J. 214, A.I.R. 1930 All. 869 (871), 129 I.C. 378; *Krishnamurthy v. Satappa*, A.I.R. 1933 Mad. 398 (399), 56 Mad. 517, 143 I.C. 780, even where the payment is made by the subsequent mortgagee out of the consideration left with him for the purpose—*Vishnu Balkrishna v. Shankareppa*, A.I.R. 1942 Bom. 227, 44 Bom. L.R. 415; and in such a case a registered instrument is not necessary—*Abdul Hamid v. Ram Kumar*, A.I.R. 1942 Oudh 260 (F.B.), (1942) O.W.N. 165. But a subsequent mortgagee paying off a prior mortgage at the request of the mortgagor or out of the money left in his hands for that purpose, acts as the agent of the mortgagor and is not entitled to subrogation. See the cases under heading "*Mortgagor's Agent*" in Note 518A, *infra*.

When a subsequent mortgagee redeems a prior mortgage, no question arises as to whether the payment is for the benefit of the mortgagor or of the mortgagee. All that one has to see in applying this section is whether the person claiming its benefit was a mortgagee at the time of his payment. Even where the mortgagee has agreed to purchase the mortgaged property, the payments made by the mortgagee to pay off prior mortgages can be availed of under this section—*Nagayyar v. Govindayyar*, 17 L.W. 14, 70 I.C. 286, A.I.R. 1923 Mad. 349.

The property against which the subsequent mortgagee may enforce his right of subrogation is the property existing at the time of redemption, and not the property originally mortgaged to the prior mortgagee. Where part of the property comprised in the prior mortgage ceased to be subject to that mortgage (having been released by the prior mortgagee)

at the time when the subsequent mortgagee redeemed that mortgage, the subsequent mortgagee could claim to recover his money not by sale of the entire property which existed at the date of the first mortgage, but only such property which existed at the time of his redemption. In other words, he cannot acquire any higher right than that of the prior mortgagee whom he redeems—*Md. Mahmud v. Kalyan Das*, 18 All. 189.

If the subsequent mortgagee redeems more property than given to him by the terms of his own mortgage-deed, he is entitled to retain possession of it in subrogation to the rights of the mortgagee redeemed by him till a proportionate amount is paid to him by those interested in the property other than that to which he is entitled under his own mortgage-deed—*Raghunandan v. Ajodhya*. 1931 A.L.J. 214, A.I.R. 1930 All. 869 (871), 129 I.C. 378.

Where a puisne mortgagee pays off a prior mortgage-deed, he acquires all the rights and powers of the prior mortgagee including the right to get the interest. The puisne mortgagee, like the prior mortgagee, is not debarred by the rule of *damdupat* from getting interest in excess of *damdupat* after the date fixed for payment, e.g., compound interest at the rate prescribed by the mortgage-deed—*Narayan v. Nathmal*, 17 N.L.R. 200, A.I.R. 1922 Nag. 155 (156), 65 I.C. 275.

A second or subsequent mortgagee redeeming a prior mortgage becomes possessed of the same powers as the prior mortgagee. But it is not necessary for him to take an assignment of the rights which he acquires from the prior mortgagee, the assignment being implied by law—*Bissessur v. Lala Sarnam Singh*, 6 C.L.J. 134. Therefore, if a second mortgagee pays off the prior mortgage without obtaining an assignment of the mortgage or without getting a receipt for the amount paid, but in lieu thereof obtains the actual mortgage-deed, he is entitled to the benefit of this section, and has the right to sue for the amount due under the first mortgage—*Narayan v. Posha*, 45 Bom. 1112 (1120), 62 I. C. 477 (479), following *Mahomed Ibrahim v. Ambika Pershad*, 39 Cal. 527 (P.C.). A subsequent mortgagee is the representative in interest of the mortgagor only to this extent that he is entitled to redeem the previous mortgage. If the previous mortgage is not invalid or void, he cannot challenge the terms thereof on the ground that the interest is excessive or penal, as he entered into the subsequent mortgage with his eyes open. The mortgagor in such cases is entitled to certain reliefs on equitable considerations, but no such considerations prevail in favour of the subsequent mortgagee—*Phulchand v. Shuganchand*, A.I.R. 1934 Lah. 799 (800).

Where the puisne mortgagee is not made a party to the prior mortgagee's suit for sale, the former can either proceed against the mortgaged property in the hands of the purchaser in execution of the prior mortgagee's decree or against the surplus sale proceeds—*Krishnaswami v. Thirumalai*, A.I.R. 1926 Mad. 101 (102, 104), 90 I.C. 410. Where a puisne mortgagee is not made a party to the prior mortgagee's suit, the former can redeem the prior mortgage on the basis of the mortgage and independently of the mortgage-deed—*Jageswar v. Sridhar*, A.I.R. 1928 Pat. 589 (592).

A subsequent mortgagee whose right to enforce his mortgage has

become barred by limitation may nevertheless be entitled to redeem a prior mortgage—*Nathmal v. Nilkanth*, A.I.R. 1933 Bom. 25 (26), 34 Bom. L.R. 1519, 141 I.C. 811.

A puisne mortgagee paying off a prior mortgagee does not get any *new charge* in respect of that payment. The language of sec. 74 makes it clear that the second mortgagee is, by redemption of the prior mortgage, to acquire no other right than that possessed by the first mortgagee. In effect, there is deemed to be a transfer of the first mortgage to the second mortgagee. The law secures to the latter which he might have acquired by a conveyance. But there is no question in this case of creating a new charge on the property—*Perianna v. Marudainayagan*, 22 Mad. 332 (335).

A puisne mortgagee paying off a mortgage-debt is entitled to proceed against all the mortgagors jointly *i.e.*, against the whole property, and not against each of the mortgagors for the proportionate share of the debt due by each of them. In this respect his position is different from that of a redeeming co-mortgagor who is entitled only to proceed against the co-mortgagors for the proportionate share of the debt due by each—*Tabarak Ali v. Dalip Narain*, 8 P.L.T. 255, A.I.R. 1927 Pat. 117 (121), 98 I.C. 968.

The rights which the puisne mortgagee acquires upon redemption of the prior mortgage are the rights of the prior mortgagee *as mortgagee*, and any rights of the prior mortgagee *as landlord* do not pass to the puisne mortgagee; therefore all subsidiary rights created on the mortgaged property by the mortgagee, such as lease-rights, will come to an end *ipso facto* when the mortgage is redeemed; and a tenant continuing on the land must be treated as a trespasser thereafter, unless from the conduct of parties or otherwise a fresh tenancy arises—*Alagirisami v. Akkulu Naidu*, 41 M.L.J. 462, 69 I.C. 651, A.I.R. 1925 Mad. 1282.

The remedy provided in this section is not the only remedy open to a subsequent mortgagee paying off a prior mortgage; he can also bring a suit under sec 69, Contract Act—*Durga Charan v. Ambica Charan*, 54 Cal. 424, A.I.R. 1927 Cal. 393 (394), 45 C.L.J. 191.

The subsequent mortgagee paying off a prior mortgage is in most cases presumed to have intended to keep alive the prior mortgage. See Note 537 under sec. 101.

Payment of prior mortgage-decree :—The puisne mortgagee can redeem the prior mortgage even after a preliminary *decree* has been passed in a suit by the prior mortgagee against the mortgagor; and by so doing the puisne mortgagee can under this section acquire all the rights of the prior mortgagee—*Gopi Narayan v. Bansidhar* 27 All. 325 (332) (P.C.). See also *Premasukhdas v. Peerkhan*, 23 N.L.R. 86, A.I.R. 1926 Nag. 21 (24) 95 I.C. 979, and *Kotappa v. Raghavayya*, 50 Mad. 626, 52 M.L.J. 532, 102 I.C. 316, A.I.R. 1927 Mad. 631 (636); *Harlal v. Lala Prasad*, A.I.R. 1931 Nag. 138 (141), 133 I.C. 395; *Yamunabai v. Maroti*, A.I.R. 1933. Nag. 163, 146 I.C. 514; *Chotey Lal v. Dharajit*, A.I.R. 1926 All. 744, 96 I.C. 1054. But this would not have the effect of reviving or giving vitality to a decree which by the terms of it has become discharged (by

the payment made by the puisne mortgagee). In other words, the second mortgagee who discharge the prior mortgage and the decree obtained on that mortgage is not an assignee of the mortgage or of the decree, and it not entitled to work out his rights by executing the decree (under the provisions of sec. 47, C. P. Code) but has to bring a *fresh* suit for the purpose of obtaining a *new decree*—*Gopi Narain v. Bansidhar*, 27 All. 325 (332, 333) (P.C.), (reversing *Bansidhar v. Gaya Prasad*, 24 All. 179); *Shib Lal v. Munni Lal*, 44 All. 67 (70); *Kottappa v. Raghavayya*, supra; *Aravamudhu v. Abiramavalli*, A.I.R. 1934 Mad. 353 (355), 66 M.L.J. 566, 150 I.C. 930. A distinction should be made between a prior mortgage as such and a prior mortgage-decree; if a prior mortgage is no longer alive as a mortgage but has suffered a change into a decree for sale, and cannot therefore be enforced as a mortgage by the prior mortgagee, it cannot be deemed alive as a mortgage and enforceable as such by the puisne mortgagee who has paid it off in the shape of a *decree-debt*. In such a case the puisne mortgagee is subrogated not to its original form as a *mortgage-charge* but to the *decree-charge* held by the prior mortgagee, i.e., the right to hold the property to sale to satisfy the *decree-debt*. The payment of the decree by the puisne mortgagee cannot reverse the process of conversion it has passed and revive it again as a mortgage. But the puisne mortgagee can enforce his remedy only by bringing a *fresh suit*, and not by executing the decree from the point at which the prior mortgagee left off. That decree has been already satisfied, and no one can execute a satisfied decree—*Parvati Ammal v. Venkatarama*, 47 M.L.J. 316, A.I.R. 1925 Mad. 80 (82, 84), 81 I.C. 771. Where a puisne mortgagee has, in execution of a decree on his mortgage, purchased the mortgaged properties and subsequently, pending an application by the mortgagor to set aside the sale, pays off a prior mortgagee-decree-holder, he is entitled, if the sale is set aside, to enforce prior mortgage against the properties secured by it—*Sibanand v. Jagmohan*, 1 Pat. 780 (784), 3 P.L.T. 533, A.I.R. 1922 Pat. 499, 68 I.C. 707. Where a puisne mortgagee purchases the mortgaged property in execution of the decree on a prior mortgage, the latter is extinguished. At any rate, the puisne mortgagee is subrogated to the position of the prior mortgagee whose security he might if he chose, enforce, but there is no corresponding right to redeem in the mortgagor. Rights of the puisne mortgagee-purchaser in such a case is not limited or regulated by this section—*Kalipada v. Basanta*, A.I.R. 1932 Cal. 126 (133), 59 Cal. 117, 35 C.W.N. 877, 138 I.C. 177. A puisne mortgagee who discharges a prior mortgage under a term of the puisne mortgage has no valid claim of subrogation in respect of the prior mortgage unless there is a registered agreement to that effect—*Bangaru Ammal v. M. V. Kuppuswami Chettiar*, A.I.R. 1963 Mad. 211.

Limitation :—The rights of the subrogated mortgagee are the rights of the original mortgagee before he brought the suit and time begins to run from the original date of the mortgage. The subrogated mortgagee-plaintiff can therefore put forward, to save limitation only, such pleas as were available to the original mortgagee and such acknowledgment as might have occurred since he acquired his right to subrogation—*Halsnad v. Mahabala*, A.I.R. 1937 Mad. 826. See also *Shamsuddin v. Haidar Ali*, infra and the cases cited there. A Full Bench of the Allaha-

bad High Court in *Alam Ali v. Beni Charan*, A.I.R. 1936 All. 33 (43) (F.B.), (1933) A.L.J. 1294, 160 I.C. 541 has held (Ganga Nath, J. dissenting) that the payment of a mortgage-decree confers upon the person who pays it off a statutory right which is not identical with the right of an assignee of the mortgage itself, but is an acquisition of a fresh charge enforceable within the period of limitation applicable to such a suit. Therefore, a subsequent mortgagee who pays off the decretal amount of a prior mortgage and redeems it acquires the rights of the mortgagee-decree-holder to recover his money by enforcement of the fresh charge within 12 years of redemption under Art. 132, Limitation Act. See also *Munna Lal v. Chunni Lal*, A.I.R. 1945 All. 239 (F.B.), I.L.R. 1945 All. 733 (overruling *Hira Singh v. Jai Singh*, A.I.R. 1945 Cal. 194, 49 C.W.N. 104; *Parvati v. Venkatarama*, A.I.R. 1925 Mad. 80, 47 M.L.J. 316; *Babulal v. Bindhachal*, A.I.R. 1943 Pat. 305, 22 Pat. 187. But see *contra Balchand v. Ratanchand*, A.I.R. 1942 Nag. 111, I.L.R. 1942 Nag. 393.

A mortgagor by paying a part of the principal or interest due on a mortgage can give a fresh start to limitation, even without the consent and behind the back of a subsequent mortgagee—*Munna Lal v. Chunni Lal*, supra.

516A. Surety :—A surety of the mortgagor is one of the persons mentioned in section 91 as having a right to redeem the mortgaged property, and consequently he acquires the right of subrogation.

Where a person is not a surety for the mortgage debt, but the security is given by the principal debtor by way of additional security, this section does not apply—*Bhushayya v. Suryanarayana*, A.I.R. 1944 Mad. 195, I.L.R. 1944 Mad. 340.

517. Co-mortgagor :—"The right of a co-mortgagor or one of several joint debtors to be subrogated to the security of the creditor, so as to enable him to recover from his co-debtors by means of such securities their proportionate shares of indebtedness which has been discharged by him, rests upon the same equity as that of a surety or any other person entitled to redeem the mortgage; for each joint debtor is regarded as the principal debtor for that part of the debt which he ought to pay and as the surety for his co-debtors as to the part which ought to be discharged by them (see Ghose on Mortgage, Vol. I, p. 371, 5th Edn.)."—*Report of the Special Committee.*

Clause (1) of this section confers the right of subrogation on all persons other than the mortgagor to whom the right to redeem is given by sec. 91, including a co-mortgagor. Clause (3) does not detract from the right but enacts that it can be extended to a creditor who without taking an interest in the property has advanced money with which the mortgagor has been enabled to redeem the mortgage—*Lal Mohan v. Govind Sahu*, A.I.R. 1940 Pat. 620, 188 I.C. 417. The position of a co-mortgagor who redeems the entire mortgage is that of a mortgagee and not a mere chargeholder in respect of the share of the other co-sharers—*Khuda Bakhsh v. Ata Mohammad*, A.I.R. 1942 Lah. 135, 44 P.L.R. 133; see also *Brij Bhukhar v. Bhagwan Datt*, A.I.R. 1942 Oudh 449 (F.B.). The redeeming co-mortgagor stands in the position of a mortgagee to the non-redeeming mortgagor *qua* his share and has as regards redemption, foreclosure or

sale of such property the same rights as the mortgagee had against the mortgagor—*Kishen Gopal v. Abdul Latif*, 15 Luck. 175, A.I.R. 1940 Oudh 97 (101), 1939 O.W.N. 1045.

Rights of redeeming co-mortgagor :—The rights of a redeeming co-mortgagor were separately provided for in the old section 95. They have now been included in the present section, which is a comprehensive section on subrogation. In section 95 it was said that the redeeming co-mortgagor had a charge on the shares of the other co-mortgagors under sec. 100, but he could not claim all the rights of the original mortgagee. Such a charge carried with it the right to bring the property to sale, but the redeeming co-mortgagor had not the right to stand upon the original security nor had a priority in respect of his charge, on the principle of subrogation—*Umar Ali v. Atmatali*, 58 Cal. 1167 (F.B.), 35 C.W.N. 409 (421, 422). Under the present section, the redeeming co-mortgagor had not the right to stand upon the original security nor had a priority off, and the right of subrogation has been expressly conferred on him. This view was also taken long ago in an Allahabad case—*Harprasad v. Raghunandan*, 31 All. 166 (169).

Where one of the co-mortgagors redeems the mortgage, equity, as embodied in the doctrine of subrogation, confers upon him a right to re-imburse himself for the amount paid in excess, he has paid over and above his own share. He stands in the mortgagor's shoes only to the extent of the aforesaid excess and not for the full amount due on the mortgage on the date of redemption—*Ganishi Lal v. Joti Pershad*, A.I.R. 1953 S.C. 1. See also *Pashupati v. Sachi*, A.I.R. 1943 Cal. 330, 47 C.W.N. 405. Where one co-mortgagor has redeemed the mortgage, the other co-mortgagors have to sue for redemption and not merely for possession, for it is not true that if there is no mortgage-debt to pay, there is no redemption—*Raghavendracharya v. Vaman*, A.I.R. 1943 Bom. 191, 45 Bom.L.R. 253 ; *Mehman Singh v. Mt. Prem Kaur*, A.I.R. 1955 Pepsu 145.

When a co-mortgagor redeems the whole mortgage, he acquires a charge which relates back to the date of the mortgage redeemed for the purpose of privity against the subsequent mortgagee, though not for limitation—*Brij Bhukhan v. Bhagwan*, A.I.R. 1944 Oudh 114, (1943) O.W.N. 404.

The fact that one co-mortgagor redeems the entire estate and is in possession of it, does not entitle him to hold it *adversely* to the other co-mortgagors, even though he had been in exclusive possession of the entire estate prior to redemption. Like a mortgagee, he is only entitled to a charge on the property—*Chandbhai v. Hasanbhai*, 46 Bom. 213 (215), A.I.R. 1922 Bom. 150, 64 I.C. 205. But if the mortgage is a *usufructuary* one, and the amount is satisfied out of the usufruct, one co-mortgagor cannot take possession of the entire property from the mortgagee, but is entitled to recover only his individual share. If, however, he gets possession of the entire property, he is then deemed to hold the shares of the others *adversely* to them, and not subject to a charge (for since he had to pay nothing, he cannot have any charge)—*Gobardhan v. Sujan*. 16 All. 254. If a purely usufructuary mortgage is redeemed by one co-mortgagor by paying the money out of his own pocket, instead of being redeemed out of the usufruct, the redeeming co-mortgagor has no doubt a charge

on the property, but he cannot in enforcing the charge sell the shares of the co-mortgagors, since there is no personal covenant in the original mortgage. His only right is to retain possession until payment to him—*Mamola v. Kedar*, 22 I.C. 918 (Oudh). The original mortgagee under the usufructuary mortgage had no right of sale (sec. 67) and there is no reason why the redeeming co-mortgagor should be placed in a better position than the mortgagee, and be allowed to bring the property to sale.

Under the old section 95 which gave the redeeming co-mortgagor only a charge on the shares of the other co-mortgagors, it was held that he was not entitled to recover the money by a sale of those shares but could only hold the entire property in charge until he was in his turn redeemed by his co-sharers on payment of their shares of the debt. He was not in the position of a mortgagee, for as soon as he redeemed the whole mortgage, the mortgage came to an end—*Ali Akbar v. Sultan-ul-mulk*, 69 I.C. 653, A.I.R. 1923 Lah. 129 (130). A similar view was taken in *Aziz Ahmad v. Chhote Lal*, 50 All. 569, 109 I.C. 38, A.I.R. 1928 All. 241 (245). His remedy was only by way of contribution and not a suit for enforcement of the mortgage—*Ramachandra v. Narayanaswami*, 51 Mad. 810, 55 M.L.J. 326, 112 I.C. 6, A.I.R. 1928 Mad. 950 (951). These decisions are no longer correct, because the redeeming co-mortgagor is now given the same rights as the mortgagee. See *Khuda Bakhsh v. Ata Mohammad*, supra. A Calcutta Full Bench also expressed the opinion that the redeeming co-mortgagor had, on the strength of his charge, a right to bring the property to sale, whether the original mortgagee had such right or not (e.g., even though the original mortgagee was a mortgagee by conditional sale or a usufructuary mortgagee, who had no right to bring the property to sale)—*Umar Ali v. Asmatali*, 58 Cal. 1167 (F.B.), 35 C.W.N. 409 (423).

If a co-mortgagor pays the full amount of the mortgage he is subrogated to the rights of the mortgagee. The existence of a decree on the prior encumbrance would make no difference, unless it had been drawn up in the specific form (i.e., in Form No. 6 App. D., Schd. I, C. P. Code) which would have enabled the judgment-debtor who paid off the decree to work out his rights in execution of the same decree against his co-judgment-debtors—*Balchand v. Ratanchand*, I.L.R. 1942 Nag. 393, A.I.R. 1942 Nag. 111, 1942 N.L.J. 267, 201 I.C. 472. The payment of decree on the mortgage results in the decree being spent and becoming discharged and satisfied and the person who makes the payment does not obtain the status of a decree-holder but is subrogated to the original rights of the decree-holder as mortgagee. The co-mortgagor who redeems does not lose his priority in consequence of a decree on a subsequent mortgage having been made before the decree on the prior mortgage—*Jagannath v. Abdulla*, A.I.R. 1934 Lah. 248, 150 I.C. 366. The combined effect of this section and sec. 95 is that while a mortgagor who pays his own debt cannot claim any subrogation against a puisne mortgagee, yet one of the several mortgagors who pays not only for himself but also for the other mortgagors is entitled to subrogation against the co-mortgagors—*Nisar v. Manzur*, A.I.R. 1936 Oudh 47 (49), 159 I.C. 54.

Certain co-sharer mortgagors sold a portion of the property to M and out of the consideration a sum was left with M for payment of the decreed

on the mortgage. M deposited this amount in Court and redeemed the mortgage. Subsequently transferees from co-sharers brought a suit for redemption of the shares of their transferors on payment of proportionate amounts; *held* that M was clearly in the position of a co-mortgagor. His case fell within para 1 of sec. 92 and therefore by his redemption of the mortgage he became subrogated to the rights of the original mortgagee—*Kundan Lal v. Faqir Bakhsh*, A.I.R. 1938 Oudh 127 (133, 134) (F.B.), 174 I.C. 714; *Keshav Rao v. Kishan Lal Radhakisan*, A.I.R. 1955 Nag. 280. A redeeming co-mortgagor is subrogated to the rights of the original mortgagee as regards his right to claim contribution from the co-mortgagors by foreclosure or sale of their shares. This equitable principle is equally applicable in the Punjab—*Abdul Gaffur v. Mangat Rai*, A.I.R. 1938 Lah. 184 (185, 186), I.L.R. 1938 Lah. 103, 40 P.L.R. 546.

A co-mortgagor who redeems the entire mortgage and stands in the position of a mortgagee breaks the integrity of the mortgage thereby, because he may be deemed *a mortgagee who has acquired the share of a mortgagor* (i.e., his own share), within the meaning of sec. 60. Consequently, he cannot compel the other co-mortgagors to redeem the whole property in solidum, but he must split up his claim into a claim against each, and can only insist upon each of them to redeem only his own share of the mortgaged property. See *Umar Ali v. Asmatiali*, 58 Cal. 1167 (F.B.), 35 C.W.N. 409 (422). This is also evident from the words "proportion" and "his share" occurring in sec. 95. See also *Ghulam Maula v. Banno*, 4 O.C. 273. In this respect the position of a redeeming co-mortgagor stands different from that of a puisne mortgagee paying off a mortgage-debt. The latter is entitled to proceed against all the mortgagors jointly, and not against each of the mortgagors for the proportionate share of debt due by each of them—*Tabarak Ali v. Dalip Narain*, 8 P.L.T. 255, 98 I.C. 968, A.I.R. 1927 Pat. 117 (121); on appeal, 9 P.L.T. 313, A.I.F. 1927 Pat. 379 (381), 103 I.C. 703.

517A. Other persons :—This section lays down that all persons who are referred to in sec. 91 can, upon redeeming the mortgaged property, claim the right of subrogation. And so, *a person having an interest in the mortgaged property* can, upon redemption, claim the right. Thus, where a member of a Malabar tarward paid off a mortgage of the tarward property created by a previous Karnavan, *held* that as he was not a mere volunteer nor even a stranger, but was a member of the tarward, and, as such having an interest in the property and a right to protect it, he was entitled to be subrogated to the rights of the mortgagee—*Nangunni Kovillamma v. Nedungadi*, 31 L.W. 165, A.I.R. 1929 Mad. 860 (862). The mortgagee from a separated member of a tarwad is a person interested in a mortgage created before partition, and on redemption of the prior mortgage binding on the tarwad he becomes subrogated to the rights of the mortgagee whom he has redeemed—*Krishnan Nair v. Dakshayani Amma*, (1955) 1 M.L.J. 223.

A purchaser of a portion of the equity of redemption is a person entitled to redeem within the description of sec. 91, and such person on redeeming the property subject to the mortgage is entitled to a right of subrogation under sec. 92—*Jhum Lal v. Sham Narayan*, 13 P.L.T. 686, A.I.R. 1933 Pat. 33 (34), 140 I.C. 845; also *Udit Narain v. Ashrafi*, 38 All.

502 (504); *Ram v. Gulab*, A.I.R. 1933 Nag. 241, 144 I.C. 736; *Gudiram v. Punamchand*, A.I.R. 1933 Nag. 171, 144 I.C. 326; *Umed v. Babu Ram*, A.I.R. 1934 All. 1035 (1036), (1934) A.L.J. 887, 150 I.C. 937. See *Ganga v. Mt. Hardei*, A.I.R. 1932 All. 32, (1931) A.L.J. 601, 133 I.C. 536. In such cases, the purchaser can only claim contribution of the proportionate amount of debt which the suit properly bears to the rest of the property—*Draviam v. Ramaiya*, A.I.R. 1935 Mad. 390 (393), 159 I.C. 837, 68 M.L.J. 362. Where land burdened with prior and subsequent mortgages is purchased by a person for full price and free from any encumbrance and he is subsequently compelled to discharge the prior mortgage when it is disclosed to him, he is subrogated to the rights of the prior mortgagee as against the subsequent mortgagee—*Sunderlal v. Amrut Rao*, I.L.R. 1939 Nag. 690, A.I.R. 1939 Nag. 217 (219), 1939 N.L.J. 366 relying on *Gokaldas v. Purammal*, 11 I.A. 126, 10 Cal. 1035 (P.C.) and *Malireddi v. Gopalakrishnayya*, 51 I.A. 140, 47 Mad. 190 (P.C.), A.I.R. 1924 P.C. 36. In such a case the transferee must show that the mortgagor in the prior mortgage was the mortgagor of the subsequent mortgage and that the properties mortgaged were the same and that the payment had been made by or on behalf of himself—*Saradindu v. Jahar Lal*, 46 C.W.N. 33, A.I.R. 1942 Cal. 153 (164), 74 C.L.J. 61. According to the terms of a subsequent mortgage, the mortgagee was given a right to redeem a prior mortgage on payment of a certain sum out of the mortgage-money. Subsequently, the equity of redemption was transferred to another person who redeemed the prior mortgage. The subsequent mortgagee thereupon instituted a suit for possession by redemption: *held*, the suit did not lie and the rule of subrogation was not applicable to the case—*Har Dial v. Gurditta Ram*, A.I.R. 1940 Lah. 201, 42 P.L.R. 139, 188 I.C. 608.

Plaintiff who had a simple money-decree against the mortgagor caused the mortgaged property to be put to sale and purchased the equity of redemption. Subsequently a second mortgagee got a decree on his mortgage and applied for final decree for sale. Plaintiff paid off the decretal amount and afterwards brought a suit on the second mortgage to recover the amount which he had paid to the mortgagees joining the second mortgagee, the mortgagor and the third mortgagee as defendants and based his claim under this section on the ground that by paying off the decree of the second mortgagee he was suborgated to the position of that mortgagee: *Held*, (1) the plaintiff was not entitled to bring the suit on the second mortgage as it had already been the subject of a decree; (2) the plaintiff having purchased the equity of redemption was in the position of a mortgagor within sec. 59A and was not entitled to the right of subrogation under sec. 92; (3) merely joining the original mortgagor as defendant did not satisfy the requirements of sec. 92 as none of the defendants did actually possess the equity of redemption—*Piarey Lal v. Dinanath*, I.L.R. 1939 All. 185, A.I.R. 1939 All. 190 (192, 193), 1939 A.L.J. 228. See in this connection *Shankerrao v. Vinayak*, A.I.R. 1951 Nag. 307, I.L.R. 1950 Nag. 806; *Balkrishna v. Rangnath*, A.I.R. 1951 Nag. 171. But see *Narayan v. Parameshwappa*, A.I.R. 1942 Bom. 98, 44 Bom. L.R. 20 where it has been held that in providing that "besides the mortgagor the following persons are entitled to redeem" and including among those persons such persons as derive title from the mortgagor, sec. 91 clearly distinguishes between the mortgagor and persons deriving title from the mortgagor; and in saying

that any of the persons mentioned in sec. 91 other than the mortgagor are entitled to subrogation, sec. 92 obviously repeats the distinction and so provides an exception to the general rule laid down in sec. 59A: hence an auction-purchaser under a money-decree who pays off a prior mortgage is entitled to subrogation against a subsequent mortgagee.

A decree for sale does not extinguish the equity of redemption until the sale is confirmed (see the amended r. 8 of O. 34, C. P. C.). Therefore, if a person who is interested in the mortgaged property pays into Court the decretal amount before a sale is held, he is entitled to be subrogated to the rights of the mortgagee-decree-holder—*Raghunath v. Krishnarao*, A.I.R. 1937 Nag. 196, 171 I.C. 612. So a purchaser from the judgment-debtor of property which has been actually sold in execution of a puisne mortgagee's decree can, before confirmation of the sale by reason of discharge of the prior mortgage on that property, claim to be subrogated to the rights of the prior mortgagee as against the Court auction-purchaser—*Venkatachalam v. Alagarwami*, A.I.R. 1936 Mad. 264, 43 M.L.W. 342, 162 I.C. 34.

An auction-purchaser also has an interest in the mortgaged property within the meaning of sec. 91 and can be subrogated to the rights of the mortgagee when the former pays him off. Such auction-purchaser is entitled to claim the amount so paid even if he has notice of subsequent incumbrances—*Parsotam v. Ali Haidar*, A.I.R. 1937 Oudh 493 (498), 171 I.C. 233. See also *Mt. Dhanwanti v. Hargobind*, A.I.R. 1924 Pat. 484 (486), 3 Pat. 435, 78 I.C. 614; *Ramamurthi v. Bangaru*, A.I.R. 1934 Mad. 268 (269), 148 I.C. 735; *Venkatachari v. Karruppan*, A.I.R. 1934 Mad. 256; 150 I.C. 1126, 67 M.L.J. 91; *Pichai v. Narasimha*, A.I.R. 1930 Mad. 471 (472), 58 M.L.J. 343, 125 I.C. 247; *Natesa v. Ramalingam*, A.I.R. 1937 Mad. 769 (772), 46 M.L.W. 332, 173 I.C. 244; *Pingali v. Kotigari*, A.I.R. 1922 Mad. 249, 70 I.C. 212. An auction-purchaser in execution of a prior mortgagee's decree obtained without impleading the puisne mortgagee acquires at least the right of the mortgagor who was impleaded. Hence, he has got the right to redeem the puisne mortgagee. He, in such a case occupies the double capacity of a prior mortgagee and the owner of the equity to redemption. While in this first capacity he is entitled to use the prior mortgage as a shield against the puisne mortgagee, in his second capacity he can redeem all subsequent mortgages—*Abdul v. Shagun*, A.I.R. 1952 Pat. 321. Where A and B jointly mortgages a property to C and B's interest is purchased by D in execution of a money decree obtained by D against B and D thereafter redeems C, D will be subrogated to the rights of C with the result that A is entitled to redeem his share by paying his dues on the mortgages and expenses to D—*Veeraswami Mandiri v. K. Manicka Mudaliar*, A.I.R. 1969 Mad. 27.

A person who has paid off the amount of a maintenance charge-decree becomes subrogated under this section to the rights of the decree-holder and has therefore a charge against the property—*Savitribai v. Nanah Lal*, A.I.R. 1934 Nag. 84, 148 I.C. 815.

518. 3rd para—Payment by third person :—

This para lays down the rule of what is called *conventional* subrogation, which takes place when a third party, who has no interest to protect,

advances money under the agreement that he would be subrogated to the rights and remedies of the creditor. See *Gurdeo Singh v. Chandrika*, 36 Cal. 193 (218). "Under the equitable doctrine of subrogation, one who pays a mortgage-debt under an agreement for an assignment or for a new mortgage for his own protection or for the benefit of another, acquires a right to the security held by the other"—Jones on Mortgage, sec. 874. Under the old law, the agreement could be presumed (41 All. 372; 33 Cal. 1133); under the present law, it must be express and *in writing registered*. "Express agreement only entitles third persons to subrogation, and not mere understanding is enough"—Jones on Mortgage, Vol. 2, § 874; *Narayana v. Pechiammal*, 36 Mad. 426 (433).

Subrogation means the substitution of one creditor for another. The doctrine of conventional or contractual subrogation is founded upon the principle of an agreement between a borrower and a lender that the latter shall be subrogated to the rights of the original creditor—*Lala Man Mohan v. Janki Prasad*, A.I.R. 1945 P.C. 23, 49 C.W.N. 195, 72 I.A. 39. Under this section, as it stood before the amendment of 1929, a mere stranger who had lent money to the mortgagor to redeem the mortgage and who was neither a surety nor interested in the property had to prove that there was an agreement between him and the debtor or creditor that he should receive and hold an assignment of the debt as security. After the amendment the right of subrogation can be claimed under para 3 only if the mortgagor has agreed by a registered instrument that he shall be so subrogated—*ibid*. Where there is no such registered agreement, equitable relief in the form of a charge cannot be given to the transferee—*Muthuswami v. Ramaswami*, A.I.R. 1942 Mad. 751, (1942) 2 M.L.J. 444.

The word "mortgagor" in "A person who has advanced money to a mortgagor means the original mortgagor who was personally bound to pay and his legal heirs—*Nachappa v. Samiappa*, A.I.R. 1947 Mad. 18, (1946) 2 M.L.J. 35. The words "A mortgagor" does not necessarily mean all the mortgagors—*Shambatta v. Narayana*, A.I.R. 1951 Mad. 917, (1951) 1 M.L.J. 596. Where a clause in a partition deed provided that all debts must be paid off by one member, by a mortgage by that member to pay off the pre-partition mortgages, he can create a right of subrogation by covenant under this para—*ibid*. Where a person redeems a mortgage without any right and according to law he cannot have the right of subrogation, he cannot be regarded as a transferee from the mortgagee—*Bhag Singh v. Mt. Santi*, A.I.R. 1952 Pepsu, 74.

Paras 1 and 3 of this section are mutually exclusive; para 1 refers to a person redeeming property and para 3 to a person who advances money with which a mortgage is redeemed. Para 1 deals with subrogation arising by operation of law, while para 3 deals with subrogation by agreement—*Hira Singh v. Jai Singh*, A.I.R. 1937 All. 588 (595) (F.B.), I.L.R. (1937) All. 880, (1937) A.L.J. 840, 171 I.C. 153; *Lakshmi v. Shankara*, A.I.R. 1936 Mad 171 (174) (F.B.), 43 M.L.W. 23; *Subbarayadu v. Lakshminarasamma*, (1939) 2 M.L.J. 533, A.I.R. 1939 Mad. 949, 1939 M.W.N. 819.

Para 3 does not cut down para 1. A lender might well have a statutory right of subrogation under para 1 as falling within the class delimited by sec. 91—*Taibai v. Wasudeorao*, A.I.R. 1930 Nag. 372 (376) (F.B.), 172 I.C.

142. There is nothing in this section to suggest that para 1 is subject to para 3 which is intended to apply to persons who have advanced money to redeem a mortgage without themselves having acquired any interest in the mortgaged property. So, a purchaser of the equity of redemption need not take any registered agreement since his right to subrogation would arise under para 1—*Ramgopal v. Nanakram*, A.I.R. 1936 Nag. 32 (33), 161 I.C. 551.

The words "who has advanced to a mortgagor" in para 3 are very wide and are not restricted to a case where the person advancing money is a simple money-creditor and not a mortgagee who also is specified in sec. 91. For the purposes of this para it matters little whether the person advancing the mortgage-money has done so with or without security—*Hira Singh v. Jai Singh*, supra at p. 595 ; *Lakshmi v. Shankara*, supra, at p. 172 ; *Chuni Lal v. Lakshmi Chand*, I.L.R. 1940 All. 212, 1940 A.L.J. 234, A.I.R. 1940 All. 237. The words in cl. (iii) "a person who has . . . redeemed" are wide enough to cover the case of a mortgagee or vendee who advances money in consideration of a mortgage or sale—*Subbarayadu v. Lakshminarasamma*, supra. In such a case the contract for the right of subrogation must be in writing and registered—*Ibid*. Where a mortgagor mortgages or sells a property for discharging a subsisting mortgage, whether the mortgagor discharges the same by receiving the money or the mortgagee or vendee discharges it by covenanting to do so retaining the consideration money for the mortgage or sale, it will in either case be a discharge by the mortgagor—*Ibid*, at p. 963 ; see also *Vithaldas v. Tukaram*, A.I.R. 1941 Bom. 153, 43 Bom. L.R. 225. A puisne mortgagee who pays off a prior mortgage as part of the consideration for the puisne mortgage is using the mortgagor's money and not his own, so he acquires no right for himself by his payment—*Narayan v. Parmeshwarappa*, A.I.R. 1942 Bom. 98, 44 Bom. L.R. 20.

Registered agreement :—By the amendment in sec. 92 the law to the effect that the intention to keep alive the prior discharged incumbrance could be presumed has been changed—*Ram Het v. Pokhar*, 7 Luck. 237 ; *Md. Raza v. Bilquis Jehan Begum*, 149 I.C. 84. Now the person who has advanced money to a mortgagor with which the mortgage has been redeemed has to prove the existence of a registered agreement of subrogation before he can claim that relief—*Ibid* ; *Appala v. Bhimalingam*, A.I.R. 1950 Mad. 186, (1949) 2 M.L.J. 520 ; *Musali v. Chellaperummal*, A.I.R. 1946 Mad. 145, (1945) 2 M.L.J. 305 ; *Dasari Venkatasu v. Bandi Rami Reddi*, A.I.R. 1956 Andhra 114. If a mortgagor mortgages the property for the second time without saying anything about the first mortgage but leaves money with the second mortgagee to redeem the first mortgage it cannot be inferred that there is an agreement in the deed of second mortgage that the second mortgagee would be subrogated to the rights of the first mortgagee—*Sheodhyan Singh v. Mst. Sanichara Kuer*, A.I.R. 1963 S.C. 1879.

The mere fact that money is borrowed and is used for the purpose of paying off a previous charge does not entitle the lender to the benefit of the discharged security. The right to the benefit depends upon the existence of an *agreement* between the borrower and lender in which it is provided that the subsequent lender must be substituted for the earlier creditor—*Gulzari Lal v. Aziz Fatima*, 41 All. 372, 50 I.C. 375 ; *Ram Hait*

v. *Pokhar*, 7 Luck. 237, 134 I.C. 1093, A.I.R. 1932 Oudh 54; *Bhola Nath v. Maharani*, A.I.R. 1936 Oudh 280 (284), 162 I.C. 362. Where a prior mortgage is redeemed partly by the mortgagor and partly by the vendees of the mortgaged property in terms of covenants in the sale-deed without any registered agreement, providing that the vendees should be subrogated to the rights of the prior mortgagee who was paid off, the vendees as against the puisne mortgagee are not entitled to the rights of subrogation under this section—*Hira Singh v. Jai Singh*, supra, at pp. 589, 598. A purchaser with whom is left part of the consideration of the sale for paying off a mortgage, but in whose favour there is no express agreement of subrogation in writing registered, is not entitled to claim subrogation as against a later mortgagee under this amended section—*Taibai v. Wasudeorao*, supra. Such is the case also with a mortgagee who advances money to the mortgagor for paying off a previous mortgage—*Lakshmi v. Shankara*, supra, at p. 172. Even before the amendment, it was held that where a person paying off a prior mortgage purchases a portion of the mortgaged property in consideration of the amount so paid by him, the lien acquired by such payment is extinguished and cannot be used by such purchaser as a shield against a subsequent mortgagee—*Benga Srinivasa v. Ganaprakasa*, 30 Mad. 67.

Punjab and N. W. F. Province :—As the Transfer of Property Act is not in force in the Punjab and North-West Frontier Province, the technical rule requiring a registered agreement under this para will not apply there. So in these Provinces an oral agreement will be sufficient to confer a right of subrogation—*Punjab National Bank v. Jagadish*, A.I.R. 1936 Lah. 390 (392), 163 I.C. 114; *Karam Chand v. Ram Singh*, A.I.R. 1937 Lah. 665, 39 P.L.R. 899. Even an implied agreement will suffice—*Gurdit v. Kalumal*, A.I.R. 1937 Pesh. 5 (6), 167 I.C. 698; *Sita Ram v. Kartar Singh*, A.I.R. 1933 Lah. 416, 146 I.C. 239.

Stranger or volunteer :—The doctrine of subrogation is not applied to a mere stranger and volunteer who has paid the debt of another, without any assignment or agreement for subrogation, being under no legal obligation to make the payment, and not being compelled to do so for the preservation of any rights or properties of his own—*Gurdeo v. Chandrika*, 36 Cal. (219); *Chama Swami v. Padalu*, 31 Mad. 439 (442); *Narayana v. Pechiammal*, 36 Mad. 426 (434); *Govinda v. Lokanatha*, 40 M.L.J. 114, 62 I.C. 291 (295); *Brijmohan v. Dukhan*, 9 Pat. 816, A.I.R. 1931 Pat. 33 (37), 130 I.C. 168; *Thimmanayanin v. Damara Kumara*, A.I.R. 1928 Mad. 713 (727), (F.B.), 169 I.C. 872; *Pengali v. Kotigari*, A.I.R. 1922 Mad. 249, 70 I.C. 212; *Veettil v. Kuttiyi*, A.I.R. 1936 Mad. 308 (309), 161 I.C. 999. The principle is that the person claiming subrogation had to pay the debt under grave necessity to save himself a loss. No such necessity arises in the case of a mere stranger—*Narain v. Narain*, 52 All. 1037, A.I.R. 1931 All. 40 (42). The right of subrogation may extend to a stranger provided he is not a mere volunteer—*Nagunni v. Nedungadi*, A.I.R. 1929 Mad. 860 (861), 31 M.L.W. 165; *Jagdeo v. Rambilash*, A.I.R. 1950 Pat. 13, 28 Pat. 531. In a Calcutta case, it was broadly stated that a stranger (notwithstanding the provisions of sec. 74, Contract Act) was entitled to be subrogated to the rights of the mortgagee to the extent of the money paid by him, if he paid off the mortgage-debt, even if he was not asked to do so by the mort-

gagor—*Gobinda Chandra v. Parsa Nath*, A.I.R. 1926 Cal. 231, 89 I.C. 116, following the English case of *Rutler v. Rice*, (1910) 2 Ch. 277. See also *Govinda v. Murugesu*, A.I.R. 1931 Mad. 720, 135 I.C. 529. But this view is not correct and has been disapproved of in *Adari Sanyasi v. Nookalamma*, 54 Mad. 708, A.I.R. 1931 Mad. 592 (596) and *Vellayudhan v. Nallathambi*, A.I.R. 1928 Mad. 541 (542). "Subrogation will arise only in those cases where the party claiming it advanced the money to pay a debt which in the event of default by the debtor he would be bound to pay or where he had some interest to protect, or where he advanced the money under an agreement, made either with the debtor or creditor, that he would be subrogated to the rights and remedies of the creditor"—*Narayana Kutti v. Pechiammal*, 36 Mad. 426 (432), citing *Wilkins v. Gibson*, 113 Georgia 31.

A purchaser of the mortgaged property who has paid off mortgages on the property, is entitled, after the sale is found to be invalid, to stand in the shoes of the mortgagee whom he has paid off. He is not a mere volunteer, because when he discharged the mortgages he did so by virtue of his claim as a purchaser and had an interest to protect—*Naziruddin v. Ahmad Husain*, 25 A.L.J. 20 (P.C.), A.I.R. 1926 P.C. 109 (110), 31 C.W.N. 538, 97 I.C. 543; *Chama Swami v. Padala Anandu*, 31 Mad. 439 (442), 18 M.L.J. 306; *Syamalarayudu v. Subbarayudu*, 21 Mad. 143; *Ammami Ammal v. Ramaswami*, 37 M.L.J. 113, 51 I.C. 57 (60). But in a recent case, the Calcutta High Court has held that a person holding an invalid mortgage with the money advanced on which a prior mortgage is paid is not entitled to be subrogated to the position of such prior mortgagee—*Padma Lochan v. Ajmaddin*, (1938) 42 C.W.N. 1106. A distinction in some cases has, however, been made between a person in possession and one who is not in possession. Thus, a purchaser of land who, while in possession of the land pays off an encumbrance on it, is entitled, when his purchase is found invalid, to stand in the shoes of the mortgagee whom he has paid off—*Mt. Nathibai v. Wailaji*, A.I.R. 1937 Nag. 330 (333), I.L.R. (1937) Nag. 111, 169 I.C. 675; *Dwarka v. Ali Mahammad*, A.I.R. 1930 Oudh 397 (399), 127 I.C. 17. So, a purchaser whose sale-deed was found to be invalid redeeming a usufructuary mortgage and getting possession was held to be entitled to be paid the amount of the usufructuary mortgage before he could be ejected from the land by the prior purchaser but whose sale-deed was subsequently registered—*Chotey Lal v. Sudershan*, A.I.R. 1937 All. 119 (120), I.L.R. 1937 All. 208, 167 I.C. 648. But at the same time it was held in this case that the purchaser who had also discharged a simple mortgage on the property was not entitled to use such payment as a shield and resist the prior purchaser's claim for possession until he (the subsequent purchaser) has been paid the amount of the simple mortgage paid by him [relying on *Bijai Saran v. Bageshwari Prasad*, A.I.R. 1929 P.C. 288, (1930) A.L.J. 531, 51 C.L.J. 70, 120 I.C. 650] for the simple reason that his mortgage did not entitle him to be in possession. The Madras High Court has recently held that if a person who has a title void *ab initio* and no other interest in the property discharges a prior mortgage, he is in the position of a mere volunteer and cannot claim to be subrogated. Mere possession also is not sufficient to support a claim of subrogation unless that possession is accompanied by some interest in the property which the person in possession is entitled to protect. This, however, may possibly be qualified if the discharge of the prior encumbrance was necessary to prevent

an immediate dispossession. On the other hand, a person who holds property under a title which though voidable, is good for the time being, is entitled to claim subrogation to the rights of the mortgagee whom he has discharged—*Venkatachalam v. Alagarswami*, A.I.R. 1936 Mad. 264 (265), 43 M.L.W. 342, 162 I.C. 34. The same High Court has, however, held that if a person under a mistaken belief that he is the mortgagor or has some other right redeems a mortgage, he would be entitled to the rights of the mortgagee by way of subrogation or a like equitable principle—*Maramittath v. Kuttiyl*, A.I.R. 1937 Mad. 451 (453), 172 I.C. 47. Where a sale is invalid for being effected during attachment of the property (under sec. 64, C. P. C.) the vendee, if he has discharged an encumbrance thereon, is entitled to have a charge on the property—*Appanna v. Yelamarti*, A.I.R. 1926 Mad. 1082 (1083), 97 I.C. 932. Where a purchaser in good faith from a widow holding a life-estate discharges a mortgage-debt out of the consideration for the mortgage and on her death the reversioner sues for possession, credit should be given to the mortgage-amount paid by the purchaser—*Baban v. Bishwanath*, A.I.R. 1934 Pat. 681. When at the time he discharged the mortgage he was not in the position of a purchaser but was merely contracting to purchase the mortgaged property, and consequently had no interest to protect, and then the contract fell through owing to this own default, he was not entitled to be subrogated to the rights of the mortgagee—*Pannammal v. Pichai*, 52 M.L.J. 33, A.I.R. 1927 Mad. 204 (206), 99 I.C. 687. So also, a purchaser cannot claim the right of subrogation, when there was no discharge of any prior mortgage to which his payment of the purchase-money could be ascribed, the prior mortgage having been already satisfied by execution sale of the property—*Audinatha v. Bharathi*, 30 L.W. 981, A.I.R. 1929 Mad. 890 (892). A purchaser whose purchase is found to be invalid is a mere volunteer, and is not entitled to subrogation—*Pichaiyappa v. Govindaraju*, 33 L.W. 78, A.I.R. 1931 Mad. 110 (111), 130 I.C. 506.

"Advanced" :—Where an advance to pay off a mortgage-decree was made on the express understanding that a mortgage would be executed for the amount in favour of the person advancing the money, but for some reason it was not executed; held the person advancing the money was entitled to invoke the doctrine of subrogation—*Oonamalai v. Narasimha*, A.I.R. 1938 Mad. 161 (163), 47 M.L.W. 40; *Bank of Chettinad v. Maung Aye*, A.I.R. 1938 Rang. 306 (F.B.). It should be noted that in both the cases the right accrued before the amendment came into force.

A lessee of a mortgaged property advanced money to the lessor to pay off the mortgagee. The loan was to be recovered out of the rent reserved. The lessor agreed that the lessee would be subrogated to the rights of the mortgagee. The transaction was held to be a lease and not a mortgage—*Board of Revenue, Madras v. Simon and Mc Canechy Ltd.*, A.I.R. 1958 Mad. 508.

Presumption and onus:—In the case of a person who advances money for paying off a mortgage and takes a mortgage or sale, the principle would be that *prima facie* the prior mortgage is discharged, unless there is an agreement that it should be kept alive. The presumption and onus are not the same in the two classes of cases, namely, in the case

where a person having an existing interest discharges a prior mortgage and a person acquiring an interest discharges a mortgage—*Subbarayadu v. Lakshminarasamma*, (1939) 2 M.L.J. 533, A.I.R. 1939 Mad. 949 (954), 1939 M.W.N. 819. The result of the case-law in regard to the presumption and onus is stated in this case.

518A. Mortgagor's agent :—As the mortgagor himself paying off a prior debt is not entitled to subrogation (see Note 515), it is also clear that under normal conditions where the mortgagor employs an agent to clear a prior mortgage, the agent is not entitled to subrogation for the manifest reason that the agent cannot be clothed with a higher right than his principal—*Narain v. Narain*, 52 All. 1037, 1930 A.L.J. 1577, A.I.R. 1931 All. 40 (42). Thus, where the mortgagor sold the equity of redemption and left with the vendee a sum to be paid to a prior mortgagee, the vendee paying off the prior mortgage must be deemed to have done so as the agent of the mortgagor, and was not entitled to subrogation without a registered instrument as provided in para 3—*Raj Bahadur v. Sitla Prasad*, A.I.R. 1951 All. 596. *Sita Ram v. Sarda Narayan*, A.I.R. 1950 All. 682 (F.B.), 1950 A.L.J. 970 ; *Radha Krishna v. Parshottam*, A.I.R. 1953 All. 296 ; *Nachappa v. Samiappa*, A.I.R. 1947 Mad. 18, (1946) 2 M.L.J. 35 ; *Bajinath v. Murlidhar*, 4 A.L.J. 349 ; *Tulsi v. Radha Kishen*, A.I.R. 1933 Lah. 810 ; *Mt. Jaidevi v. Sripal Singh*, A.I.R. 1934 Oudh 129 ; *Jagmohan v. Jagat Kishore*, A.I.R. 1932 P.C. 84, 148 I.C. 815, 36 C.W.N. 4 (7) ; *Mulchanā v. Radha Kisan*, A.I.R. 1927 Nag. 150 (153), 100 I.C. 272. Contra *Ramgopal v. Nanakram*, A.I.R. 1936 Nag. 32 (33), 161 I.C. 551. But where a mortgage is effected by the father and the mortgaged property is allotted to his son on partition and the son redeems the mortgage, the son can claim subrogation as the assignee of the original mortgagor—*Doraiswami v. Vachani Mudaliar*, A.I.R. 1955 Mad. 601.

So also a subsequent mortgagee discharging the prior mortgage at the mortgagor's request, or out of the money left with him by the mortgagor for the purpose, does not do so as mortgagee but as agent of the mortgagor, and in such a case he cannot claim to be subrogated to the rights of the mortgagee so paid off—*Tufail v. Bilota*, 27 All. 400 ; *Shafiquallah v. Samiullah*, 52 All. 139, A.I.R. 1929 All. 943 (946) ; *Sheo Dhyani Singh v. Sunichara Kuer*, A.I.R. 1956 Pat. 349.

It is in each case a question of fact whether a payment has been made by a person as a mere agent of the mortgagor or on his own account for the protection of his interest in the mortgaged property—*Narain v. Narain*, *supra*. Where the second mortgage was executed with the express purpose of discharging the prior mortgage, and money was left with the second mortgagee for that purpose, and the parties, contemplating the possibility of the money left with the mortgagee proving insufficient for the purpose, covenanted that if such a contingency arose, the mortgagors would be personally liable for it, the intention of the parties was that the prior mortgage should be extinguished. There is no question of subrogation, and the mortgagee by paying the excess amount is not entitled to claim the amount as a prior charge—*Said Ahmad v. Raja Barkhandi*, 8 Luck. 40, 1932 Oudh 255, 139 I.C. 64.

This doctrine of agency has, however, been repudiated by the Allahabad Full Bench in *Tota Ram v. Ram Lal*, 54 All. 897, A.I.R. 1932

All. 489 (491), which makes no distinction between a case where the subsequent mortgagee pays off the prior mortgage of his own accord or pays it off out of the money left in his hands by the mortgagor. But in a recent Full Bench case of the same High Court it has been held that where a subsequent mortgagee or vendee pays off a prior mortgage out of his own funds and is thus out of pocket in excess of the amount of the mortgage-money or the sale-consideration which had been fixed by the deed, he is certainly entitled to the right of subrogation. But the money with which the subsequent mortgagee or the vendee pays the first mortgage, may be the property of the mortgagor and so no subrogation should be allowed as the subsequent mortgagee or vendee in making the payment is acting only as an agent of the mortgagor—*Hira Singh v. Jai Singh*, A.I.R. 1937 All. 588 (594) (F.B.) I.L.R. (1937) All. 880, (1937) A.L.J. 840, 171 I.C. 153. See also *Karam Chand v. Ram Singh*, A.I.R. 1937 Lah. 665, 39 P.L.R. 899; *Mukaram v. Md. Hossein*, A.I.R. 1936 Cal. 42 (43), 62 Cal. 677, 161 I.C. 48. Such a purchaser is not entitled to subrogation under para 1; but he may be so entitled under para 3 if the mortgagor by a registered instrument agreed that he should be subrogated—*Bansidhar v. Karloo Mandar*, A.I.R. 1938 Pat. 532 (533), 19 P.L.T. 500, 176 I.C. 655.

Undertaking to pay two or more mortgages:—A later purchaser or mortgagee who undertakes to pay two prior encumbrances but pays only one, cannot use the payment as a shield against the claim of the other encumbrancer or claim priority over him—*Abdul v. Abdul*, A.I.R. 1933 Mad. 715, 65 M.L.J. 390; *Lakshmi v. Narayanasami*, A.I.R. 1930 Mad. 51 (54), 53 Mad. 188, 124 I.C. 497. But see *Tota Ram v. Ram Lal*, supra, where it has been held that where a purchaser undertook to pay off two or more mortgages to which the property was subject and he discharged only the prior mortgage, he must be given priority over the subsequent mortgage by being subrogated to the position of the earlier mortgagee. This view was also taken in the subsequent Madras case of *Bappu v. Dhurvas*, A.I.R. 1934 Mad. 227 (229), 64 M.L.J. 606, 148 I.C. 311. The Madras High Court has, however, in a recent Full Bench case reiterated the proposition laid down in *Abdul v. Abdul*, supra, and overruled *Bappu v. Dhurvas*, supra. See *Kakshmi v. Shankara*, A.I.R. 1936 Mad. 171 (172) (F.B.), 43 M.L.W. 23, dissenting from the Allahabad Full Bench case of *Tota Ram v. Ram Lal*, supra.

Where a subsequent purchaser of mortgaged properties pays certain decree-debts and mortgage-debts of the mortgagor, he cannot claim that only the prior mortgages were fully paid off so as to use them as a shield against subsequent mortgages. In the absence of evidence of such payments, it would be taken that all debts were paid *pro tanto* and he would be entitled to only such proportionate amount as would be deemed to have gone towards satisfaction of the prior mortgages and nothing more—*Kantele v. Neti Venkata*, A.I.R. 1934 Mad. 31 (38), (1933) M.W.N. 597.

519. 4th para—Payment must be in full:—The words "mortgage has been redeemed" refer merely to the payment off of the mortgage-money and not to an extinction of the mortgagee's rights over the mortgaged property. A person mortgaged in succession three properties to one B, subsequently he executed a fourth mortgage in favour of B charging D properties. It was provided in this mortgage-deed that the mortgage would not be redeemable unless the debts on all the prior mortgages

were paid. The fourth mortgage was not a comprehensive mortgage of properties of the prior three mortgages. Subsequently, the mortgagor executed a mortgage in favour of P charging all the properties in the four prior mortgages with certain other properties with the object of satisfying the debt on the four prior mortgages. It was provided in this mortgage-deed that P would be subrogated to the rights of B on payment off of debts on all or any of the prior mortgages. The mortgagor with this money actually paid to B all debts due on the first three mortgages before the right to sue on the fourth mortgage accrued to B. B brought a suit on the fourth mortgage: *held* that P was entitled to be subrogated to rights of B under the first three mortgages ranking in priority to the mortgage thereon of B under the terms of the present section 92, or if sec. 92 was not applicable (as the mortgage was executed in 1927), then under the pre-existing law—*Janaki Nath v. Pramatha Nath*, A.I.R. 1940 P.C. 38, 67 I.A. 82, I.L.R. (1940) 1 Cal. 291, 44 C.W.N. 361.

A person who claims to be subrogated to the rights of a mortgagee must pay the entire amount of the incumbrance in question. Payment of a portion only of the incumbrance is not sufficient. Such a qualification of the right of subrogation applies whether the right be claimed under the statute or under the pre-existing law—*Ibid*. A partial payment of the debt on an earlier mortgage by a subsequent mortgagee does not give a claim for subrogation—*Gurdeo v. Chandrika*, 36 Cal. 193 (220, 221); *Hanumanthiyan v. Meenatchi*, 35 Mad. 183; *Venkata Lakshminarayanan v. Venkayya*, 43 M.L.J. 284, 95 I.C. 689, A.I.R. 1922 Mad. 441 (442); *Narain Pershad v. Narain Singh*, 52 All. 1037, A.I.R. 1931 All. 40 (42); *Lakhraj v. Jang Bahadur*, 7 P.L.T. 22, 89 I.C. 822, A.I.R. 1926 Pat. 23; *Ma Lon v. Ma Nyo*, 1 Rang. 714, A.I.R. 1924 Rang. 204, 79 I.C. 766; *Pingali v. Kotigari*, A.I.R. 1922 Mad. 247, 70 I.C. 212; *Thimmanayanim v. Damara Kumara*, A.I.R. 1928 Mad. 713 (718) (F.B.), 27 M.L.W. 544, 109 I.C. 872; *Nisar v. Manzur*, A.I.R. 1935 Oudh 245 (249), 154 I.C. 267; *Birendra v. Bahuria*, A.I.R. 1934 Pat. 612, 13 Pat. 356; *Madho Ram v. Kritya Nand*, A.I.R. 1944 P.C. 96, 49 C.W.N. 75. Such partial payment would only have the effect of giving fresh life to the prior mortgage—*Brijmohan v. Dukhan*, 9 Pat. 816, A.I.R. 1931 Pat. 33 (37), 130 I.C. 168, 11 P.L.T. 883. The person who makes the payment; cannot, by simply paying the interest as it accrues due or paying or discharging a portion of the interest which has already accrued, claim a right of subrogation. He must pay the entire amount of the incumbrance which is senior to his own—*Gurdeo Singh v. Chandrika Singh*, 36 Cal. 193 (220). A purchaser of the equity of redemption cannot, upon redeeming only a half share of the mortgage, claim a right to subrogation—*Kanhaiya v. Ikram Fatima*, 8 Luck. 103, A.I.R. 1932 Oudh 268 (271). But see *Charan Dass Malchand v. Smt. Tara Debi*, A.I.R. 1964 Punj. 281 where it has been held that if a mortgage is split up any person redeeming an independent part in full acquires the right of subrogation. A subsequent mortgagee is not entitled to redeem the prior mortgage by simply paying the price for which the prior mortgagee may have purchased the mortgaged property at an auction-sale held in execution of the decree obtained by him on his mortgage; where he (the subsequent mortgagee) elects to redeem the prior mortgage under such circumstances, he, like the mortgagor, will not be entitled to do so save upon tender or payment of the full amount due

on it—*Dip Narain v. Har Singh*, 19 All. 527 ; *Gurdeo Singh v. Chandrika Singh*, 36 Cal. 193 ; *Wahidunnissa v. Gobordhan*, 25 All. 388 (394) (F.B.) ; *Dino Nath v. Lachmi Narayan*, 25 All. 446 (453) ; *Danoba v. Damodar*, 16 Bom. 486 ; *Phulmani v. Nagesha*, 33 All. 370. But the subsequent mortgagee is entitled to subrogation if the prior mortgage has been entirely satisfied, although he has advanced only a part of the money—*Rupabai v. Audimulam*, 11 Mad. 345 ; *Saminatha v. Krishna*, 38 Mad. 548 ; *Ram Sarup v. Ram Richhpal*, 51 All. 920, A.I.R. 1929 All. 621, 119 I.C. 84 ; *Shib Charan v. Muqaddam*, A.I.R. 1936 All. 62 (63), 158 I.C. 643 ; *Neelakanta v. Sankara*, A.I.R. 1953 Tr.-Coch. 69.

If, however, a purchaser of the equity of redemption, with the consent of the prior incumbrancer, *partially* discharges the mortgage-debt, and the prior incumbrancer *accepts* the part-payment and allows the liability on the property to be discharged in part, the purchaser is entitled to stand in the shoes of the prior incumbrancer, and is entitled to claim priority over subsequent incumbrancers—*Udit Narain v. Ashrafi*, 38 All. 502 (504) ; *Premasukhdas v. Peerkhan*, 23 N.L.R. 86, A.I.R. 1926 Nag. 21 (24), 95 I.C. 979. But see *Mangal Sen v. Kewal Ram*, A.I.R. 1940 All. 75, 187 I.C. 274 where it has been held that para 4 of this section does not make any exception in favour of a person who has been allowed by the mortgagee to redeem the mortgage in part ; hence a person so redeeming cannot claim the right of subrogation (in this case *Udit Narain v. Ashrafi Lal*, *supra*, has been held not to be good law).

To confer a right of subrogation it is necessary that a prior mortgagee must be paid in full, but it is not necessary that the person claiming to be subrogated should have paid the entire mortgage-debt himself—*Padma Lochan v. Ajmaddin*, 42 C.W.N. 1106. The fact that part of the redemption-money was paid by the vendee and part by the mortgagor has no bearing on the question—*Hira Singh v. Jai Singh*, A.I.R. 1937 All. 588 (598) (F.B.), I.L.R. (1937) All. 880, (1937) A.L.J. 840, 171 I.C. 153. All that is necessary is that the mortgage dues must have been fully satisfied. For instance, if three persons A, B and C advance money with which a prior mortgage is redeemed in full, they are entitled to claim subrogation in proportion to the amounts they have respectively paid—*Kamalapati Devi v. Jogeshwar Dayal*, 18 Pat. 342, A.I.R. 1939 Pat. 375, 1939 P.W.N. 8 ; *Sinnaswami v. Rama*, A.I.R. 1941 Mad. 563, (1941) 1 M.L.J. 519, 1941 M.W.N. 313.

A puisne mortgagee intending to redeem a prior mortgage must pay for the advances made and expenses incurred by the prior mortgagee and which the prior mortgagee is entitled to add to his mortgage-money under sec. 72—*Fulsa v. Khubchand*, 1891 A.W.N. 193.

Availability of the right of subrogation is no bar to a suit for contribution—*Aley v. Vappukakkaru*, A.I.R. 1964 Ker. 256.

80. No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby

93. No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby

Tacking
abolished.

Prohibition
of tacking.

acquire any priority in respect of his original security. And except in the case provided for by section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

acquire any priority in respect of his original security ; and, except in the case provided for by section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

"As the principle of 'tacking' is closely allied to subrogation, we propose to put section 80 as section 93."—*Report of the Special Committee.*

Excepting a verbal alteration in the marginal note, no other amendment has been made.

520. Principle :—This section was enacted with the object of prohibiting the English form of tacking which gave an unjust priority to the holder of a third mortgage over the holder of a second mortgage when the third mortgagee had paid off the first mortgage—*Tajoo Bibi v. Bhagwan Prosad*, 16 All. 295. And this section therefore expressly declares that by the mere payment of a prior mortgage, a subsequent mortgagee does not acquire for his *subsequent* mortgage any priority over any other mortgage—*Girdhar v. Ram Autar*, 8 C.W.N. 690. Thus, the owner of a house mortgaged it in 1861 to A and put him in possession and in 1873 mortgaged the same to B and in 1874 again to A to secure another sum. B, who sued the mortgagor for possession and obtained a decree and was resisted by A in execution, sued A to eject him and to obtain possession of the mortgaged property until he was paid off the amount due on his mortgage, whereupon A set up his own two mortgages, and claimed to be paid the amount due on *both* of them before he could be called upon to render up possession. *Held*, that A's right as against B was either to redeem B's intermediate mortgage, or else to hold the mortgaged property until his own first mortgage was redeemed to B, but that A could not claim to retain possession as against B until his *third* mortgage as well as his first was paid off, since B's mortgage was prior in date to, and therefore was to be preferred before, the third mortgage of A—*Narayan v. Pandurang*, 7 Bom. 526. A property was mortgaged to A, and then to B, and then again to A. A obtained two decrees on his mortgages (*i.e.*, first and third mortgages) and the whole of the sale-proceeds realised in execution of his decrees was paid to him. B then obtained a decree on his mortgage and sued A in which he claimed that his decree should be satisfied out of the sale-proceeds before satisfying A's decree under the third mortgage. A contended that as the property had been sold in discharge of *both* his incumbrances, he was entitled under sec. 73, C.P. Code (1908) to the proceeds in respect of both of his decrees in priority to the second mortgagee. *Held* that A's contention could not prevail, for such a distribution of sale-proceeds, postponing the second mortgagee to the third, would be to defeat the intention of the legislature

as expressed in sec. 73 of the C. P. Code and also in sec. 80 (93) of the Transfer of Property Act—*Mithu Lal v. Kishan Lal*, 12 All. 546. See also *Canara Banking Corporation Ltd. v. South India Bank Ltd.* (1957) 2 Mad. L.J. 502.

The words "except in the case provided for by section 79" mean except where the mortgage expresses a maximum to be secured thereby. If no maximum is fixed, the case falls under the latter part of this section and the prior mortgagee, making a subsequent advance to the mortgagor whether with or without notice of an intermediate mortgage, does not acquire any priority over the intermediate mortgage in respect of his security for such subsequent advance—*Imperial Bank of India v. U. Rai Gyaw Thu & Co., Ltd.*, 51 Cal. 86 (98) (P.C.), 1 Rang. 637, A.I.R. 1923 P.C. 211, 28 C.W.N. 470, 76 I.C. 910. The word "subsequent" from the context must mean subsequent to the intermediate mortgage, so in the sense of the section an advance when made after another mortgage is granted becomes a subsequent advance—*Ibid.*

This section is complementary to section 79—*Durga Prasad v. Mario Golstaun*, A.I.R. 1955 Cal. 194.

75. Every second or other subsequent mortgagee has, so far as regards redemption, foreclosure, and sale of the mortgaged property, the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee or mortgagees, and the same rights against the subsequent mortgagees (if any) as he has against his mortgagor.

Rights of mesne mortgagee against prior and subsequent mortgagees.

94. Where a property is mortgaged for successive debts to successive mortgagees, a mesne mortgagee has the same rights against mortgagees posterior to himself as he has against the mortgagor.

Rights of mesne mortgagee.

Amendment :—This section has been redrafted by sec. 47 of the T. P. Amendment Act (XX of 1929).

521. This section only relates to the rights of the second mortgagee as against the subsequent mortgagees, and does not define his rights as against the mortgagor, which have to be gathered from the other provisions of the Act—*Kanti Ram v. Kutubuddin*, 22 Cal. 33 (38, 42).

The principle of law is 'redeem up, foreclose down'; so, if there are several mortgagees, the later can always redeem the earlier, but the earlier cannot redeem the later except by consent—*Chinna Pillai v. Venkatasamy*, 40 Mad. 77; *Premasukhdas v. Peerkhan*, 23 N.L.R. 86, A.I.R. 1926 Nag. 21 (23), 95 I.C. 979. Where each of two simple mortgagees files a separate suit impleading the mortgagor alone and in the auction sales following different persons became purchasers, the priority of the dates of purchase determines the priority of the title to possession

—*Mad. Jaman v. Akali Mudiani*, A.I.R. 1943 Cal. 577, 47 C.W.N. 682. A puisne mortgagee can realize his right to the *jus possessendi* without redeeming the prior mortgage—*ibid.* Where there are prior and puisne mortgages on the same property and suits are instituted by the prior and puisne mortgagees, each not impleading the other, the purchaser at the Court sale in execution of the decree obtained by the prior mortgagee cannot redeem the purchaser at the Court sale in execution of the decree obtained by the puisne mortgagee—*Shanmugam Nadar v. Sivan Pilai*, A.I.R. 1967 Mad. 418.

95. Where one of several mortgagors redeems the mortgaged property, and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession.

95. Where one of several mortgagors redeems the mortgaged property, * * * *he shall, in enforcing his right of subrogation under section 92 against his co-mortgagors, be entitled to add to the mortgage-money recoverable from them such proportion of the expenses properly incurred in such redemption as is attributable to their share in the property.*

Amendment :—This section has been amended by sec. 48 of the T. P. Amendment Act (XX of 1929).

The words "obtains possession" have been omitted. See Note 524 below.

Retrospective effect of amendment :—Since the amended provisions of sec. 92 have retrospective effect, this section has also got retrospective operation—*Brij Bhukhan v. Bhagwan Datt*, A.I.R. 1942 Oudh 449 (456) (F.B.). See Note 1A, *ante*.

This section is supplementary to sec. 92 in respect of co-mortgagors.

The old sec. 95 was applicable only when a co-mortgagor discharged the mortgage and not to cases coming under sec. 74—*Shamsuddin v. Haidar Ali*, A.I.R. 1945 Cal. 194, 49 C.W.N. 104.

522. Principle :—The principle of this section is the principle upon which contribution is claimed by and is allowed to one co-sharer of a property against another, when the former discharges a joint debt. The effect of the old sec. 95 was not to place the person claiming to enforce the charge completely in the position of the mortgagee in such a manner that he could enforce the charge of the mortgage-deed against those mortgagors who had not borne their share in the redemption—*Birendra v. Bahuria*, A.I.R. 1934 Pat. 612 (614), 13 Pat. 356. Under the old section 95 which was the only section containing a complete statement of the right of a redeeming co-mortgagor, such a mortgagor had merely a "charge on the shares of the other co-mortgagors for his proportion of the expenses" etc., but this was not a right of subrogation; and the old section 74, which was the only section dealing with subrogation, did

not include the case of a redeeming co-mortgagor but was concerned only with the subsequent mortgagee redeeming a prior mortgage.—*Umar Ali v. Asmatiali*, 58 Cal. 1167 (F.B.), 35 C.W.N. 409 (419), 130 I.C. 889. The old section 95 has been elaborately analysed and explained in this case.

Each and every one of the mortgagors who owns separate shares in the mortgaged property is entitled to redeem the whole estate by payment of the whole mortgage-debt, and seek contribution from the others—*Narender v. Dwarka*, 5 I.A. 18 (27), 3 Cal. 397 (P.C.).

The word 'mortgagor' includes persons deriving title from the mortgagor (sec. 59A); consequently, a purchaser of the equity of redemption of one of the mortgagors can redeem the whole mortgage—*Dhakeswar v. Harihar*, 21 C.L.J. 104, 27 I.C. 780 (783); *Ramchandra v. Narayanaswami*, 51 Mad. 810, 112 I.C. 6, A.I.R. 1928 Mad. 950 (951); *Mohan v. Kashinath*, 3 N.L.R. 92. So also, one of the representatives of the original mortgagor can do so—*Mamola v. Kedar Nath*, 22 I.C. 918 (919) (Oudh).

When the equity of redemption vests in several persons by reason of gift of different portions to them, they must all be treated as co-mortgagors within the meaning of this section. There is nothing in sec. 59-A to support the view that if a mortgagor transfers his equity of redemption to several persons, then they cannot be co co-mortgagors—*Nisar v. Manzur*, A.I.R. 1936 Oudh 47 (48-49), 159 I.C. 54. See also *Md. Fariduddin v. Nand Ram*, A.I.R. 1927 All. 626; *Abdul v. Abdul*, A.I.R. 1933 Mad. 715, 65 M.L.J. 390.

The right to enforce a charge created under this section by the redemption of a mortgage by the holder of a part of the mortgaged property accrues only when the whole mortgage-debt has been paid off, and the period of limitation for a suit for enforcement of such a charge is 12 years from the date of payment of the whole debt—*Birendra v. Bahuria*, A.I.R. 1934 Pat. 612, 13 Pat. 356.

523. Redeems :—Co-mortgagor paying money after mortgage-decree :—A charge is created under this section in favour of a co-mortgagor who *redeems*, and there can be redemption only as long as the mortgage subsists. Where an order absolute for sale had been passed under sec. 89 (repealed) of the T. P. Act the security as well as the mortgagor's right to redeem were both extinguished, and any payment made thereafter could not be taken as payment by way of 'redemption'; consequently no charge could be created under this section in favour of the person who made such payment—*Rabnath v. Ganesh Prosad*, 23 O.C. 334, 60 I.C. 213; *Nawab Jahanara v. Mirza Shujauddin*, 9 C.W.N. 865 (867). But a different view has been taken by the Bombay High Court. Thus, it has been held there that even if *after* a decree has been passed for sale, one of the co-mortgagors sells his share of the property and the purchaser pays off the entire mortgage-debt and saves the property from sale, he acquires a charge on the property in respect of so much of the money as the portions of the other co-mortgagors were reteably liable for—*Danappa v. Yamnappa*, 26 Bom. 379. This is also the view of the Allahabad High Court. See *Ibn Husain v. Ramdai*, 12

All. 110, where the mortgage was satisfied by a co-owner of the property *after decree*.

Where the holder of a mortgage-decree for sale assigns it to a person who acquires the interest of one of the judgment-debtors before the assignment and in execution proceedings started by him the other judgment-debtors object to the execution and challenge the assignment, the rights of the parties cannot be determined in execution proceedings, but must be left for determination in a proper suit for contribution—*C. K. Bezbarua v. Golak Chandra*, A.I.R. 1939 Cal. 425 (427), 70 C.L.J. 143, 183 I.C. 792.

Under the present Rule 5 of Order 34, the mortgagor can redeem *even after sale*, and before the confirmation of the sale.

Payment need not be made in Court :—If the money is paid out of Court, and the decree-holder accepts it, and certifies the payment, the requirements of this section are fulfilled—*Tukarama v. Arjuna*, 54 I.C. 904 (Nag.).

Although it is possible for co-mortgagors to work out the equities as between themselves by a contribution suit where some of them are made to discharge a burden which primarily rests on others, still the Court should avoid doing anything which would unnecessarily involve such a course—*Lalit Mohan v. Krishnadhan*, A.I.R. 1939 Cal. 166 (169), 42 C.W.N. 1170, 68 C.L.J. 139.

Redemption by payment of balance due :—A person is said to 'redeem' a mortgage, if he pays off the balance of money remaining due on the mortgage and releases the security. Therefore, a co-mortgagor is entitled to a charge under this section who pays off the balance of money due upon the mortgage and releases the property—*Hira Kuer v. Palku*, 3 P.L.J. 490, I.C. 479.

524. Possession not necessary :—The old section contained the words "obtains possession" which gave rise to some misunderstanding, for which the Legislature has thought fit to omit them from the present section—see *Mohan Singh v. Seiva Ram*, A.I.R. 1924 Oudh 209 (217), 75 I.C. 579.

In other words, if the mortgagee was not in possession, the redeeming co-mortgagor need not obtain possession. See *Bhagwan Das v. Hardei*, 26 All. 227; *Ibn Hasan v. Brijbhukhan*, 26 All. 407 (417). *Hira Kuer v. Palku*, 3 P.L.J. 490, 46 I.C. 479. *Ghulam Maula v. Banno*, 4 O.C. 273; *Qamar Jahan v. Munney Mirza*, 12 O.L.J. 313, 2 O.W.N. 413, 92 I.C. 559, A.I.R. 1925 Oudh 613; *Mohun v. Kashinath*, 3 N.L.R. 92; *Jag Mohan v. Naurang*, 20 O.C. 72, 39 I.C. 186 (187). The section must be construed on the footing that in cases in which there is no question of obtaining possession, the charge is intended to follow immediately upon the redemption—*Umar Ali v. Asmatiali*, 58 Cal. 1167 (F.B.), 35 C.W.N. 409 (419).

Redeeming mortgagor's right of subrogation :—See Note 517 under sec. 92.

524A. Expenses properly incurred :—The poundage fee paid by

the judgment-debtor for setting aside the sale of the mortgaged property is not an expense properly incurred in redeeming the mortgage—*Damodarasami v. Govindarajulu*, A.I.R. 1943 Mad. 629 (F.B.), (1943) 1 M.L.J. 291. So also the compensation which a mortgagor has to pay to the auction-purchaser on the sale of the mortgaged property being set aside under O. 21, r. 89 C. P. Code is not an expense properly incurred—*ibid*.

525. Interest :—Under this section the redeeming co-mortgagor is given a charge only for the *expenses* properly incurred by him in redeeming the property, but it does not provide for *interest* on the redemption-money. It lies on the discretion of the Court to allow a reasonable interest—*Gafur Iman v. Amir Isab*, 49 Bom. 591, A.I.R. 1925 Bom. 484 (485), 88 I.C. 658. See also *Suwabai v. Krishna*, A.I.R. 1948 Nag. 256, I.L.R. 1946 Nag. 668. In the Privy Council case of *Ahmad Wali Khan v. Shamsul*, 28 All. 482 (P.C.), their Lordships did not allow interest from the date of redemption, but only from the date of institution of the suit by the redeeming co-mortgagor to recover from the other co-mortgagors their share of the redemption-money, and the interest was allowed at the Court-rate (6 per cent.). No interest was allowed for the intervening period. This case has been followed by the Bombay High Court in *Gafur Iman v. Amir Isab*, *supra*.

The Calcutta High Court holds that the doctrine of subrogation is only a fiction of law, and the extent to which it would be carried in any particular case must be governed by equitable considerations, so as to attain the ends of substantial justice—*Digambar v. Harendra*, 14 C.W.N. 617 (623), 11 C.L.J. 226, 5 I.C. 165. In this case (p. 624), interest at the rate stipulated in the mortgage was allowed from the date of redemption up to the date when it was decreed that the redeeming mortgagor had a charge on the shares of the other co-mortgagors; and from that date up to the date of realisation, at the Court-rate. The Oudh Court holds that the rate of interest must be reasonable. The fact that the redeeming co-mortgagor had to borrow redemption-money at a high rate of interest is not a ground for charging the same rate from the other co-mortgagors—*Jago v. Arjun*, 49 I.C. 230 (Oudh). See also *Raushan Ali v. Kali Mohan*, 4 C.L.J. 79, where the Court allowed interest at 12 per cent. The limited right of subrogation created by this section must be treated as if in fact it entitles the co-mortgagor to enforce the terms of the mortgage-bond. The question of what interest should be payable to the co-mortgagor paying the mortgage-debt or what amount and from what date, is one at the discretion of the Court—*Birendra v. Bahuraj*, A.I.R. 1934 Pat. 612 (614), 13 Pat. 356.

Mortgage by deposit of title-deeds.

96. *The provisions hereinbefore contained which apply to Mortgage by deposit of title-deeds. a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds.*

This section has been inserted by sec. 48 of the T. P. Amendment Act (XX of 1929).

97. *[Repealed by Act V of 1908.]*

See O. XXXIV, r. 13 in the Appendix.

Anomalous Mortgages.

98. In the case of a mortgage, not being a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, or an English mortgage, or a combination of the first and third, or the second and third, of such forms, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.

Mortgage not described in section 58, clauses (b), (c), (d) and (e).

98. In the case of an *anomalous mortgage* the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.

Rights and liabilities of parties to anomalous mortgages.

Amendment :—This section has been amended by sec. 49 of the T. P. Amendment Act (XX of 1929).

Scope :—The general recognized forms of mortgages are defined in sec. 58 *ante*, but parties in course of business are sometimes apt to import in particular mortgage transactions some terms which do not strictly come within any of these general forms. The terms may partly be of one form of mortgage and partly of another and this is the sort of combination which is contemplated by this section—*Buttokristo v. Govindaram*, A.I.R. 1939 Pat. 540, 182 I.C. 132.

Where by the terms of a mortgage, the mortgagee is given the right to recover the mortgage-debt by sale of the mortgaged property and in the alternative by realising the rent of that property from the tenants, the mortgage being a combination of a simple and a usufructuary mortgage does not fall within the scope of sec. 98 as it was before the amendment of 1929—*Ibid*, at p. 542.

The rights and liabilities of parties to an anomalous mortgage are governed by sec. 98 which however does not altogether exclude the operation of other relevant provisions, provided they are not inconsistent with the contract in the deed. Thus where the mortgagee of an anomalous mortgage is obliged to pay a previous mortgage debt for obtaining possession of the mortgaged property, he has the legal right of subrogation under para 1 of sec. 92, where such a right is not excluded from the term of the contract between the parties—*Jagdeo v. Rambilash*, A.I.R. 1950 Pat. 13, 28 Pat. 531. See also *Hundaldas v. Balukhan*, A.I.R. 1943 Sind 59, I.L.R. 1942 Kar. 452.

526. General principles applicable :—This section provides that the provisions in the Act relating to the rights and liabilities of the parties do not apply to an anomalous mortgage which is governed by the deed itself. But the principle of substitution of some other property for the mortgaged property being a general principle of law not provided for

in the Act is not affected by this section—*Ganga Prasad v. Dulari Saren*, A.I.R. 1937 Pat. 345 (347), 170 I.C. 134.

It has been held that the provisions of sec. 60 are imperative and the right of redemption cannot be lost even in the case of an anomalous mortgage—*Chellakutti v. Veragappa*, A.I.R. 1925 Mad. 366, 82 I.C. 809. But in a Full Bench case of the Madras High Court Wallis, C. J. and Sheshagiri Ayyar, J. were of opinion that sec. 60 does not apply in the case of an anomalous mortgage when there is a contract or local usage to the contrary—*Kandula v. Padmanabhudu*, 43 Mad. 589 (F.B.).

527. Rights and liabilities :—In the case of an anomalous mortgage, the rights and liabilities of the parties should be determined by the contract as evidenced in the mortgage-deed. Thus, where according to the terms of an anomalous mortgage-deed, there was no provision for payment of interest after 4 years, *held* that interest was not claimable after that period—*Sundar Dei v. Thakur Baldeo*, 28 I.C. 161, 18 O.C. 10. The mortgagee may have a right to foreclose or to bring the property to sale according to the terms of the deed. If there is no provision in the deed for sale, the mortgagee has no right to bring the property to sale—*Madho Rao v. Ghulam*, 15 N.L.R. 134 (P.C.), 56 I.C. 717; *Gajadhar v. Sibananda*, 28 C.W.N. 532, A.I.R. 1924 Cal. 592, 81 I.C. 768. But see *Smt. Savitri Devi v. Smt. Beni Debi*, A.I.R. 1968 Pat. 222 where it has been held the mortgagee is entitled to realise the mortgage money by sale even in the absence of any provision to that effect in the deed. It is only where sale is specifically prohibited that the money cannot be realised by sale. If the mortgage-deed provides both for foreclosure or for sale according to the option of the mortgagee, he can bring either a suit for foreclosure or a suit for sale; and in such a case, if he brings a suit for foreclosure, the mortgagor cannot compel him to accept a decree for sale, unless he (the mortgagor) proves by satisfactory evidence that the remedy sought for by the mortgagee is manifestly injurious to his interest—*Nawab Syed v. Balak Ram*, 18 I.C. 24 (Oudh). In a *dakhal-rehan* deed the mortgagors stated that they had taken a loan which they expressly promised to pay by a certain date. It was next stipulated that in the event of non-payment, the creditors would be put in possession of certain property as *dakhal-rehandars* until payment. There was a further stipulation that if the creditors, through any act done by the mortgagors or in any manner failed to get possession, they should be at liberty to realize the principal with interest from the person and properties of the mortgagors or from the *rehan* property in any manner they liked: *held* that the mortgage was of an anomalous kind and the rights and liabilities of the parties were to be determined by their contract as evidenced by the deed. As the deed created a personal liability, the assignee of the mortgagee was entitled to get a decree under Or. 34, r. 6, C. P. Code, against the mortgagor personally—*Beni Madho v. Janki*, A.I.R. 1937 Pat. 261 (262), 169 I.C. 75.

A mortgage-deed contained the following terms: "As we have received Rs. 500, you will, in lieu of the said amount and interest, enjoy the said property for three years by virtue of *Arakattu Otti* on the condition that on the expiry of the said 3 years we should redeem the land without paying either principal or interest, and you will on the expiry

of the said 3 years deliver possession without objection." The mortgagee obtained possession of only a portion of the land. *Held* that on the expiry of the three years, the mortgagee was bound to deliver possession of that portion to the mortgagor, according to the terms of the deed, and was not entitled to retain possession of that portion on the ground that possession of the whole had not been given to him. His remedy was to sue for damages for breach of contract in not giving possession of the whole of the land—*Visvalinga v. Palaniappa*, 21 Mad. 1 (3). A usufructuary mortgage was made for four years, and it was covenanted "that the mortgagee, will credit the profits towards the yearly interest. Should any deficiency arise, the mortgagor will pay the same from his own pocket, and the whole money, principal and interest, having been paid at the expiry of the term, the mortgaged property will be redeemed." *Held* that as a term was fixed in the bond, it was not a purely usufructuary mortgage, but an anomalous mortgage; and the intention of the parties was that if at the expiration of the four years the principal and interest were paid up by the mortgagor, the mortgage would be redeemed; but in the event of this not taking place either by reason of the profits having been insufficient to pay the mortgage-debt with interest or the mortgagor having failed to do so, the mortgage relations between the parties were to continue upon the same terms as theretofore—*Hikmatulla v. Iman Ali*, 12 All. 203 (205). If a deed purporting to create a usufructuary mortgage contains a personal covenant to pay the transaction is an anomalous mortgage entitling the mortgagee to bring a suit for sale—*Ramchandra Naidu v. Hassina Bi*, (1968) 1 M.L.J. 139. A deed of anomalous mortgage contained a clause that in case of default of payment the mortgage might bring a suit for sale, and in case the whole amount was not realised by the sale, he was to have a personal remedy against the mortgagor for the balance. The mortgagee brought a suit for a money-decree against the mortgagor. *Held* that the creditor could not rely on the personal covenant and get a simple money-decree as the covenant could be availed of only in a certain contingency (*viz.*, the insufficiency of the sale-proceeds to discharge the whole debt) which had not arisen—*Kalka v. Mathura Das*, 21 O.C. 341, 50 I.C. 220 (221).

It was held in certain Madras cases that since the rights of the parties are governed by the term of the contract, any covenant agreed between the parties in a deed of anomalous mortgage must be enforced, even though it amounted to a clog on redemption—*Kuttikat v. Kunhikavamma*, 1918 M.W.N. 235, 43 I.C. 989; *Hakeem Patte v. Sheikh Davood*, 39 Mad. 1010; *Kandula Venkiah v. Donga Pallaya*, 43 Mad. 589 (598, 609) (F.B.), 57 I.C. 724. But this view has now been overruled by a Privy Council case. In this case, the mortgage-deed provided that the property was mortgaged for five years, that the mortgagor was to redeem at the end of the term, and that if he did not do so, the mortgagee was to have the option of taking possession for a period of twelve years. If the mortgagee took possession, the mortgagor would not be entitled to redeem within 12 years. The mortgage-debt not having been paid at the end of five years, the mortgagee took possession; in the same year the mortgagor sued to redeem. The mortgagee contended that since he elected to take possession, the mortgagor was not entitled to redeem till

after the expiry of twelve years. *Held* that even if it were an anomalous mortgage in which the rights and liabilities of the parties are determined by the agreement entered into between them, still such agreement cannot defeat the statutory right of redemption conferred by section 60. That section is unqualified in its terms and is not controlled by the provisions of sec. 98, and it lays down that a mortgagor has a right of redemption as soon as the principal money has become due. In the present case the mortgage is stated to be for five years, which means that the principal money becomes due after 5 years, and the mortgagor's right of redemption consequently accrued after the expiry of that period. This right cannot be defeated or postponed for 12 years by reason of the mortgagee taking possession. In other words, an agreement creating a clog on redemption cannot be enforced even in an anomalous mortgage—*Muhammad Sher Khan v. Raja Seth Swami Dayal*, 44 All. 185 (P.C.), 25 O.C. 8, 66 I.C. 853, A.I.R. 1922 P.C. 17. If the suit for the sale of a property subject to a usufructuary mortgage containing also a stipulation for the sale of property is dismissed the mortgagee's right to possess is not thereby extinguished—*Bharoselal v. Daryao*, 1961 Jab. L.J. 1207.

Where the stipulation in the deed entails great hardship on the parties and amounts to a penalty, it will be relieved against by the Court. See *Kottal Uppi v. Edavalath*, 6 M.H.C.R. 258. Assuming that the Court has jurisdiction to grant relief against penalty, the Court has no jurisdiction to re-open a final decree for foreclosure for the purpose of extending the time for foreclosure on equitable grounds—*Autar Singh v. Md. Ejaz Rasool*, A.I.R. 1950 P.C. 88, 54 C.W.N. 313, 77 I.A. 53.

Local usage :—As instances of local usage, mention may be made of *otti* and *kanom mortgages*, which according to the custom prevailing in Malabar are not redeemable before 12 years from the date of their execution. In modern times, *kanoms* have acquired many of the incidents of mortgage and are recognised as anomalous mortgages—*Moiduni v. Poothari*, A.I.R. 1933 Mad. 876 (879), 65 M.L.J. 826. See Note 348A under sec. 58.

99. [Repealed by Act V of 1908.)

See O. XXXIV, r. 14, C. P. Code in the Appendix.

Charges.

100. Where immoveable property of one person is, by act of parties or operation of law, made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained as to a mortgagor shall, so far as may

100. Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions herein-before contained *which apply to a simple mortgage*

be, apply to the owner of such property, and the provisions of sections 81 and 82 shall, so far as may be, apply to the person having such charge.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust.

shall, so far as may be, apply to such charge.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, *and save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.*

Amendment :—This section has been amended by sec. 50 of the T. P. Amendment Act (XX of 1929).

527A. Effect of amendments :—The amendments in this section were made not for altering the law, but for making it clearer—*Goswami v. Ramchandra*, A.I.R. 1944 Nag. 1, I.L.R. 1943 Nag. 713; *Rustomalli v. Aftabhuseinkhan*, A.I.R. 1943 Bom. 414, 45 Bom. L.R. 862; *Kulandaivelu v. Sowbhagmal*, A.I.R. 1945 Mad. 350, (1945) 1 M.L.J. 261; *Mt. Indrani v. Maharaj*, A.I.R. 1937 Oudh 217 (F.B.); *Municipal Board v. Roop Chand*, A.I.R. 1940 All. 456, I.L.R. 1940 All. 669. Even before the amendment a charge whether created by act of parties or by operation of law was not enforceable against a transferee for consideration without notice—*Rustomalli v. Aftabhuseinkhan*, supra. See also *Bapurao v. Narayan*, A.I.R. 1950 Nag. 117, I.L.R. 1949 Nag. 802.

Amendment is retrospective:—As this section is not referred to in sec 63 of Act XX of 1929, the amendment made herein is retrospective—*Indra Narain v. Md. Ismail*, I.L.R. 1939 All. 885, (1939) A.L.J. 849, A.I.R. 1939 All 687 (688) *per* Bennet and Verma, JJ.; *Barhu v. Jasoda*, A.I.R. 1945 Pat. 426, 24 Pat. 260; *Sheo Narain v. Lakhan*, A.I.R. 1945 Pat. 434, 24 Pat. 345 relying on *Tika Sao v. Hari Lal*, A.I.R. 1940 Pat. 385 (F.B.), 19 Pat. 752. See Note 1A, *ante*.

Scope :—This section, as amended, applies to transfers by auction-sale in execution of decrees—*Ibid*. For a contrary view see *Surayya v. Venkataramanamma*, (1940) 1 M.L.J. 831, A.I.R. 1940 Mad. 701, 1940 M.W.N. 341. This section read with O. 34 r. 14 C. P. Code does not apply where a decree for future maintenance says that the maintenance will be a first charge upon certain properties as an additional safeguard to the decree-holder—*Sheonandan v. Asrafi Kuer*, A.I.R. 1946 Pat. 216, 12 B.R. 333. The first charge referred to in sec. 65 Bengal Tenancy Act is not a charge within this section—*Dirpal v. Karamchand*, A.I.R. 1952 Pat. 9.

A charge may be created on property which will come into existence on a future date, and it may be enforced then and will have priority over a charge on that property created after that date—*Alkash Ali v. Nath Bank*,

A.I.R. 1951 Ass. 56, I.L.R. (1951) 3 Ass. 1. A charge already created will continue to subsist so long as it is not extinguished—*Baraha Devaswom v. Ummer Sait*, A.I.R. 1951 Tr.-Coch. 17.

In view of the preamble, the Act cannot be regarded as exhaustive when it deals with allied topics like charges which are foreign to its purpose—*Ghasiram v. Kundanbai*, A.I.R. 1940 Nag. 163 (166), 1940 N.L.J. 1.

The first part of this section deals with substantive rights and the second with the manner in which they are to be enforced. The latter portion does not govern the former: hence an agreement which clearly falls within the definition of charge cannot be invalidated altogether simply because it contains provisions which offend against the procedure law as laid down in the later portion of the section—*Renukabai v. Bheosan Hapsaji*, A.I.R. 1939 Nag. 132, 1939 N.L.J. 129, 185 I.C. 33.

"Act of parties". "Operation of law" :—An act of party is an expression of the will or intention of that party directed to the creation, transfer or extinction of a right. An act of law on the other hand means the creation, transfer or extinction of a right by operation of the law itself, independent of any consent on the part of the party affected. Consequently, decrees are not outside the expression "operation of law"—*Bapurao v. Narayan*, A.I.R. 1950 Nag. 117, I.L.R. 1949 Nag. 802.

528. Mortgage and charge distinguished :—(1) A mortgage is a transfer of interest in a specific immoveable property but a charge is not. This distinction has been fully set out in Note 327 under sec. 58. See also *Bapurao v. Narayan*, supra.

(2) A charge may be created by act of parties or by operation of law; but a mortgage can be created only by act of parties.

(3) A simple mortgage carries a personal liability, unless excluded by express contract. But the same rule does not apply to a charge; in fact the rule is opposite, because by the definition of a charge *no personal liability is created*. But where a charge is the result of a contract, there may be a personal remedy. Every case must depend upon its own facts—*Raghukul v. Pitam*, 52 All. 901, A.I.R. 1931 All. 99 (100), 130 I.C. 198; *Balasubramania v. Sivaguru*, 21 M.L.J. 562, 11 I.C. 629 (632); *Rama- brahman v. Venkatanarasu*, 23 M.L.J. 131, 16 I.C. 209 (210). See Note 534 post.

(4) A power to bring the mortgaged property to sale is given in a simple mortgage either expressly or by implication; but a charge does not contain any words to that effect—*Balasubramania v. Sivaguru*, (supra). If the date is specified, the property is specified, there is a covenant to pay and there are words which indicate that the property is to be sold in case the debt is not paid, then the bond should be treated as creating a mortgage and not mere charge—*Narayanasamy v. Ramasamy*, 12 L.W. 674, 60 I.C. 611 (613). But like a simple mortgage a charge-holder has the right to bring the property to sale.

(5) A charge created by operation of law (e.g., a charge created by a decree) does not require the formalities (e.g., registration) prescribed by sec. 59 for a mortgage—*Gobinda v. Dwarka*, 35 Cal. 837 (841), *Maina v.*

Bachchi, 28 All. 655 (660). (But a charge created by act of parties requires registration—*Maina v. Bachchi*, 28 All. 655, at p. 659).

(6) As regards the relief granted, there is now no distinction between a charge and a simple mortgage.

(7) In the case of a charge the property need not be specific. A charge differs from a mortgage not only in form but in substance. For instance a plea of purchase for value without notice may be good against a charge, but not against a mortgage—*Bapurao v. Narayan*, A.I.R. 1950 Nag. 117, I.L.R. 1949 Nag. 802.

A charge in India cannot usefully be compared with a charge, legal or equitable, in England, because in India such a charge is defined by statute—*Dgu Bhaitoprasad v. Jugal Prasad*, A.I.R. 1941 Nag. 102, 1940 N.L.J. 651.

A charge is not exactly identical with a mortgage. One obvious distinction is that a mortgage is for a fixed term whereas charge may be in perpetuity. In the case of a mortgage it can be ultimately redeemed, whereas a charge in perpetuity cannot be redeemed at all—*Matlub v. Mt. Kalawati*, A.I.R. 1933 All. 934. *Jnanendra v. Sashi Mukhi*, 44 C.W.N. 240, A.I.R. 1940 Cal. 60, 186 I.C. 833. In the case of a recurring charge even although the charged property might be sold in execution of a decree for arrears payable in respect of the sum charged, the liability in respect of future payments would ordinarily remain after the sale, and as a charge is attached to the property, the auction-purchaser would ordinarily get the purchased property subject to the charge—*Janendra v. Sashi Mukhi*, *supra*.

The substantial distinction between a mortgage and a charge lies in the fact that while in the case of a mortgage there is the transfer of the interest in the immoveable property, there is no such transfer of interest in the case of a charge which merely secures payment of the money against specific property—*Gobinda v. Dwarka*, 35 Cal. 837 (841); *Siva Prasad v. Beni Madhab*, 1 Pat. 387 (392), A.I.R. 1922 Pat. 529, 70 I.C. 24; *Royzuddi v. Kali Nath*, 33 Cal. 985; *Nathan v. Durga*, 52 All. 985, A.I.R. 1931 All. 62 (64), 130 I.C. 489; *Narain v. Murli Dhar*, 6 O.W.N. 903, A.I.R. 1929 Oudh 539 (541), 121 I.C. 81; *Akshoy v. Corporation of Calcutta*, 42 Cal. 625; *Sharif Ahmad v. Hunter*, A.I.R. 1937 Oudh 35 (42) (F.B.), 166 I.C. 477; *Sikandar Ara v. Hasan Ara*, A.I.R. 1936 Oudh 196, 165 I.C. 70; *U. P. Government v. Manmohan*, A.I.R. 1941 All. 345 (F.B.).

A charge is in the nature of a mortgage and the charge-holder is entitled to recover the amount due to him from whatever portion of the property he chooses. The question how far each of the owners of the property burdened with the charge is liable, is a question of contribution and does not concern the charge-holder—*Parshadi Lal v. Brij Mohan*, A.I.R. 1936 Oudh 52 (54), 11 Luck. 575, 159 I.C. 117.

Whether a transaction creates a charge or not is to be gathered from the intention of the parties as expressed in the contract—*Mohini v. Purnashashi*, 55 C.L.J. 198; *Venkata v. Venkata*, A.I.R. 1931 Mad. 140 (145), 54 Mad. 163, 135 I.C. 17; *Jeut Koeri v. Mathura Koeri*, A.I.R. 1926 All. 171, 24 A.L.J. 125, 90 I.C. 787.

There is no difference in principle between a charge created by a

decree and one created by contract; a charge in either case creates no interest in the property, and it is in this respect that it differs from a mortgage—*Mt. Indrani v. Maharaj Narain*, A.I.R. 1937 Oudh 217, 166 I.C. 662 (F.B.).

A charge created for the payment of a legacy or an annuity or maintenance-money by a will or trust-deed is easily distinguishable from a mortgage—*Gobinda v. Dwarka*, 35 Cal. 837 (842).

The 'charge' referred to in sec. 65 of the Bengal Tenancy Act is not such a charge as that defined by sec. 100 of the Transfer of Property Act, and does not require to be enforced in the same manner. Thus, a landlord who had got a decree for arrears of rent of an under-tenure was not restricted to executing the decree by sale of the under-tenure in the first instance, but could execute it in the ordinary manner against the judgment-debtor's person or other property, moveable or immoveable—*Fotick v. Foley*, 15 Cal. 492; *Royzuddin v. Kali Nath*, 33 Cal. 985.

Charge and lien distinguished :—(1) The main distinction between the two terms is that a 'charge' may be created by act of parties or by operation of law, whereas a 'lien' can arise only by operation of law. "A lien answering to the *tacita hypotheca* of the Civil Law, is a right conferred by law, and not by contract, upon one man to retain possession of or have a charge upon property real or personal belonging to another, until certain demands are satisfied. But in some works the word 'lien' is used to include not only lien arising by operation of law, but also charges or hypothecations arising out of contract; as where one agrees to give another a 'lien' on property."—Fisher on Mortgage, 5th Ed., p. 2.

(2) A "charge" in strictness not only empowers its possessor in any case to hold the property charged, if in his possession, but also gives him the right to come into Court and sue actively for the satisfaction of his claim. A "lien" strictly is neither a *jus in rem* nor a *jus ad rem*, but is simply a right to possess and retain property until some charge attaching to it is paid or discharged. Story's Equity Jurisprudence, § 506, cited in *Kishan Lal v. Ganga Ram*, 13 All. 28.

(3) A charge is confined to immoveable property but a lien may be had in respect of moveable also.

The possession of a mortgagee who has constructive notice of a charge on the property mortgaged resembles that of a trustee under sec. 91, Trustees Act II of 1882. Hence he is as much bound to fulfil the obligation which attaches to the property mortgaged as the mortgagor himself, there being an equitable *lien* under the law—*Renukabei v. Bheosan Hapsaji* A.I.R. 1939 Nag. 132 (134), 1939 N.L.J. 129, 185 I.C. 33.

529. Requisites of a charge by act of parties :—A document creating a charge on immoveable property must be a document that creates such charge *immediately* on the execution, without operating as a charge at some *future* time. When the Legislature speaks of a charge under this section, it speaks of something which operates as a charge upon the land immediately as it is executed and not as a mere possibility of a charge—*Madho v. Sidh Binaik*, 14 Cal. 687; *Harjas Rai v. Naurang*, 3 A.L.J. 200; *Abdul Samad v. Municipal Committee*, 67 I.C. 939 (Lah.). A charge cannot

be created on a future contingency. An *ekrarnama* which does not say that the properties mentioned therein remain liable for the allowance from the date of execution of the document, but only says that if the allowance remains in arrear in *future* the properties may be sold for realisation of the same, cannot be said to create a charge—*Mohini v. Purna Sashi*, 36 C.W.N. 153, A.I.R. 1931 Cal. 451, 138 I.C. 24; *Rajaram v. Jagannath*, A.I.R. 1926 Oudh 209 (210), 91 I.C. 507; but see *Kesari v. Tansukh*, A.I.R. 1934 Lah. 765 (767), 153 I.C. 1064 and *Harnam v. Md. Akbar*, A.I.R. 1937 Pesh. 76 (78), 170 I.C. 136, where it has been held that a charge can be created for the discharge of a contingent liability. See also *Kabul Chand v. Badri Das*, A.I.R. 1938 All. 22 (25), I.L.R. (1938) All. 63, 173 I.C. 130 and the heading “floating charge” under Note 530. Where a document, after reciting the receipt of a loan and the time for repayment, continued: “If I do not pay the money according to the stipulation, then I declare in writing that I shall lose my right to the said land. If I do not pay the money according to the promise then the aforesaid Misser shall take possession of the land,” held that the document did not create either a mortgage or a charge. All that it did create was the mere possibility of a charge—*Madho Misser v. Sidh Binaik*, 14 Cal. 687. Similarly, where a sale-deed contained a covenant to the following effect: “If, in future, any person appears as a claimant of the property sold and makes a claim, in consequence of which there is an injury to the property sold, or we do not give possession, then the purchaser may recover the money from our person or the property sold or any other property,” it was held that the covenant did not create a charge in favour of the purchaser—*Harjas Rai v. Naurang*, 3 A.L.J. 220. But the Madras High Court holds that an instrument, by which a liability not existent in *praesenti* but which will arise, if at all, in *future* is secured, may create a present charge within the meaning of this section. Thus, where in a partition deed between the members of a joint family, it was provided that if owing to the default of two of the dividing co-parceners the debts which they had undertaken to pay should have to be paid by the others, then the persons who paid should recoup themselves out of the properties allotted to the defaulting parties, held that it created a present charge within the meaning of this section—*Imbichi v. Achampat Avupaya*, 33 M.L.J. 58, 39 I.C. 867. A valid charge can be created on the happening of a condition, where the condition itself is first stipulated, and the condition happens afterwards—*Balasubramania v. Sivaguru*, 21 M.L.J. 562, 11 I.C. 629 (632). See also *Cooling v. Saravana*, 12 Mad. 69.

In a document creating a charge the form of words used is immaterial. Where from the circumstances of a transaction, the document shows an intention to make the land as security for the payment of the money mentioned therein, the document creates a charge—*Janardan v. Anant*, 32 Bom. 386 (390); *Madan Lal v. Ghasiram*, A.I.R. 1951 Pat. 254, 30 Pat. 613; *Gangamoni v. Kumud*, A.I.R. 1950 Pat. 478. Whether a document creates a charge or not, must depend upon the construction to be placed on the document. To create a charge, it is not necessary to employ any technical terms, where the intention of the parties was to indicate in unambiguous language that definite fund should be employed for the discharge of a particular debt or claim, and there is no ambiguity either as to the amount of the debt or the amount of the fund out of

which the debt has to be satisfied, the transaction amounts to a charge—*Nathan v. Durga*, 52 All. 985, A.I.R. 1931 All. 62; *Maina v. Bachchi*, 28 All. 655 (658); *Narain v. Murli Dhar*, 6 O.W.N. 903, A.I.R. 1929 Oudh 539 (540), 121 I.C. 81; *Seth Chhaganlal Madhavji v. Bai Memunabai Amadmiya*, A.I.R. 1955 Sau. 86.

A charge is created if the language is definite though wide. In construing words describing property, a distinction should be drawn between wideness of language and vagueness or indefiniteness of language. Where in a partition-deed it was stipulated that one of the parties should discharge a certain debt, and, in default, it was provided that, if either of the parties should fail to observe any of the provisions of the deed, the party in default should pay to the other party, who should have sustained loss, twice the amount from their properties; *held* that the word "properties" referred to the properties mentioned in the schedules to the deed, and consequently there was no indefiniteness. The words were sufficiently apt to create a charge—*Manickam v. Audinarayana*, 34 Mad. 47, 5 I.C. 917. Where a bond runs thus: "To secure this money, I pledge voluntarily and willingly my wealth and property in favour of the said banker. Whatever property, etc., belonging to me be found by the said banker, should be available to him," *held* that the words were sufficiently specific and certain to include all the property of the obligor—*Ramsidh v. Balgobind*, 9 All. 158. But a promise by the debtor to pay out of his property indefinitely, or an indefinite order for the satisfaction of a decree out of the assets of a deceased person in whosoever hands they may be found, does not create any charge on any specific property—*Bheri Dorayya v. Moddipatu*, 3 Mad. 35. So also, a bond which provides for the realisation by the creditor of the principal and interest "out of my moveable and immoveable property, my own *milk*" is too vague to create a mortgage or a charge on any definite estate—*Collector v. Beti Maharani*, 14 All. 162. But where an *ekrarnama* provided that in the event of the executant not paying the maintenance the obligee was at liberty to proceed against the properties relinquished by her, and in case she was unable to realise the arrears from those properties she might have recourse to the other properties of the obligor, but *no particular or specific property* was mentioned as liable for the claim, the deed could not be construed as creating a charge—*Mohini v. Purna Sashi*, 36 C.W.N. 153, A.I.R. 1932 Cal. 451, 138 I.C. 24.

In order to create a charge, it is necessary that the property should be made security (*i.e.*, *sufficient* security) for the payment of money. Thus, during the pendency of an appeal, the appellant offered, as security for stay of execution of the decree against him, a property which was worth Rs. 4,000. The amount of the decree and costs came up to Rs. 6,000. *Held* that the respondent decree-holder did not have a charge on the property for his judgment-debt, as the property was not a *sufficient* security for the payment of the decretal amount—*Samasundaram v. Nachiappa*, 2 Rang. 429 (435), A.I.R. 1925 Rang. 55, 84 I.C. 302.

A charge must be created in favour of a particular *person* specifically named. A security-bond for refund of sale-proceeds in case of a reversal of decree in appellate Court does not amount to a charge, because the undertaking is given to the Court, but the Court is not a judicial person,

and it can neither sue nor take the property nor assign it—*Mehdi Ali v. Chunni Lal*, 1929 A.L.J. 902, A.I.R. 1929 All. 834 (836), 119 I.C. 81; see also *Raj Raghubir v. Jai Indra*, 46 I.A. 228, 42 All. 158; *Akshoy Zamindary v. Ram Nath*, 40 C.W.N. 1281.

Writing and Registration:—A charge can be created without any written instrument at all, and even if it is in writing, it need not be registered—*Parbhu Dayal v. Babban*, 1 O.L.J. 43, 23 I.C. 867 (869). But the Allahabad High Court is of opinion that the provisions as to registration contained in the Registration Act and Transfer of Property Act apply to charges (when created by act of parties) just as much as to mortgages—*Maina v. Bachchi*, 28 All. 655 (659); *Krishna Deva Vargara v. Official Liquidator*, A.I.R. 1962 All. 101; *Ilahi Bux v. Jamila Bai*, A.I.R. 1959 Raj. 143. These observations are however obiter. The law in this respect is thus stated by Sir Rash Behary Ghose: "It is worthy of notice that a charge may be created *orally*, although if it is created by an instrument in writing, it must be registered, unless made by a will or the amount secured is less than one hundred rupees"—*Law of Mortgage*, 5th Edn., p. 157. See also Gour's *Law of Transfer*, 6th Edn., p. 1400, § 2444. It has also been held to be so in the case of *Kuppuswamy v. Rasappa*, A.I.R. 1936 Mad. 865 (867), 44 M.L.W. 438. See also *Amratlal v. Keshavlal*, A.I.R. 1926 Bom. 495 (496), 28 Bom.L.R. 939, 98 I.C. 696; *Bapurao v. Narayan*, A.I.R. 1950 Nag. 117, I.L.R. 1949 Nag. 802. Recently the Madras High Court has however held that the words "so far as may be" in this section have not the effect of taking sec. 59 out of its purview. Unless given by a statute a charge on immoveable property can only be created by a registered instrument executed by the person creating the charge and attested by at least two witnesses—*Shiva Rao v. Sanmughasundaraswami*, I.L.R. 1940 Mad. 306, A.I.R. 1940 Mad. 140, (1940) 1 M.L.J. 922. Thus, where debentures of Rs. 50 each have been issued by a company, the loan being on the security of specified immoveable property, the debentures are invalid, if not registered—*Viswanadhan v. M. S. Menon*, I.L.R. 1939 Mad. 199, A.I.R. 1939 Mad. 202 (203), (1939) 1 M.L.J. 185.

In an earlier Madras case it was held that the special provisions of the T. P. Act relating to the *attestation* of mortgages do not apply to a charge, and even if it is attested, the provisions of the Evidence Act relating to the method of proof of mortgages, are not applicable thereto—*Ramaśwami v. Kuppuswami*, 14 L.W. 96, 66 I.C. 554, A.I.R. 1921 Mad. 514. But see *H. Venkata Sastri v. Rahilna Bi*, A.I.R. 1962 Mad. 111 (F.B.) where it has been held that a charge created by act of parties attracts sec. 100, that such a charge must be attested by two witnesses and that the Registering officer and identifying witnesses cannot be regarded as attesting witnesses.

530. Charge by act of parties—Instances:—In a suit for recovery of money due on *baki khata* accounts, a compromise was come to and a petition was filed requiring the defendants to pay a certain sum of money together with interest by instalments to the plaintiff, and further declaring that the immoveable properties specified therein shall be deemed to be hypothecated for the realisation of the money. *Held* that the parties intended to create a charge—*Govinda Chandra v. Dwarka Nath*, 35 Cal. 837 (844), 12 C.W.N. 849. Where a document provided that the amount

was to be paid in easy instalments and stipulated that the debtor would not alienate a specified money until the satisfaction of the debt, *held* that the property was made security for the payment of the debt, as the stipulation intended to preserve the property intact so as to be available for realisation of the amount. Consequently, a charge was created on the property—*Narain v. Murli Dhar*, 6 O.W.N. 903, A.I.R. 1929 Oudh 539 (540), 121 I.C. 81. *Jawahir v. Indomati*, 36 All. 201 (*per* Richards, C.J.); *Royzuddi v. Kali Nath*, 33 Cal. 985. Defendants borrowed money from the plaintiff for starting a factory. An agreement was entered into which provided that in certain events the properties of the factory would be liable for certain moneys and that in certain other contingencies the lender would be at liberty to recover a certain amount from the machinery of the factory or from the borrowers. A promissory note was also passed in favour of the plaintiff. *Held* that the agreement amounted to an equitable charge on the property (factory)—*Amratlal v. Keshavlal*, 28 Bom.L.R. 939, A.I.R. 1926 Bom. 495, 98 I.C. 606. Where a mortgagee, after executing a mortgage for a village executed a further document in which he recited, "I shall first pay off this debt, including principal and interest. and thereafter I can redeem the mortgaged village, having paid up the mortgage-money. Without the payment of this debt, I cannot redeem the mortgaged village." *Held* that the intention of the executant was that the debt created by this document was a further charge on the village—*Aditya v. Ram Ratan*, 5 5Luck. 365 (P.C.), 57 I.A. 173, 34 C.W.N. 625 (627), 123 I.C. 191, A.I.R. 1930 P.C. 176, 59 M.L.J. 342, 28 A.L.J. 646; *Janardan v. Anant*, 32 Bom. 386 (390). By a document one J admitted liability in respect of which he undertook to execute a charge-bond over a specific share and rights in a village together with the *sir* land. J further had undertaken to get sanction for the transfer of *sir* and not to assign certain property until the above were carried out: *Held* that the last undertaking was to segregate the property so that it would be answerable in the hands of J should he fail to give the charge-bond, and that made the property a security for the payment of money, and a charge was thus created by the deed—*Dau Bhairoprasad v. Jugal Prasad*, A.I.R. 1941 Nag. 102, 1940 N.L.J. 651. A document stating "I have willingly fixed an annual allowance of Rs. 100 in cash in perpetuity out of the profits of the said village for my eldest brother" creates a valid charge—*Kanhai Lal v. Muhammad Hussain*, 5 All. 11. A will devising immoveable properties and directing the devisee to pay certain debts of the testator from these properties creates a charge on them in respect of those debts—*Girish Chunder v. Anundamoyi*, 15 Cal. 66 (P.C.). An agreement called a sanad and attested by witnesses, by which a Hindu agrees to pay to his sister, and after her death, to her daughter, a fixed sum every three years out of the proceeds of an estate inherited by him from his maternal grandmother, creates a valid charge on the produce of the estate, and the heir of the grantor takes it subject to this charge—*Chalamanna v. Subbama*, 7 Mad. 23. Similarly, where an allowance had been enjoyed for more than three quarters of a century and had been received during all that time out of certain lands, with the acquiescence of the successive owners thereof, it implied a valid grant of the allowance in perpetuity and that it was charged on those lands—*Manavikrama v. Gopalan*, 30 Mad. 203. Where P, a partner, under a consent decree in a suit for divorce, agrees

to pay his unmarried daughter Rs. 250 per month and thereafter there is a further agreement between P, his daughter and the other partners that the said sum is to be paid out of the remuneration and profits payable to P from the firm a charge is created in favour of the daughter on the remuneration and profits payable to P—*Commissioner of Income-tax v. C. N. Patuck*, (1969) 1 I.T.J. 14.

Where by a *jaminnama* a share of A's pulni interest is made security for the payment of money to B in respect of the *dar-patni* rent, it creates a charge within the meaning of this section—*Naresh v. Dharendra*, A.I.R. 1950 Cal. 323, 54 C.W.N. 601. Where a person agrees to receive a lump-sum in lieu of his share in the income of a village, a charge is created on the income of the village in respect of that sum—*Rustomalli v. Aftabhusein*, A.I.R. 1943 Bom. 414, 45 Bom.L.R. 862. Where an agreement provided that at the time of redemption of a usufructuary mortgage the mortgagor should pay on adjustment a sum of Rs. 1000 with interest which the mortgagee had to spend for obtaining possession of the mortgaged property; the agreement created a further charge on the mortgaged property—*Sheobachan v. Madho Saran*, A.I.R. 1952 Pat. 73. A document by which liability will arise, if at all, in future, may create a present charge within this section—*Crowther v. Jamanabharanam*, A.I.R. 1953 Tr.-Coch. 344. But where in a partition deed direction was given that certain items of property should be converted into cash and the same to be utilized for discharging certain debts, it was held that no charge on the property directed to be sold was intended—*Velayudha v. Govinda*, A.I.R. 1952 Tr.-Coch. 62.

Where in a usufructuary mortgage-bond it was provided: "In case the creditor is dispossessed in any way, he shall realize his dues from my one anna share in Mouza Dharwali"; it was held that this was not a mere possibility of a charge: it was a present charge on existing property—*Murat v. Pheku*, A.I.R. 1928 Pat. 587 (588), 7 Pat. 584, 110 I.C. 526. Where on a partition among brothers, a mortgage-debt due by the family is apportioned and there is a covenant by which a defaulting member's share will be liable to pay any excess amount paid by another member, a charge is created over the property of the former for such amount paid by the latter—*Abdul v. Abdul*, A.I.R. 1933 Mad. 715, 65 M.L.J. 390. A lease providing that the lessee shall be personally liable for payment of the rent and that certain specified properties shall be regarded as security for the payment and shall not be transferred by the lessee while the rent remains unpaid does not create a mortgage but merely a charge—*Shiva Prasad v. Beni Madhab*, 1 Pat. 387. When the intention of the parties is to create a liability in perpetuity not capable of being relieved absolutely at any time, the transaction cannot be a mortgage. An agreement to pay maintenance allowance to a person and to continue to pay to his descendants from generation to generation making it charge over property creates a charge and not a mortgage—*Marlub v. Kalawati*, A.I.R. 1933 All. 934 (937). An agreement which provides that in default of certain payment for maintenance by one party to the other, the latter will be at liberty to cultivate a field and maintain herself clearly creates a charge, the intention being that she is to look to the profits of the land for maintenance for a particular period. But such a charge cannot be enforced

by sale of the land—*Renukabai v. Bheosan Hapsaji*, A.I.R. 1939 Nag. 132 (134), (1939) N.L.J. 129, 185 I.C. 33. To secure repayment of a loan a document called *zamanatnama* was executed on a proper stamp for a mortgage and the only condition was one restricting the executant from alienating certain property; *held*, that the instrument created a charge and not a mortgage—*Vir Bhan v. Salig Ram*, A.I.R. 1937 Lah. 35 (37), 17 Lah. 659, 164 I.C. 381. The fact that particular allowances have been thrown on particular estate means that those allowances are to be paid out of the profits of the specified estate, and accordingly constitutes a charge on those estates—*Sharif v. Hunter*, A.I.R. 1937 Oudh 420 (421), 167 I.C. 52.

Floating charge:—The governing idea of a floating security is to allow a going concern to carry on its business in the ordinary course, the effect of which would be to make the assets liable to constant fluctuation and some event must happen or some act must be done by the mortgagee to crystallize the charge. A charge on the sub-soil right in a coal mine and on the *kuthi*, pits, machinery, pumps, boilers, etc., is not a floating charge—*H. V. Low & Co. v. Pulin*, A.I.R. 1939 Cal. 154, 59 Cal. 1372. In the case of a fixed charge for the recovery of a specific sum of money from a specific property a transfer of interest immediately takes place when the charge is created, while a floating charge for the recovery of money from the general assets of the person who creates the charge is contingent, that is, on the occurrence of some event a fixed sum of money due at the time becomes recoverable from the specific assets which are in existence at that time. When the contingency arises, the charge is crystallized and then becomes a fixed charge—*U. P. Government v. Manmohan*, A.I.R. 1941 All. 345 (348) (F.B.). "A floating charge on the assets of a company for the time being is a familiar instance of a charge being created on property not in existence at the time when the loan is advanced, but which is acquired subsequently"—*per* Niamatulla, J. in *Kabul Chand v. Badri Das*, A.I.R. 1938 All. 22 (25), I.L.R. 1938 All. 63, 173 I.C. 130. A floating charge in favour of B in respect of the stock in trade of a cloth merchant becomes crystallized as soon as attachment before judgment is effected at the instance of C from whom piece goods were purchased on credit to replenish the stock after the creation of the charge; therefore B has a preferential claim over the sale proceeds—*G. Bhar & Co. v. United Bank of India Ltd.*, A.I.R. 1961 Cal. 308. For an elaborate discussion of the question of a "floating charge" see K. M. Ghosh's *Company Law*, 5th Edn., pp. 35, 314-315 and 576-578.

531. Charges by operation of law:—"The charges are founded upon the consideration of a duty or implied intention on the part of the owner to make it answerable for a specific claim," See Fisher on Mortgage, 5th Edn., sec. 504. A charge by operation of law results *not* by volition of the parties, but as the result of a legal obligation. Such charges are known as equitable liens in English law—*Syud Nadir v. Baboo Pearoo*, 19 W.R. 255. If the parties cannot by mutual consent agree to create a charge, it is open to the Court, as a Court of equity, to create such a charge in order to secure to the person the right to which he is entitled, in an effective manner—*Kanhaiya Lal v. Jangi*, 24 A.L.J. 649, A.I.R. 1926 All. 527 (529), 96 I.C. 39.

The expression "operation of law" in this section is not restricted to such cases as fall under sec. 55 or sec. 73. A charge created by a decree based upon an award made on an agreement out of Court or otherwise is a charge created by operation of law—*Abdul v. Ishtiaq*, A.I.R. 1943 Oudh 354 (F.B.), (1943) O.W.N. 261. The inclusion of charges by operation of law in sec. 100 is not inconsistent with the scheme of the T. P. Act—*Laxmi Devi v. Mukand Kunwar*, A.I.R. 1965 S.C. 834.

Instances—(a) Vendor's charge for unpaid purchase-money; see sec. 55 (4);

(b) Where several properties are liable for the payment of an annuity and the owner of one of such properties has discharged the whole liability, he acquires thereby a charge on the other properties—*Yakub v. Kishen*, 28 All. 743.

(c) Section 228 of the Calcutta Municipal Act makes the consolidated rate as it accrues from time to time a charge on the property—*Akhoy v. Corporation of Calcutta*, 42 Cal. 625, 27 I.C. 261. See also *A. M. A. Firm v. Marudachalam*, A.I.R. 1948 Mad. 412, (1948) 1 M.L.J. 284; *Nawalkishore v. Municipal Board*, A.I.R. 1943 All. 115 (F.B.), I.L.R. 1943 All. 458; *Har Charan v. Agra Municipal Board*, A.I.R. 1952 All. 315. A municipality cannot enforce its charge on a property on account of arrears of tax in the hands of a bona fide purchaser for value at a court sale without notice of the charge—*Haji Abdul Gafur v. Ahmedabad Municipal Corporation*, (1967) 8 Guj. L.R. 65.

(d) A party entitled to claim contribution under sec. 82 acquires a charge in respect thereof. See Note 497 under sec. 82.

(e) The plaintiff agreed to advance money to the defendant company up to a certain limit upon the security of the stock in trade and immoveable property of the company which were to be mortgaged to the plaintiff. He made certain advances and agreed to perform the rest of the promise, being always ready and willing to pay the balance. *Held* that the agreement created a charge in favour of the plaintiff, on the assets of the defendant company when it went into liquidation—*Hukmichand v. Pioneer Mills, Ltd.*, 2 Luck. 299, A.I.R. 1927 Oudh 55 (58), 99 I.C. 483.

(f) A co-sharer who pays the entire arrears of rent under the Madras Estates Land Act is entitled to a charge on the other co-sharer's portion of the holding—*Vyrapperumal v. Alagappa*, A.I.R. 1932 Mad. 189, 55 Mad. 468, 135 I.C. 609; *Mariam v. Narayanan Thrathar Nambooripada*, A.I.R. 1965 Ker. 55.

(g) Where a mortgagee in order to protect his mortgage lien deposits the amount due as arrears of Government revenue, the amount forms a charge upon the mortgaged property under this section read with Or. 34, r. 15, C. P. C.—*Raj Kumar v. Jai Karan*, 57 I.C. 653, 5 Pat.L.J. 248. But r. 14 read with r. 15 of O. 34 has no application to a case in which a charge is created by the decree—*Mt. Kawkikabai v. Bachraj*, A.I.R. 1934 Nag. 147, 150 I.C. 492.

(h) Where a person pays money for the purpose of restoring the property to its owner, he has a lien on the property known as a salvage lien—*Kunja v. Bhagabat*, A.I.R. 1953 Or. 103, 17 Cut.L.T. 157. Cash

advance made by the mortgagee to the mortgagor to be repaid at the time of redemption operates as a charge and no question of limitation arises in recovering it—*Ali Mohammad v. Ramniwas*, A.I.R. 1967 Raj. 258.

Charge created by award of arbitrators:—An arbitrator was chosen by parties to make a partition. The arbitrator awarded a house and some shops to the plaintiff, and another house and other shops to the defendant, and as they were of unequal value, he directed that the lots should be equalised by the defendant paying Rs. 1,400 to the plaintiff as compensation for the deficiencies of the property allotted to him, within a month, and that if no such payment was made the latter would be entitled to claim interest at a certain rate; and that the payment of the said amount would be a charge on the shop allotted to the defendant. *Held* that a valid charge was created—*Kanhaiya Lal v. Jangi*, 24 A.L.J. 649, 96 I.C. 39, A.I.R. 1926 All. 527. An award partitioning joint family property provided: "We allot the property mentioned in List A to N which shall remain in his possession subject to a charge for maintenance of S and if she ever falls out with N and they ceased to live together, the charge for maintenance thereon will be at the rate of Rs. 75 a month, the amount fixed by us": *Held*, that the words clearly created a charge in favour of S on the property allotted to N; and that the charge was created from the date of the award—*Dan Kuer v. Sarla Devi*, A.I.R. 1947 P.C. 8, 51 C.W.N. 81, 73 I.A. 208. Where an award provides that the first party is to get a certain amount from the second party and that the amount due is charged upon the immovable property given to the second party the charge will be invalid if the award is not registered, but the first party can enforce the rest of the award imposing a personal liability on the second party to pay the amount—*M. Venkataratnam v. M. Chelamayya*, A.I.R. 1967 Andh. Pra. 257 (F.B.). A charge created by the Arbitrator in his award can be enforced in execution, because such a charge is not governed by sec. 100 T. P. Act—*Dhirendra Nath Sen v. Santa Sila Devi*, A.I.R. 1968 Cal. 336. A charge created by a consent decree can be enforced in execution—*Jailaram Sakarchand v. Himatlal Hiralal & Co.*, A.I.R. 1968 Guj. 156. A charge created by an award is neither 'by act of parties' nor by 'operation of law'—*Dhirendra Nath Sen v. Santa Sila Devi*, A.I.R. 1969 Cal. 406.

Registration:—A charge created by operation of law (e.g., a charge created by a decree) does not require registration—*Maina v. Bachhi*, 28 All. 655 (660); *Gobinda v. Dwarka*, 35 Cal. 837 (841). But a compromise decree creating a charge over immoveable properties which were not the subject-matter of the suit is compulsorily registrable under sec. 17 of the Registration Act—*Sambhuram v. Guizarilal*, 40 C.W.N. 974. See the amended clause (vi) of sub-sec. (2) of sec. 17 of the Registration Act.

Charge created by decree:—A charge which is created by a decree is not created by act of parties nor can it be said to have been created by operation of law. Such a charge does not fall under this section nor the principle underlying it applies to it—*Ghasiram v. Kundanlal*, A.I.R. 1940 Nag. 163 (165, 166), (1940) N.L.J. 1; *Debendra v. Trinayani*, A.I.R. 1945 Pat. 278, 24 Pat. 245; *Mahesh v. Mundar*, A.I.R. 1951 All. 141 (F.B.) 1951 A.L.J. 39; *Thangavelu Mudaliar v. Thirumalswami Mudaliar*, A.I.R. 1956 Mad. 68; *Radhe Lal v. Ladali Prasad*, A.I.R. 1957 Punj. 92; *Dhirendra*

Nath Sen v. Santa Sila Devi, A.I.R. 1968 Cal. 336 ; *Rajah Bommadevara v. Rao Janardhana*, A.I.R. 1959 Andh. Pra. 622 (F.B.). But see *Raichand v. Basappa*, A.I.R. 1941 Bom. 71, 42 Bom.L.R. 1113 where it has been held that the principles underlying Or. 34 of the C. P. Code may and ought to be applied by analogy to charges created by a decree, unless the terms of the decree make it clear that the remedy of recovering the decretal amount from the property charged was not given in lieu of the personal remedy, but in addition to it. Where a decree declares a charge on certain properties, the parties to the decree as well as their privies are bound and one effect of this is that the questions of notice does not ordinarily arise—*Ghasiram v. Kundanlal*, supra. In a charge created by a decree there is no privity of estate between the charge-holder and the judgment-debtor and consequently the latter can deal with the property and a *bona fide* transferee from him without notice will be protected—*Goswami v. Ramchandra*, A.I.R. 1944 Nag. 1, I.L.R. 1943 Nag. 713. There is no difference in principle between a charge created by a decreed and one created by the act of parties or by operation of law—*ibid*. Where a charge-decree is merely declaratory and thus incapable of execution, the *bona fide* purchaser for value without notice takes free of the charge, the reason being that the legal estate prevails over a mere equity except when the legal owner takes with notice—*Ibid*, at p. 171 ; *Mammohan Das v. Bahauddin*, A.I.R. 1957 All. 575.

Where a compromise creating a charge is incorporated in a decree, it creates a charge by operation of law. The mere fact that the compromise was not attested would not invalidate the charge—*Batcha v. Perianayagammal*, A.I.R. 1952 Mad. 163 ; *Sheo Narain v. Lakhan*, A.I.R. 1945 Pat. 434, 24 Pat. 345. A compromise decree is however nothing more than a contract between the parties and is therefore subject to all the provisions regarding contract and is a charge created by the act of parties—*Goswami v. Ramchandra*, A.I.R. 1944 Nag. 1, I.L.R. 1943 Nag. 713 ; *Manmohan v. Bahauddin*, A.I.R. 1957 All. 575. A compromise decree embodying an agreement that the property shall remain attached by the Civil Court until the decretal debt is satisfied and shall be liable to be sold for that debt does not create a charge—*Madan Lal v. Ghasiram*, A.I.R. 1951 Pat. 254, 30 Pat. 613. But see *contra Sheo Narain v. Lakhan*, supra.

A decree-holder obtained a compromise decree on 19th February, 1932 by which a charge was created on certain immoveable property of the judgment-debtor. The same property was however mortgaged to a third party on 26th April, 1932. The compromise decree was registered on 10th June, 1933: held, the mortgagee had priority over the decree-holder as the registration was invalid, the Registrar having no jurisdiction to register the decree—*Rampratap v. Darsan Ram*, A.I.R. 1939 Pat. 96, 178 I.C. 505.

Where a charge is created by a maintenance decree, no registration or attestation of the compromise is necessary—*Jagadeesa v. Bavanambal*, A.I.R. 1946 Mad. 243, (1946) 1 M.L.J. 143. In such a case the parties are not prevented from contracting out of it the rights created under the decree, though they cannot go before the Court and ask the decree to be correspondingly modified—*ibid*. Where a decree for future maintenance in favour of a Hindu widow has made the future maintenance a charge

on the property in possession of members of her husband's family and in execution of that decree the property is sold subject to her right of future maintenance, she can, when there is again default in payment of maintenance, apply for sale of that property again without bringing a suit under sec. 67 *ante*, for the immoveable property has not been made security for the payment of her money by an act of parties or by operation of law. It is only by virtue of a decree that the charge has been created—*Durga Prasad v. Tulsa Kuar*, A.I.R. 1939 All. 579, (1939) A.L.J. 542, 184 I.C. 626; *Sivagangai Ammal v. Jagadambal*, A.I.R. 1967 Mad. 126. A charge created by decree, e.g., where a decree makes maintenance a charge on specified properties, the decree-holder is entitled to realise the maintenance by executing the decree, without having recourse to any suit—*Abdul Muhammad v. Seetha Lakshmi*, 33 L.W. 109, A.I.R. 1931 Mad. 120 (122). See also *Ambalal v. Narayan*, 43 Bom. 631; *Minakshi v. Chinnappa*, 24 Mad. 689; *Indramani v. Surendra*, 35 C.L.J. 61, A.I.R. 1922 Cal. 35; *Bhoje Mahadev v. Gangabai*, 37 Bom. 621, 21 I.C. 54 (55); *Hari Sankar v. Tapai*, 4 Pat. 693, A.I.R. 1926 Pat. 31; *Sabitri v. Mrs. Savi*, 12 Pat. 359, A.I.R. 1933 Pat. 306; *Jata Bhusan Chatterjee v. Krishna Bhabini*, A.I.R. 1957 Cal. 204; *Seethalakshmi Ammal v. Srinivasa Naikar*, A.I.R. 1958 Mad. 23. The decree can be executed against a transferee—*Attarbai v. Mishrilalsa*, A.I.R. 1966 Madh. Pra. 318. But see *Hemlata v. Bhowani Charan*, 39 C.W.N. 725, where it has been held that a separate suit is maintainable. Where in a suit for money a decree based upon a compromise is passed creating a charge on certain properties for satisfaction of the decretal debt, the decree is capable of execution by sale of the charged properties without the necessity of having recourse to a suit to enforce the charge under sec. 67—*Mt. Kawtikabai v. Bachraj*, A.I.R. 1934 Nag. 147 (149), 150 I.C. 492. If a Hindu wife obtains a decree for maintenance against her husband she cannot claim any charge on the properties transferred by the husband unless the properties retained by the husband are insufficient to meet the decretal dues—*Ramaswami Gounder v. Baghavammal*, A.I.R. 1967 Mad. 457.

Mere attachment of property, whether before or after judgment, does not create a charge. But where by a compromise not only the attachment was continued, but it was stated that until the payment of the entire decretal amount the judgment-debtor should not transfer the attached property by mortgage, sale or gift and that in default of payment of the instalments fixed the decree-holder would be entitled to realize the entire decretal amount from the land, a charge was created in favour of the decree-holder—*Tirath Ram v. Official Receiver*, A.I.R. 1938 Lah. 509 (510), 40 P.L.R. 429. The insertion of a clause in a compromise deed whereby a judgment-debtor promised to make certain payment with a provision that the attachment was to continue, did not however create a charge on the property attached before judgment—*Basanti Debi v. Official Receiver*, A.I.R. 1936 Lah. 610, 164 I.C. 940.

Where a charge-decree is executed as a money-decree and therefore in that execution the decree-holder did not object to an order directing the property to be sold subject to a mortgage, it would not have the effect of extinguishing the charge—*Bahru v. Jasoda*, A.I.R. 1945 Pat. 426, 24 Pat. 260. Where it was stated in the judgment that the decretal amount

would not be a charge on the plaint properties, the direction that the amount could be realised from the properties of the defendants' family could not amount to a charge on those properties—*Sankararu v. Dakshayani*, A.I.R. 1953 Tr.-Coch. 193.

Where a particular right is charged on specific immoveable property by a decree of Court, such right cannot be enforced against a subsequent transferee for valuable consideration without notice of the charge—*Basumati Kuer v. Harbansi Kuer*, A.I.R. 1941 Pat. 95, 21 P.L.T. 783. The holder of a charge decree, when the charge is created in lieu of the personal liability of the judgment-debtor, must first exhaust the charge before proceeding against any other property of the judgment-debtor, but when the charge is created in addition to the personal liability of the judgment-debtor, the decree-holder is not held to any rule of priority in executing the decree—*Mustafa Sheriff v. Raghavelu Naidu* (1967) 1 Mys. L. J. 664. A contract between two parties is nevertheless a contract though it is embodied in a decree. Hence a charge created by a decree in pursuance of an agreement between the parties would be a charge created by act of parties and consequently one contemplated by this section—*Ibid.* Where a charge is created by a decree, it binds a person who claims through the judgment-debtor although such person acquires the property without notice of the charge—*Ahsan v. Maina*, A.I.R. 1938 Nag. 129 (131), 172 I.C. 949. A charge created by a decree of a foreign Court over property outside its jurisdiction is invalid—*Sarfaraz v. Md. Salim*, A.I.R. 1934 Oudh 348 (349), 150 I.C. 140.

532. Cases in which no charge is created :—A co-sharer who has paid the whole revenue and thus saved the estate from sale does not, by reason of such payment, acquire a charge on the shares of the other co-sharers—*Kinu Ram v. Musaffar*, 14 Cal. 809 (F.B.); *Khub v. Pudmanund*, 15 Cal. 542; *Seth Chittor v. Shib Lal*, 14 All. 273 (F.B.); *Shivrao v. Pundlick*, 26 Bom. 437. *Bhubaneshwari v. Mimir Khan*, 7 Pat. 613, 9 P.L.T. 573, 111 I.C. 84, A.I.R. 1928 Pat. 641 (649); *U Shwe v. Maung Thank*, A.I.R. 1928 Rang. 278. The Madras High Court, however, holds that such payment creates a charge—*Raja of Vizianagram v. Raja Setrucherla*, 26 Mad. 686 (F.B.); *Alakayammal v. Subbarayya*, 28 Mad. 493; *Puthen Purayil v. Mangalsuri*, 36 Mad. 493; *Nagala v. Koganti*, A.I.R. 1926 Mad. 141, 90 I.C. 551; but such charge can only avail against the property as it stood on the date of payment and cannot avail retrospectively, i.e., the co-sharer is not entitled in respect of his charge to priority over prior encumbrancers and persons who have in good faith and without any suspicion that a charge may come into future existence advanced money on the property—*Vyraperumal v. Alagappa*, 55 Mad. 468, A.I.R. 1932 Mad. 177, 135 I.C. 609. Where a person not in possession of the property but believing that he has title to it pays Government revenue, he cannot on discovering the fact that another person has title to the property, claim a charge on it for the amount so paid within the meaning of this section or Art. 132 of the Limitation Act—*Saraswathi v. Rama Setty*, A.I.R. 1950 Mad. 39, (1949) 2 M.L.J. 419.

There is no law applicable in India by which a simple creditor is entitled to a charge over property acquired with the money advanced—*Annapurna Co. Ltd., in re*, A.I.R. 1926 All. 397, 93 I.C. 93.

If a mortgagor, after executing a mortgage, takes a subsequent loan from the mortgagee under a simple money-bond, and in that bond stipulates that he will not redeem the mortgage without paying off the subsequent loan, the simple money-bond does not create any charge on the property, and consequently the stipulation cannot be enforced. The mortgagor will be entitled to redeem the mortgage without paying off the amount due under the money-bond. See Note 379 under sec. 61.

In a partition suit the parties entered into a compromise-decree by which certain properties were given to certain branches to which also were allotted some debts, and then it was provided that until the said debts were fully discharged, the properties allotted to the several persons should be liable in the first instance. *Held* that the compromise merely contained a contract of indemnity between the *parties themselves*, conferring no benefit on the *creditors*, and that the latter not being parties to the contract could not sue to enforce the same, because the compromise neither created a trust for the creditors nor a charge in their favour—*Suryanarayana Rao v. Basivireddy*, 55 Mad. 436, 62 M.L.J. 533, A.I.R. 1932 Mad. 457. Where in a partition suit the Judge refused the defendant's prayer to make the money allotted to him to be a charge on the property allotted to the plaintiff but directed the latter not to transfer the said property until the money due to the defendant had been paid: *held* that the order was more in the nature of an injunction and did not create a charge—*Ram Narain v. Nawab Sajjad Ali*, A.I.R. 1946 Oudh 99, 21 Luck. 185. Where one co-heir takes upon himself to save the property of the deceased from Court sale in execution of a decree passed against all the co-heirs, no charge is created in favour of the co-heir making the payment, especially when the payment is made without the knowledge or consent of the other co-heirs—*U Shwe Bwa v. Maung Thauk*, 6 Rang. 500, A.I.R. 1928 Rang. 278 (280), 113 I.C. 801. A co-sharer paying off the amount of the rent decree and the auction purchaser's fees, and getting a sale set aside under sec. 174 of the Bengal Tenancy Act, does not acquire a charge on the shares of the defaulting co-tenants—*Gopi v. Ishur*, 22 Cal. 800. Where one of the two persons having a joint holding from a mittadar, paid the whole of the mittadar's due for certain years, such payment did not create a charge on the land—*Thanikachella v. Sudachella*, 15 Mad. 258.

An agreement to execute a mortgage is not by itself a mortgage under sec. 58, nor even a charge under sec. 100—*Hukumchand v. Radha Kishen*, 34 C.W.N. 506 (511) (P.C.), A.I.R. 1930 P.C. 76, 123 I.C. 157; *Ram Hait v. Pohkar*, 7 Luck. 237, A.I.R. 1932 Oudh 54 (56), 134 I.C. 1093.

Where a mortgagee has paid the revenue and land tax in respect of the mortgaged property, this section can have no application unless the mortgagee elects to have the money spent by him added to the mortgage-principal—*Murray v. M. S. M. Firm*, A.I.R. 1936 Rang. 47 (48), 161 I.C. 626.

Where an ordinary bond provided that a factory would be held *paibandh* for the debt, it was held that the bond created no special lien on the factory—*Jagatdhar v. Brown*, 33 Cal. 1133. Where money was advanced but the transaction was found to be neither a sale nor a mortgage, it was held that no charge was created for the money—*Phattechand v. Uma*, A.I.R. 1934 Bom. 24 (25), 35 Bom.L.R. 1138, 149 I.C. 241. Where

a document was not relied upon as an equitable mortgage it would not of itself create any charge—*Jowala Das v. Thakar Das*, A.I.R. 1936 Lah. 251 (254), 158 I.C. 562.

A charge created by a Mahomedan on the unknown share of property of one of his heirs defeats the provision of the Mahomedan law and hence it is invalid and cannot be enforced—*Mutlub v. Mt. Kalawati*, A.I.R. 1933 All. 934 (937).

533. "And the transaction does not amount to a mortgage":—There is a defect in the language of this section. It maintains a distinction between a mortgage and a charge—a distinction without important consequences—without in any way exhibiting the *differentia*. This section recognises that by the act of parties immoveable property may be made security for the payment of money in ways which do not amount to a mortgage, but it does not limit or define those ways—*Imperial Bank of India v. Bengal National Bank*, 57 Cal. 328, 34 C.W.N. 605 (613, 615), 127 I.C. 760, A.I.R. 1930 Cal. 536. The words "and the transaction does not amount to a mortgage" do not mean that if the transaction on the face of it purports to be a mortgage, but the instrument is not operative as such by reason of defective execution or non-compliance with the formalities prescribed by law (e.g., stamp, registration, attestation) the transaction is converted into a charge—*per Mookerjee, J. in Royzuddin v. Kali Nath*, 33 Cal. 985. As to the distinction between a mortgage and a charge, see Note 327 under sec. 58.

Therefore, an instrument which cannot operate as a mortgage for want of due attestation, as required by sec. 59, does not operate as a charge under this section—*Debendra v. Behari*, 16 C.W.N. 1075; *Samoo Patter v. Abdul Samad*, 31 Mad. 337; *Anantarama v. Yussujzi*, 31 M.L.J. 133. *Pran Nath v. Jadu*, 31 Cal. 729; *Collector of Mirzapur v. Bhagwan Prosad*, 35 All. 164 (F.B.); *Maharaja Ram Narain v. Adhindra*, 44 Cal. 388 (P.C.); *Khemchand v. Malloo*, 10 N.L.R. 81, 26 I.C. 691; *Kumari Bibi v. Srinath*, 1 C.W.N. 81; *Priyhdas v. Saheb Khan*, 18 S.L.R. 282, A.I.R. 1926 Sind 88, 93 I.C. 660; *Official Receiver v. Tirthadas*, 97 I.C. 321, A.I.R. 1927 Sind 66 (75); *Narayan v. Lakshmandas*, 7 Bom. L.R. 934; see Note 355, *ante*. So also, a mortgage is not converted into a charge by reason of non-compliance with the formalities of registration, prescribed by sec. 59—*Ma Bon v. Maung Po*, 32 I.C. 595, 8 L.B.R. 533. *Maung Tun v. Maung Aung Dun*, 2 Rang. 313 (318); *Somasundaram v. Nachiappa*, 2 Rang. 429 (436), A.I.R. 1925 Rang. 55, 84 I.C. 302. An equitable mortgage by deposit of title-deeds is invalid if it is not executed in any of the towns specified in section 59; and it cannot operate even as a charge under section 100—*Konchad v. Siva Rao*, 28 Mad. 54.

On the same principle, a sale which is invalid because of non-compliance with sec. 54 as to registration does not operate to give the purchaser a charge for the amount of the sale-price against the seller's estate. Section 100 was never intended to indemnify people who endeavour to get conveyances in violation of the express provisions of law—*Ma Lan v. Maung Shwe*, 4 Bur. L.T. 115, 10 I.C. 919.

534. Enforcement of charge :—A charge is in the nature of a mortgage and the charge-holder is entitled to recover the amount due to him

from whichever portion of the property he chooses. The question how far each of the owners of the property burdened with the charge is liable, is a question of contribution among the owners themselves and does not concern the charge-holder—*Parshadi v. Brij Mohan*, A.I.R. 1936 Oudh 52 (54), 11 Luck. 575, 159 I.C. 117; *Sharif v. Hunter*, A.I.R. 1937 Oudh 420 (423), 167 I.C. 52. See also *Raghubar v. Hussain*, A.I.R. 1948 Oudh 147, 23 Luck. 13; *Savitribai v. Radhakisan*, A.I.R. 1948 Nag. 44, I.L.R. 1947 Nag. 381. As a charge-holder has all the rights of a simple mortgage, he can, when the nett proceeds of the sale have proved insufficient, and if the balance is recoverable from the defendant, claim a personal decree for such amount. The mere fact that a charge has been created by operation of law does not disentitle the charge-holder from pursuing the personal remedy—*Babu Ram v. Inamullah*, A.I.R. 1936 All. 411, 157 I.C. 533. When a charge created by a decree is enforceable in execution, the statutory impediment contained in O. 34, rr. 14 and 15 C. P. Code does not apply and no suit is necessary—*Manindra v. Radhasyam*, A.I.R. 1953 Cal. 676. A charge-holder is merely entitled to put the property charged to sale. He cannot claim a right to possession—*Madho Ram v. Kritya Nand*, A.I.R. 1944 P.C. 96, 49 C.W.N. 75.

Where an agreement which created a charge of maintenance on certain land of a mortgagor provided that in default of a certain sum, the charge-holder was entitled to possession of the land and on default the charge was sought to be enforced against the mortgagee, *held*, that the decree should approximate as near as might be a decree for foreclosure and that the mortgagee should be given a chance to redeem it if he desired to keep the property in possession, as the relief was an equitable one and could be moulded to suit the requirements of the case—*Renukabei v. Bheosan Hapsaji*, A.I.R. 1939 Nag. 132 (136), 1939 N.L.J. 129, 185 I.C. 33. Where two properties are burdened with a maintenance charge and the charge-holder by his own negligence allows his remedy to be lost as against one of the properties, he cannot claim as against the other property to recover anything more than a proportionate share of the original maintenance—*Aisa Begam v. Raghubar Dayal*, A.I.R. 1941 Oudh 203, 1940 O.W.N. 1249, 192 I.C. 327. The fact that the maintenance was fixed by a will makes no difference—*Ibid*.

535. Para 2—Charge of trustee :—The second para must be read as referring to sec. 32 of the Indian Trusts Act.

A trustee of a mosque making advances out of his own pocket to meet the expenses of the mosque cannot enforce his charge against the trust property by bringing a suit for sale. He can use only for recovery of the money—*Abban Saheb v. Soran*, 38 Mad. 260; *Peary v. Narendra*, 37 Cal. 229 (P.C.).

The expenses incurred by the trustee are a first charge or lien upon the corpus of the estate—*Ex parte James*, 1 Dow & Cl. 272; *Re Exhall Coal Co.*, 35 Beav. 449; but the Court of Law will not order the trustee's lien to be realised by giving a decree for foreclosure or sale, for it would have the effect of destroying the trust estate. The proper course for such realisation is to deliver the deeds into his custody, and to issue a prohibition against any disposition of the property without previous discharge of the trustee's lien—*Darke v. Williamson*, 25 Beav. 622.

A person in enjoyment of income of property subject to a charge for the expenses of a temple, is liable to make them good out of the profits derived from the property—*Parshadi Lal v. Brij Mohan*, A.I.R. 1936 Oudh 52, 11 Luck. 575, 159 I.C. 117. Where a charge is created in favour of a Thakurdwara over a portion of the income derived from certain property, but the portion allotted is not spent over the Thakurdwara for several years, the trustees are entitled to interest on the amount which ought to have been spent on the temple—*Ibid.*

Construction :—A proviso excepts out of the earlier part of the section something which but for the proviso would be within it. Para 2 limits the operation of para 1, and the word “charge” must have reference to the charge mentioned in para 1.—*Maresh v. Mt. Mundar*, A.I.R. 1951 All. 141 (F.B.), 1951 A.L.J. 39. But see *Raichand Gulabchand v. Dattaray Shankar Mote*, A.I.R. 1964 Bom. 1. The words “transfer for consideration” are used in a wider sense and include both a transfer by act of parties and one by operation of law or in execution of a decree, thus including an auction-purchaser in a Court sale—*Nawal Kishore v. Municipal Board*, A.I.R. 1943 All. 115 (F.B.), I.L.R. 1943 All. 453 overruling *Indra Narain v. Md. Ismail*, A.I.R. 1939 All. 687, I.L.R. 1939 All. 885. See also *Rajkishore v. Sultan Jehan*, A.I.R. 1953 Pat. 58; *Sheo Narain v. Lakhan*, A.I.R. 1945 Pat. 434, 24 Pat. 345.

Enforcement of charge against purchaser without notice :—One important point of distinction between a mortgage and a charge is that while a mortgagee can follow the mortgaged property in the hands of any transferee from the mortgagor, irrespective of notice, a charge can be enforced against a transferee only if it is shown that he has taken with notice of the charge. In other words, a charge cannot be enforced against a *bona fide* purchaser for value who was not aware of the charge—*Royzuddi v. Kali Nath*, 33 Cal. 985 (1903); *Akshoy v. Corporation of Calcutta*, 42 Cal. 625 (1906); *Mohini v. Purna Sashi*, 36 C.W.N. 153; *Kishan Lal v. Ganga Ram*, 13 All. 28 (1904); *Gur Dayal v. Karam Singh*, 38 All. 254 (1905); *Prabhu Dayal v. Baban Lal*, 1 O.L.J. 43, 23 I.C. 867 (1906); *Hunter v. Nisar Ahmad*, 8 Luck. 168, A.I.R. 1933 Oudh 336 (1907); *Chhaganlal v. Chhnilal*, A.I.R. 1934 Bom. 189 (1908), 36 Bom. L.R. 277, 152 I.C. 267; *Vir Bhan v. Salig Ram*, A.I.R. 1937 Lah. 35 (1909), 17 Lah. 659, 164 I.C. 381; *Sharif v. Hunter*, A.I.R. 1937 Oudh 420, 167 I.C. 718; *Ramji v. Municipal Board*, A.I.R. 1937 Oudh 31, 12 Luck. 353, 164 I.C. 1034; *Badridas v. Raja Pratapgir*, A.I.R. 1940 Nag. 8 (11), 1939 N.L.J. 525, 188 I.C. 23. Contra—*Srinicasa v. Ranganatha*, 36 M.L.J. 618, 51 I.C. 963, where it is said that a purchaser without notice of the charge takes the property subject to the charge; see also *Mahadeo v. Anandi Lal*, 47 All. 90, 22 A.L.J. 887, 92 I.C. 348, A.I.R. 1925 All. 60, *Fateh Ali v. Gobardhan*, 5 Luck. 172, A.I.R. 1929 Oudh 316, 117 I.C. 405, and *Molloya v. Krishnaswami*, 47 M.L.J. 622, 85 I.C. 855, A.I.R. 1925 Mad. 95 (105), where the same view is taken. Certain property, which was subject to a charge, was sold to one H who purchased it for consideration without notice of the charge and subsequently transferred it to K who had full notice of the charge: *held* that the mere fact that H intervened would not change the situation. K purchased the property with notice and he could not avail himself of any defence under this section which H might have been able to do if he were the last owner—*Harnam Singh v. Md.*

Akbar Khan, A.I.R. 1937 Pesh. 76 (78), 170 I.C. 136. In an Allahabad case it was held that if the charge was created by a *decree of Court*, it could be enforced against a *bona fide transferee* for value without notice—*Maina v. Bachchi*, 28 All. 655 (659).

This section must be read along with sec. 52. Hence, where during the pendency of a suit by a Hindu widow for maintenance against her husband's coparceners and for a charge on the family property the coparceners executed a mortgage on that property, the mortgage would be affected by the charge granted in the widow's suit, even if the mortgagee took the mortgage without notice of the suit—*Rajagopala v. Kesava*, A.I.R. 1945 Mad. 126, I.L.R. 1945 Mad. 726. But if a charge is not shown in the proclamation for sale under Or. 21, r. 66 the charge cannot be enforced against the auction-purchaser—*Laxmi Devi v. Mukand*, A.I.R. 1965 S.C. 834. Where an auction-purchaser purchases a property without notice of a charge created on such property by a maintenance decree, the auction-purchaser is hit by *lis pendens* and the property in the hands of the auction-purchaser will be liable for discharge of the maintenance decree—*Bela Dibya v. Ramkishore Mohanty* A.I.R. 1969 Orissa 114.

Where there was no obligation on a purchaser to make inquiry in the *mamlatdar's* office to see if there was any charge on the land and all that he was bound to do was to see if there was any entry made of the charge in the record of rights which made no mention of the same, the purchaser could not be held to have had constructive notice of the charge—*Laksman v. Secretary of State*, A.I.R. 1939 Bom. 183 (186), 41 Bom. L.R. 257, 182 I.C. 635. The principle of constructive notice should however be applied to arrears of taxes which form a charge under the Municipalities Acts on the property sold at an auction-sale—*Municipal Board, Lucknow v. Ramji Lal*, A.I.R. 1941 Oudh 325, 1941 O.W.N. 122, 193 I.C. 290.

Either under this section or under the more general rule of law, the burden is on the transferee to establish that he is a *bona fide* transferee for value without notice—*Renukabal v. Bheosan Hapsaji*, A.I.R. 1939 Nag. 132, 1939 N.L.J. 129, 185 I.C. 33.

It has been held that where a charge is created by a decree, no question of notice arises and a subsequent purchaser will be bound irrespective of whether he has notice of the charge or not—*Hemlata v. Bhowani Charan*, 39 C.W.N. 725; *Maina v. Bachchi*, 28 All. 655 (659); *Sashi Bhusan v. Bhupendra Nath*, A.I.R. 1936 Cal. 112. But a recent Full Bench of the Oudh Chief Court have held that where a particular right is charged on specific immovable property by a decree of Court, such right cannot be enforced against a subsequent transferee for value without notice of the charge and that this principle applies also in cases where a charge is created before the amendment of 1929—*Mt. Indrani v. Maharaj Narain*, A.I.R. 1937 Oudh 217 (F.B), 166 I.C. 662. The Nagpur High Court has held that where a charge is created by a decree, the correct way of approaching the matter whether the charge is binding on *bona fide* purchaser for value without notice, is not to found the rights of the charge-holder upon any provision of this Act, but upon the law of estoppel by record. The Transfer of Property Act does not

purport to cut down the principles of estoppel by record—*Ahsan v. Maina*, A.I.R. 1938 Nag. 129 (130), 172 I.C. 749. See in this connection *Goswami v. Ramchandra*, A.I.R. 1949 Nag. 1, I.L.R. 1943 Nag. 713. According to the Special Committee's Report the amendment made at the end of para 2 makes it clear that no charge can be enforced against a transferee for value without notice, whether the charge is created by act of parties or by decree of Court. See the *Special Committee Report* cited at pp. 541-542 *ante*. Though a charge created by a decree is, like any other charge, not enforceable against a transferee for consideration without notice, when the decree directs for sale of the property, it can be sold even when in the hands of such a transferee—*Mahesh v. Mt. Mundar*, A.I.R. 1951 All. 141 (F.B.), 1951 A.L.J. 39, per Malik, C.J.

If the charge is created by a *registered* instrument, the registration amounts to *notice*, and a purchaser of the property takes it subject to the charge—*Nathan v. Durga*, 52 All. 985, 1939 A.L.J. 1267, A.I.R. 1931 All. 62 (64), 130 I.C. 489. Thus, a stipulation in a registered lease to the effect that the lessee should deduct from the annual rent certain portion as repayment of a sum of money already borrowed by the lessor from him, creates a charge on the property leased and not merely a personal covenant. If, therefore, subsequent to the execution of the lease, a creditor of the lessor obtains a money-decree against him and at auction-sale purchases the property leased out, he purchases it only subject to the charge created by the stipulation in the lease (the *registered* lease amounting to *notice* of the charge)—*Nathan v. Durga*, *supra*.

The holder of a charge on a property is entitled to enforce the same against the transferee of the property with notice, even though the transferee has purchased only a part of the property. If he is obliged to satisfy the full amount of the charge, his remedy is a suit for contribution against the owners of the remaining portion of the property—*Hunter v. Nisar*, *supra*.

"Property in the hands of a person" :—A simple mortgagee cannot be considered to have the property "in his hands" within the meaning of the proviso in para 2—*Surayya v. Venkataramanamma*, A.I.R. 1940 Mad. 701, (1940) 1 M.L.J. 831, 1940 M.W.N. 341.

Security bond :—A security bond relating to immoveable property under sec. 145, C.P.C., can be enforced without bringing a regular suit—*Daw Ohn v. U Bah*, A.I.R. 1929 Rang. 126, 7 Rang 352, 118 I.C. 632, and the case cited there, See also *Sukumari v. Mugneeram*, A.I.R. 1926 Cal. 889, 30 C.W.N. 683, 95 I.C. 908.

101. Where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares, by express words or

Extinguishment of charges.

101. Any mortgagee of, or person having a charge upon, immoveable property, or any transferee from such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the

No merger in case of subsequent encumbrance.

necessary implication, that it shall continue to subsist or such continuance would be for his benefit.

mortgagor or owner; as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property; and no such subsequent mortgagee or charge-holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto.

This section has been redrafted by sec. 51 of the T. P. Amendment Act (XX of 1929).

Thus, under the old section, 'extinguishment' was the rule, and 'keeping alive' was the exception (although this rule was rarely followed). Under the new section, 'keeping alive' is the rule.

535A. Amendments, whether retrospective:—This is one of the sections not specifically mentioned in sec. 63 of the Amending Act XX of 1929. It falls within the "other sections" referred to therein. For the reasons given in Note 1A, *ante*, the section, it is submitted, has retrospective operation. See also *Tota Ram v. Ram Lal*, A.I.R. 1932 All. 489 (492) (F.B.), 54 All. 897, 139 I.C. 127. Contra—*Ko Po v. C. A. & C. Firm.*, A.I.R. 1932 Rang. 197, 140 I.C. 156. The Madras High Court has however consistently held that this section as well as other amended sections have no retrospective effect—*Rajah of Kalahasti v. Parthasarathy*, A.I.R. 1942 Mad. 558, (1942) 2 M.L.J. 47 (following *Lakshmi v. Sankaranarayana*, 59 Mad. 359 (F.B.), A.I.R. 1936 Mad. 171, 70 M.L.J. 1). It has been held in this case that it is not possible for the Courts to apply the principles underlying the amended section in cases arising before the passing of Act XX of 1929. For other cases for and against this view see Note 1A, *ante*.

535B. Principle:—A principle, which might clearly be apparent in this section before it was amended, does not underlie it after amendment when the amendment omits the words recognizing the principle—*Basanewa v. Dodgowda*, A.I.R. 1942 Bom. 95 (96), 44 Bom. L.R. 15.

In this amended section the legislature has adopted the simple rule that the existence of a subsequent incumbrance prevents merger. But it did not amend or alter the old law of the union of estates which occurred when the mortgagee acquired the rights of the mortgagor or the purchaser of the equity of redemption acquired the rights of the mortgagee—*Devichand v. Chintaman*, A.I.R. 1945 Bom. 116, 46 Bom. L.R. 763. When a charge is extinguished by the purchase of the property by the charge-holder at the prior mortgagee's auction sale, what is extinguished is not merely the security but the debt itself—*ibid*.

Merger.—Merger of estates takes place when two estates held in the same legal right become united in the same person. The question whether there has or has not been a merger of the equity of redemption with the mortgagee rights depends on the intention of the person in whose possession both rights were at the same time—*Md. Abdul Samad v. Girdhari Lal*, A.I.R. 1942 All. 175. Where the capacity in which a person is in possession of the mortgagee rights is something quite different from the capacity in which he is in possession of the equity of redemption, the mere fact that those two capacities are united in the same physical person cannot result in a merger : consequently there cannot be any extinguishment of the mortgage—*Ibid.* So far as the Indian law is concerned, this section codifies the law of merger and it is exhaustive, so far as it does—*Rajah of Kalahasti v. Parthasarathy*, A.I.R. 1942 Mad. 558 (564), (1942) 2 M.L.J. 47.

535C. Application :—This section in term applies only when there is a subsequent mortgagee or charge-holder. The principle of this section does not apply to the case of a Court purchaser or to the owner of the property—*Baswanneva v. Dodgowda*, supra; *Bhagerathibai v. Monohar*, A.I.R. 1951 Nag. 164, I.L.R. 1950 Nag. 698. Though this section has generally been invoked in cases where the rights of mesne incumbrancers come up for decision, the principle of the section is not limited to those cases. It only lays down a general rule of presumed intention, and where the later conveyance will be inoperative as against any intermediate right, whether founded on an encumbrance or on an attachment, the principle equally applies—*Mahalakshmi v. Somaraju*, I.L.R. 1939 Mad. 600, A.I.R. 1939 Mad. 393 (396), (1939) 2 M.L.J. 72. This section does not apply where the mortgagee purchases the mortgaged property and there are no subsequent incumbrancer. But the equitable rule of intention applies and the presumption is that the mortgagee intended to keep alive the previous mortgage, if it would be for his benefit—*Ram Sahai v. Mahabir*, A.I.R. 1943 Oudh 407, (1943) O.W.N. 320. A prior mortgagee, whose mortgage is wholly satisfied by the purchase by the mortgagee himself of the property of the mortgagor, cannot claim the benefit of subrogation. It is ordinarily claimed by a person other than a prior mortgagee on the ground that such person has discharged prior mortgages; and where a prior mortgagee purchases the property of the mortgagor, as against the puisne mortgagee, his claim is covered by this section and he will still be entitled to keep his prior mortgagee's interest apart from the mortgagor's equity of redemption, and a subsequent mortgagee shall not be entitled to sell such property without redeeming the prior mortgage or otherwise than subject thereto. How the equities between the prior mortgagee and the puisne mortgagee are to be worked out in apportioning liability between the several items comprised in the mortgages and sales, is a matter which the executing Court can conveniently determine at the time the properties are directed to be sold, or the sale proceeds have to be distributed—*Rama Aiyar v. Bagavattimuthu*, A.I.R. 1936 Mad. 473 (474-75), 70 M.L.J. 506, 163 I.C. 834.

In a sale of the mortgaged property free of incumbrance held by the Deputy Commissioner under sec. 138 C.P. Land Revenue Act, even if the decree-holder is the purchaser, he would obtain an absolute title free

from all incumbrances. The considerations of merger under this section does not apply to the case—*Ratanlal v. Sagarbai*, A.I.R. 1945 Nag. 289, I.L.R. 1945 Nag. 643. Where a purchaser at a Court sale or a private sale discharges what he thinks to be the only mortgage on it and subsequently discovers that there is still a later mortgage subsisting, he is entitled to sue on the mortgage he has discharged—*Arumuga v. Semba*, A.I.R. 1936 Mad. 814 (816), 70 M.L.J. 719, 163 I.C. 704. But see *Baswannewa v. Dodgowda*, supra.

536. Principle of "keeping alive":—In the earlier part of the old section it was stated that when a mortgagee acquired the equity of redemption in his security, the *general rule was that the mortgage was extinguished*, and the onus was thrown on the mortgagee to prove that it was to his interest to keep the charge alive and that was his intention at the time of the transaction—*Bai Rewa v. Vali Mohamed*, 46 Bom. 1009 (1014), 70 I.C. 912, A.I.R. 1922 Bom. 211; *Darshan Singh v. Arjun*, 1 Luck. 560, 3 O.W.N. 741, A.I.R. 1926 Oudh 606 (607), 98 I.C. 28.

But in spite of the express words of the earlier part of the section, and in spite of the rule laid down in *Toulmin v. Steere*, 3 Mer. 310, on which it was based, it was held in a majority of cases that in such circumstances the Court would presume that it was to the benefit of the mortgagee to keep the charge alive and that the mortgagee intended to keep it alive. That is, the Courts laid more stress on the latter part of the section than on the earlier part.

In *Toulmin v. Steere*, 3 Mer. 310, it was laid down that the purchaser of an equity of redemption who paid off a prior mortgage out of the purchase-money and had taken a conveyance of the estate from the mortgagee, could not set up that mortgage as against a subsequent mortgagee who had taken subject to the prior mortgage. But this inflexible rule, being based on no intelligible principle, was never followed in India, and has been adversely commented on in several cases, even in England. See *Manks v. Whittely*, [1911] 2 Ch. 488 (*per* Parker, J.). It has been observed by the Judicial Committee and the Indian High Courts that the question to be asked in each case would be—What was the *intention* of the party paying off the charge? He had a right to extinguish it, and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention should be ascribed to him? The ordinary rule is that a man having a right to act in either of two ways shall be presumed to have acted according to his interest—*Gokaldas v. Puranmal*, 10 Cal. 1035 (P.C.); *Mahesh Lal v. Mohant Bawan Das*, 9 Cal. 961 (977) (P.C.); *Ibrahim Hossein v. Ambica Prosad*, 39 Cal. 527 (P.C.); *Thorne v. Cann*, (1895) A.C. 11 (19); *Ayyareddi v. Gopalakrishnayya*, 47 Mad. 190 (195) (P.C.); *Mehr Singh v. Amar Nath*, 7, Lah. 212, 94 I.C. 152; *Fakiraya v. Gadigaya*, 26 Bom. 88; *Dinobandhu v. Jogmaya*, 29 Cal. 154 (P.C.); *Jamiunnissa v. Pitambardas*, 11 A.L.J. 127, 18 I.C. 704. *Hari Narayan v. Hari Prasad*, 12 A.L.J. 470, 23 I.C. 827; *Mahalakshammal v. Sriman Madhwa*, 35 Mad. 642; *Shankar v. Sadasiv*, 38 Bom. 24 (31); *Gauri Sanker v. Bahadur*, 6 P.L.T. 385, A.I.R. 1925 Pat. 605 (607); *Baij Nath v. Daleep Narain*, 1 P.L.T. 582, 58 I.C. 489; *Tiruvengadan v. Satapathi*, 49 M.L.J. 361, A.I.R. 1925 Mad. 1217, 90 I.C. 767; *Baldeo v. Dy. Commissioner*, 10 O.L.J. 112, A.I.R. 1924 Oudh 1

9, 74 I.C. 503; *Banshidhar v. Jagmohan*, 3 Luck. 472, A.I.R. 1929 Oudh 88 (89), 110 I.C. 79; *Radhakishun v. Fakharuddin*, A.I.R. 1934 Lah. 143; *Abdul v. Arunachala*, A.I.R. 1932 Mad. 84, 136 I.C. 305; *Ko Po v. C. A. & C. Firm*, A.I.R. 1932 Rang. 197, 140 I.C. 156; *Pal Singh v. Sundar Singh*, A.I.R. 1933 Lah. 1000 (1001), 145 I.C. 719; *Kalimuddin v. Baidyanath*, A.I.R. 1930 Cal. 572, 51 C.L.J. 565, 128 I.C. 192; *Someshwari v. Moheshwari*, A.I.R. 1931 Pat. 426 (431), 10 Pat. 630, 135 I.C. 85; *Lakshmi v. Shankar*, A.I.R. 1936 Mad. 171 (172) (F.B.), 43 M.L.W. 23; *Karam Chand v. Ram Singh*, A.I.R. 1937 Lah. 665, 39 P.L.R. 899; *Pramatha v. Janaki*, A.I.R. 1937 Cal. 194 (198), 41 C.W.N. 472, 171 I.C. 747; *Jagatdhar v. Brown*, 33 Cal. 1133; *Md. Ibrahim v. Ambika*, 39 Cal. 527 (P.C.). "The mere fact of a charge having been paid off does not decide the question whether it is extinguished. If a charge is paid off by a tenant for life, without any expression of his intention, it is well established that he retains the benefit of it against the inheritance. Although he has not declared his intention of keeping it alive, it is presumed that his intention was to keep it alive, because it is manifestly for his benefit. On the other hand, when the owner of an estate in fee or in tail pays off a charge, the presumption is the other way, but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it"—*petr* Jessel, M.R. in *Adams v. Angell*, (1877) 5 Ch. D. 634.

The question of merger depends upon the intention at the time when the mortgagee acquires the rights of the mortgagor. The mere possibility of a suit for pre-emption would not be sufficient to indicate such an intention—*Ghaffur v. Budloo*, A.I.R. 1943 Oudh 284, (1943) O.W.N. 159. The question whether the continuance of the mortgage would be for the mortgagee's benefit is to be determined at the time of the mortgagee's acquisition of the full ownership—*Damodarasami v. Govindarajulu*, A.I.R. 1943 Mad. 429 (F.B.), (1943) 1 M.L.J. 291.

A subsequent mortgagee can avail himself of his interest in a prior mortgage as a shield against intermediate mortgagee. The effect of this section is to keep the prior mortgage alive subject always to any question of limitation. It does not give it a re-birth. Thus a mortgage which at the date of the subsequent incumbrance is already barred by limitation will not be revived as a protection against an intermediate incumbrancer—*Munshi Lal v. Hira Lal*, A.I.R. 1947 All. 74 (F.B.), I.L.R. 1947 All. 11. After the mortgage the mortgagor granted a perpetual lease of the mortgaged property and then the mortgagee purchased it, but kept his mortgage alive. In a suit by the mortgagee against the lessee, it was held that the suit was maintainable provided it was not barred by limitation—*Ramsahai v. Mahabir*, A.I.R. 1943 Oudh 407, (1943) O.W.N. 320.

The mortgagee who purchases the equity of redemption is entitled to assert his right as mortgagee and may claim that his mortgage-interest has been kept alive, as this is for his benefit—*Mangtulal v. Upendra*, 57 Cal. 82, A.I.R. 1930 Cal. 335 (337), 125 I.C. 661. Where the mortgagee purchases the equity of redemption with a stipulation to reconvey after a fixed period the mortgage is not extinguished by merger, because the stipulation to reconvey indicates a contrary intention—*Madhappa*

Gounder v. Karuppa Gounder, A.I.R. 1962 Mad. 343. Where a prior mortgagee purchased the property mortgaged to him, this section would protect him from the claims of puisne incumbrancers, for it was clearly for his benefit, when he became the absolute owner of the property, that his prior charge should be kept alive—*Baldeo v. Uman Shankar*, 32 All. 1 (3); *Bhup Singh v. Sakha Ram*, A.I.R. 1945 All. 158, I.L.R. 1945 All. 186. A contract to deprive the prior mortgagee of his charge must be a very clear one—*Madan Mohan v. Nand Ram*, A.I.R. 1943 All. 156, 1953 A.L.J. 62. Where a mortgagor sells his equity of redemption to a first mortgagee with possession, after the creation of a second mortgage over the properties, the first mortgagee is entitled to keep his incumbrance alive as against the second mortgagee, though it does not continue against the owner whose equity of redemption the first mortgagee had purchased—*Ibrahim Sahib v. Arumugathayee*, 38 Mad. 18. On a mortgagee purchasing the mortgaged property along with other properties and jointly with other persons in undivided shares, his mortgage lien is not extinguished by the purchase. The mortgage should be regarded as existing, it being evidently for the benefit of the mortgagee that it should be so regarded—*Gunindra v. Baijnath*, 31 Cal. 370. Where the mortgagor executes a fresh mortgage in renewal of the old one to the same mortgagee, there is always a presumption that the mortgagee intends to keep the prior mortgage alive for his benefit—*Punjab & Sind Bank v. Kishen Singh*, A.I.R. 1935 Lah. 350 (353), 16 Lah. 881, 156 I.C. 795. Where the second transaction replacing a former mortgage is frustrated wholly or partially, the mortgagee can fall back on the earlier mortgagee—*Dasari v. Onarasi*, A.I.R. 1936 Mad. 61 (62), 59 Mad. 44, 160 I.C. 757. Where a mortgagee takes another mortgage in renewal of the former deed, he has priority over incumbrances subsequent to the first deed—*Kanhaiya v. Gulab*, A.I.R. 1933 Oudh 9 (12), 7 Luck. 655, 138 I.C. 206. Where a prior mortgagee purchases the equity of redemption in execution of a money-decree against the mortgagor, he is presumed to keep alive his mortgage against the puisne mortgagees, who will have to redeem him—*Ram Sarup v. Ram Lal*, 44 All. 659, 20 A.L.J. 596, 75 I.C. 472, A.I.R. 1922 All. 394. See also *Gulam v. Pandharinath*, A.I.R. 1948 Bom. 379, 50 Bom. L.R. 271. Under the amended section, the purchase by the mortgagee of the equity of redemption has in itself the effect of keeping alive the prior mortgage, and the *intention* to do so need not be proved nor presumed; nor is it necessary to consider whether the continuance of the incumbrance would be to his benefit. When an earlier mortgage is renewed by the execution of a subsequent mortgage, the mortgagee has a right to extinguish the earlier mortgage and a right to keep it alive. In the absence of any express evidence of his intention, the ordinary rule is that a man having a right to act in either of two ways shall be assumed to have acted according to his interest, and therefore the mortgagee must be deemed to have intended to keep the earlier mortgage alive. The fact that the renewal related only to a part of the property comprised in the earlier mortgage is no bar to keeping it alive—*Himmat Sahai v. Md. Moin*, A.I.R. 1941 All. 200, 1941 A.L.J. 234. Where a mortgagee after purchase by him of a part of the mortgaged property comes to Court and claims to enforce his entire mortgage against the remaining portion in respect of the whole unabated mortgage-debt, the burden lies

heavily upon him for showing that special circumstances or a special bargain existed from which it must be concluded that no part of the mortgaged-debt was to be extinguished—*ibid.* See in this connection *Mahalakshmi v. Somaraju*, I.L.R. 1939 Mad. 600, A.I.R. 1939 Mad. 393 (396), (1939) 2 M.L.J. 72; *Singheswar v. Medni Prasad*, A.I.R. 1940 Pat. 65, 187 I.C. 339; *Ram Lal v. Bhagat Ram*, A.I.R. 1940 Lah. 247, 190 I.C. 673 and *Subbarama v. Krishnaiya*, A.I.R. 1939 Mad. 718 (721, 722), (1939) 2 M.L.J. 16, 1939 M.W.N. 635. Where a subsequent usufructuary mortgagee paid off a prior mortgagee's foreclosure decree and later sued the mortgagor for the amount so paid and he too obtained a foreclosure decree it was held under the circumstances that an intention to keep alive the mortgage could not be inferred—*Gaffoor v. Badloo*, A.I.R. 1943 Oudh 284, (1943) O.W.N. 159. The doctrine of "keeping alive" will not be applicable where the subsequent mortgage fails for want of registration—*Ram Narain v. Nawab Singh*, A.I.R. 1947 All. 214, I.L.R. 1946 All. 375. See in this connection *Saila Bala v. Gouri Bala*, A.I.R. 1952 Cal. 749.

Where a third mortgagee (or a purchaser) professes to keep in his hands a part of the consideration in order to pay off the first and the second mortgages, but he pays off only the first mortgage, then in a suit by the second mortgagee to enforce his mortgage it is open to the third mortgagee (or the purchaser) to insist on his being treated as a first mortgagee whose mortgage must be paid off before the second mortgagee can bring the property to sale—*Tota Ram v. Ram Lal*, 54 All. 897 (F.B.), 139 I.C. 107, A.I.R. 1932 All. 489 (491); *Bapu v. Venkatachalapathi*, 64 M.L.J. 606.

A prior mortgagee, by purchasing the rights of a puisne mortgagee, does not lose the rights which had been secured to him by the prior mortgage. In such cases the presumption is that he intended to keep alive the prior security and would be entitled to fall back upon it in case of necessity—*Fateh Ali v. Gehna*, 9 Lah. 88, A.I.R. 1928 Lah. 301 (303), 112 I.C. 17; *Makhan Mal v. Gokul Chand*, A.I.R. 1932 Lah. 237, 137 I.C. 699. If a mortgagee of two properties purchases one of them in discharge of his mortgage, unaware of a subsequent mortgage of both the properties in favour of another, he must be deemed to have kept his own mortgage alive and is entitled to use it as a shield against the subsequent mortgagee—*Abdul Majid v. Arunachala*, 61 M.L.J. 857, 136 I.C. 305, A.I.R. 1932 Mad. 84 (85). See also *Kalimuddin v. Baidyanath*, A.I.R. 1930 Cal. 572, 51 C.L.J. 565, 128 I.C. 192.

The principle of this section applies not only where the mortgaged property is purchased by the prior mortgagee or charge-holder, but also extends to cases where the property is purchased by a *third person*. And so, where the mortgaged properties are sold to a third person, and the sale-proceeds are devoted to paying off prior incumbrances, and the circumstances at the time of the sale are such that it is for the benefit of the purchaser that the mortgages involved in the purchase should not be extinguished, it must be held that they enure for the benefit of the purchaser, and that he will be entitled to priority over puisne mortgagees—*Natchiappa v. Ko Tha*, 6 Rang. 488, A.I.R. 1928 Rang. 287 (288), 113 I.C. 809; *Nangunni Kovillamma v. Nedungudi*, 31 L.W. 165, A.I.R.

1929 Mad. 860 (861); *Ram Lal v. Bhagat Ram*, A.I.R. 1940 Lah. 247, 190 I.C. 673. But where an outsider having no interest to protect deliberately with his eyes open purchases in order to enable the owner and the charge-holder to extinguish the charge between them, the stranger purchaser is not entitled to keep the charge alive as against subsequent encumbrances—*Nemasao v. Madhorao*, A.I.R. 1942 Nag. 33, 1941 N.L.J. 634.

The words "otherwise acquire" appear to indicate acquisition by succession as well. Thus where M succeeded to the mortgage-right to his father and then succeeded to the equity of redemption as heir of his mother who had purchased the same, it was held that M must be presumed to keep alive the mortgage—*Chandra Bibi v. Mohanram*, A.I.R. 1934 Pat. 134, 13 Pat. 200, 153 I.C. 412.

Punjab:—Though the Act is not in force in the Punjab, the general principles to be applied are those embodied in the Act as amended in 1929 which must be held to be more in accordance with justice, equity and good conscience—*Nizam Din v. Ram Sukh*, A.I.R. 1938 Lah. 286 (287). It should always be presumed that in India a purchaser of previous mortgagee-rights intends to keep the mortgage alive for his benefit—*Ibid.*

537. Puisne mortgagee paying off prior mortgage:—Where a subsequent mortgagee redeems a prior mortgage, he becomes entitled to the position of the mortgagee redeemed, and he can keep alive the prior mortgage that he has paid off, if it suits his purpose to do so—*Chhotelal v. Bansidhar*, 24 A.L.J. 570, 95 I.C. 998, A.I.R. 1926 All. 653. *Bhiku v. Shujjat Ali*, 29 Cal. 25 (30); see also *Ramdas v. Ramnandan*, 9 P.L.T. 148, A.I.R. 1928 Pat. 195, 108 I.C. 95. He must be assumed to have acted in the manner most beneficial to himself and to have kept the mortgage alive to be used as a shield against an intermediate incumbrancer. In other words, payments made to the prior mortgagee are to be regarded as purchases *pro tanto* of the prior mortgage—*Ramsahai v. Kunwar*, 7 Luck. 26, A.I.R. 1932 Oudh 314 (317), 139 I.C. 626.

Where a mortgagor in executing a simple mortgage of the property on which there was a prior usufructuary mortgage, left with the subsequent mortgagee some portion of the consideration money for the discharge of the prior usufructuary mortgage, and it was redeemed subsequently, *held* that the question was whether the prior mortgage was kept alive for the benefit of the subsequent mortgage of the property who discharged it, was a question of intention, and in the absence of clear express evidence the presumption would be that the intention was to keep up the prior mortgage for the benefit of the subsequent mortgagee—*Hari Narayan v. Har Prosad*, 12 A.L.J. 470, 23 I.C. 827.

Where a subsequent mortgagee advances money for discharging a prior mortgage on which a *decree* had been passed, he is entitled to priority in respect of that money in a suit by an intermediate mortgagee. It is sufficient for him to show that there was a prior incumbrance which it was for his benefit to keep alive. The fact that the mortgage had taken the form of a decree does not affect the question—*Purnamal*

Chand v. Venkata Subbarayulu, 20 Mad. 486 (487); *Ram Narayan v. Sahadeo*, 1 Pat. 332 (334), A.I.R. 1922 Pat. 181, 3 P.L.T. 261, 67 I.C. 221. Where the prior mortgagee obtained a decree and the mortgaged property was brought to sale, and thereupon the mortgagor executed a fresh mortgage, the consideration of which was the discharge of the decree, *held* that the prior mortgage was not extinguished, and that the later mortgagee on discharge of the decree could hold the earlier mortgage as a shield—*Ram Bilas v. Lachmi*, 8 O.W.N. 541, 132 I.C. 542, A.I.R. 1931 Oudh 295 (296).

If a third mortgagee pays off a first mortgage, he does not thereby extinguish the first mortgage, but it is kept alive for the benefit of the third mortgagee, who gets priority over a second mortgagee—*Seetharama v. Venkatakrishna*, 16 Mad. 94 (96); *Gangadhara v. Sivarama*, 8 Mad. 246 (249); *Mohanlal v. Md. Sujat*, A.I.R. 1933 Mad. 155, 144 I.C. 969. Where a person mortgaged his property first to A, then to another, and thirdly to A again, in which last mortgage there was a recital of the first mortgage and a statement as to the liquidation of the first debt, *held*, that the fact of the old debt being paid off by new transaction would not necessarily destroy the security; and if there was nothing to show a contrary intention, the creditor must be presumed to have intended to keep the security alive for his own protection—*Gopal Chunder v. Herumbo Chunder*, 26 Cal. 523; *Inderdawan v. Gobind Lal*, 23 Cal. 790. Where a mortgagor executed three successive mortgages in favour of B, C and D, and in the third mortgage-deed (executed in favour of D) the fact of the mortgage to C was not disclosed but only the mortgage to B, and it was recited in the deed that out of the money borrowed from D the mortgage in favour of B was to be paid off at once and that there was no other incumbrance affecting the property other than that in favour of B; *held* that when the mortgage in favour of D was executed the intention of the parties was that D should have the first and only charge on the property, and so it was utterly immaterial to consider whether D's intention was to keep alive B's mortgage. D would therefore be entitled to priority over C—*Durga v. Baijnath*, 8 Pat. 360, 10 P.L.T. 479, 118 I.C. 730, A.I.R. 1929 Pat. 325 (327). A property, on which there were two mortgages, was attached subject to those mortgages. The mortgagor then made a third mortgage and by means of the sum raised thereby he paid off the two prior mortgages. The purchaser at auction sale, which followed the attachment, contended that he had purchased the property free from the two prior mortgages and that the third mortgagee was not entitled to any priority over the first two mortgages. It was *held* that the two prior mortgages were kept alive for the benefit of the third mortgagee. He had advanced the money to pay off the first two mortgages with the idea of keeping the benefit to himself and not to benefit the auction-purchaser—*Dinabandhu v. Jogmaya*, 29 Cal. 154 (P.C.). *Madho Singh v. Panchanan Singh*, 49 All. 233, 25 A.L.J. 45, 101 I.C. 409, A.I.R. 1927 All. 211 (212). A land was subject to three simple mortgages, of which the second was on the crops as well as on the land. A purchaser of the land subject to the three mortgages, and the respondents, who were assignees of his interest, paid money to the second mortgagee to save the crops from sale under a decree which he had obtained under the mortgage. *Held*

that there being no covenant by the mortgagor to pay the third mortgage, the payments made to the second mortgagee were to be regarded as purchases *pro tanto* of the second mortgage, not as a discharge of it, the fact that the third mortgage did not include the crops not being material; and that accordingly the respondents were entitled to keep the second incumbrance alive for their own benefit, and thus obtain priority over the third mortgagee—*Ayyareddi v. Gopalakrishna*, 47 Mad. 190 (195) (P.C.), 46 M.L.J. 164, A.I.R. 1924 P.C. 36, 79 I.C. 592.

Where an intermediate mortgagee discharged a mortgage-decree passed on a prior and a puisne mortgage, and the decree itself had been passed in a suit to which the intermediate mortgagee was a party but on a compromise arrived at between the other parties to the suit, *held* that the intermediate mortgagee must be deemed to have paid the decree amount not intending to extinguish the mortgage-debts but to keep them alive and to enable him to recover them from the mortgagor—*Nagayyar v. Gobindayyar*, 17 L.W. 14, A.I.R. 1923 Mad. 349 (350), 70 I.C. 286.

Where a mortgagee, subsequently to the execution of the mortgage-deed, takes another mortgage in renewal of the former deed, the prior mortgage is not extinguished but is kept alive, and the mortgagee had priority over incumbrances subsequent to the first deed—*Alangaran v. Lakshmanan*, 20 Mad. 274 (275), following *Seetharama v. Venkata Krishna*, 16 Mad. 94 (96); *Kanhaiya v. Gulab Singh*, 7 Luck. 655, A.I.R. 1933 Oudh 9.

538. Cases under old sections :—“Absolutely”—The word “absolutely” was used in the old section to indicate that the interest in which the encumbrance should merge must be the absolute interest and not a limited one; and the encumbrancer must become entitled to the absolute interest—*Sonatulla v. Abu*, A.I.R. 1930 Cal. 530 (531), 57 Cal. 473, 126 I.C. 413; *Rajah of Kalahasti v. Parthasarathy*, A.I.R. 1942 Mad. 558, (1942) 2 M.L.J. 47. There was nothing in this section which would entitle a person who had acquired an absolute title to the property or happened to become a charge or encumbrance holder of the property to plead the charge or encumbrance only by a way of defence—*Rajah of Kalahasti v. Parthasarathy*, *supra*.

Extinguishment :—Prior to the amendment of this section, as well as prior to the enactment of the T. P. Act, the principle which guided the Court was that where the absolute owner of an estate became also the owner of a charge thereon, in the absence of any intention, express or presumed, merger or extinguishment of title would take place—*Someshwari v. Maheshwari*, 10 Pat. 630, A.I.R. 1931 Pat. 426 (432), 135 I.C. 85. But see *Rajah of Kalahasti v. Parthasarathy*, *supra*, at p. 562 where it has been held that under the exception in the old section even if the person did not declare either by express words or by necessary implication that the charge would continue, but if the Court found that the continuance of the charge or encumbrance would be for a person's benefit, it was required to presume, in accordance with the natural presumption, that a person would not have acted or intended to act against his benefit and that he must have intended to keep the charge or encumbrance

alive. If the mortgaged property is sold to the mortgagee, and there is *no mesne incumbrance* at the time of the sale, the conclusion seems to be inevitable that the mortgage has been extinguished. The ordinary presumption in such a case is that the owner does not intend to keep up a charge upon the estate to which he has acquired a full title—*Baj Rewa v. Fali Mahomed*, 46 Bom. 1009 (1014), A.I.R. 1922 Bom. 211, 70 I.C. 912. If there is a mesne mortgagee, then it is conceivable that the prior mortgagee who acquires full proprietary rights may keep alive his prior mortgage and use it as a shield when occasion arises. But where there is *no mesne mortgagee*, and the transaction is a straight dealing between the mortgagee on the one side and the mortgagor on the other, whereby the mortgagee obtained the sale of the equity of redemption from the mortgagor and thus acquired full proprietary ownership, the result of the transaction being the confluence of the interest of the mortgagor and the purchaser of the equity of redemption, the doctrine of merger fully comes into operation, and there is no room for any presumption in favour of an intention to keep the prior mortgage alive—*Lakshmi v. Partap*, 12 Lah. L.J. 56, A.I.R. 1930 Lah. 620 (623). See also *Mahesh v. Mohant Bawan*, 9 Cal. 961 (P.C.); *Gobind v. Kuldip*, A.I.R. 1924 Lah. 377, 73 I.C. 764; *Kanhaiya v. Ikram*, 8 Luck. 103, A.I.R. 1932 Oudh 268; *Bibi Basirunnissa v. Habib Ahmad*, A.I.R. 1960 Pat. 264.

539. Subsequent mortgagee suing for sale is bound to redeem prior mortgage :—See the last sentence of this section : “*and no such..... subject thereto.*” A prior mortgagee who has purchased the property mortgaged to him has a right to be repaid the money due in respect of his mortgage before a subsequent mortgagee can bring such property to sale in execution of a decree on the mortgage held by the latter—*Baldeo v. Uman Shankar*, 32 All. 1 (3). In a suit by a subsequent mortgagee to enforce his mortgage where the prior mortgagee who has also purchased the equity of redemption and is in possession, is also added as a party to the suit, it is premissible for the subsequent mortgagee to sell the property subject to the prior incumbrances under the earlier mortgages without redeeming them. The prior mortgagee is however entitled to remain in possession until the prior mortgages are redeemed irrespective of the question of limitation—*Hari Ram v. Munshi Singh*, A.I.R. 1939 All. 660 (662), 1939 A.L.J. 559, 185 I.C. 126.

102. Where the person on
 Service or or to whom any
 tender on or notice or tender is
 to agent. to be served or
 made under this Chapter does
 not reside in the district in
 which the mortgaged property
 or some part thereof is situate,
 service or tender on or to an
 agent holding a general
 power-of-attorney from such
 person, or otherwise duly
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 to accept such service or

vice or tender, shall be deemed sufficient.

tender shall be deemed sufficient.

Where the person or agent on whom such notice should be served cannot be found in the said district, or is unknown to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient.

Where no person or agent on whom such notice should be served can be found or is known to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient:

Provided that, in the case of a notice required by section 83, in the case of a deposit, the application shall be made to the Court in which the deposit has been made.

Where the person or agent to whom such tender should be made cannot be found within the said district, or is unknown to the person desiring to make the tender, the latter person may deposit in such Court as last aforesaid the amount sought to be tendered and such deposit shall have the effect of a tender of such amount.

Where no person or agent to whom such tender should be made can be found or is known to the person desiring to make the tender, the latter person may deposit, in any Court in which a suit might be brought for redemption of the mortgaged property the amount sought to be tendered and such deposit shall have the effect of a tender of such amount.

Amendment :—This section has been amended by section 52 of the T. P. Amendment Act (XX of 1929).

103. Where, under the provisions of this Chapter, a

Notice, etc., to or by
person incompetent to
contract

notice is to be served on or by, or a tender or deposit made or accepted or taken out of Court by, any person incompetent to contract, such notice may be served *on or by*, or tender or deposit made, accepted or taken, by the legal curator of the property of such person ; but where there is no such curator, and it is requisite or desirable in the interests of such person

that a notice should be served or a tender or deposit made under the provisions of this Chapter, application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of serving or receiving service of such notice, or making or accepting such tender, or making or taking out of Court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract; and the provisions of *Order XXXII in the First Schedule to the Code of Civil Procedure, 1908* shall, so far as may be, apply to such application and to the parties thereto and to the guardian appointed thereunder.

Amendment :—By section 53 of the T. P. Amendment Act (XX of 1929), the words 'on or by' have been added to correct a mere clerical error (*Report of the Special Committee*), and the reference of Chapter XXXI of the old C. P. Code of 1882 has been replaced by a reference to O. XXXII of the present Code.

540. Minor mortgagee :—Where the mortgagee is a minor, the mortgagor may make a tender to the lawful guardian; if he makes a deposit, the notice of the deposit must be served on the lawful guardian. If there is no lawful guardian, and the mortgagor makes a deposit under sec. 83, it is his duty to make an application for the appointment of a guardian *ad litem* of the mortgagee under this section, and to see that a proper person is appointed guardian for the purpose of receiving service of notice under sec. 83. Until the mortgagor has done this, he cannot be said to have "done all that has to be done to enable the mortgagee to take the amount out of Court," so as to exempt the mortgagor from the payment of interest under sec. 84—*Pandurang v. Mahadaji*, 27 Bom. 23 (29); *Sheo Saran v. Ram Lagan*, 44 All. 64 (67); *Shivanath v. Manohar*, 16 O.C. 261, 22 I.C. 245. *Gokul v. Chandra Sekhar*, 48 All. 611, A.I.R. 1926 All. 665, 96 I.C. 1, 24 A.L.J. 769; *Appa Pai v. Somu*, 49 M.L.J. 327, A.I.R. 1925 Mad. 1017, 90 I.C. 754. Where the mortgagor deposited in Court the correct amount but took no steps to have a guardian *ad litem* appointed by the Court for the minor mortgagee, but merely asked for service of notice on the mortgagee 'under the guardianship of his father,' *held* that the proceedings were not valid and interest would not cease to run—*Sheo Saran v. Ram Lagan*, 44 All. 64 (65), 19 A.L.J. 852, 64 I.C. 413 A.I.R. 1922 All. 355. Where the mortgagor applied for the appointment of the minor mortgagee's mothers as their guardians, and notices were issued to the mothers but were not served on them, and Court eventually ordered service by proclamation but no formal order was recorded appointing the mothers as guardians, *held* that such substituted service was not sufficient. It is necessary for a proper guardian to be appointed that the notice should be served, not by substituted service, but by ordinary service on a person who is capable of becoming a guardian and who agrees expressly or by implication to become a guardian—*Phool Kuer v. Rewari*, 1930 A.L.J. 1020, A.I.R. 1930 All. 609 (610), 124 I.C. 191. See also Note 511 under sec. 84.

No guardian need be appointed under this section when there is

already a guardian of the property of the minor mortgagee; but the fact a certain person had appeared as next-friend of the minor in a previous litigation between the same parties, does not dispense with the necessity of appointing a guardian under this section because the proceedings under this section cannot be called a continuation of the previous suit—*Shionath v. Manohar*, 16 O.C. 261, 22 I.C. 245.

If there is a dispute as to whether the person in whose favour a deposit is made is a minor or not, the Court has to be satisfied of the fact of minority, and this cannot happen unless the Court inquires into the matter—*Ganeshi Lal v. Rohni*, 50 All. 655, 26 A.L.J. 355, A.I.R. 1928 All. 311 (312), 108 I.C. 570.

When a mortgage, though executed in favour of a minor member, is in reality a mortgage taken by the head of the joint family of which the minor is a member, the mortgage-money being supplied from the joint family funds, it may well be held that an offer to pay the money on such a mortgage to the managing member of the family is a good and valid tender in the eye of the law, and no guardian *ad litem* is necessary to be appointed for receiving the tender—*Sheo Saran v. Ram Lagan*, 44 All. 64 (66), 64 I.C. 413, A.I.R. 1922 All. 355.

The procedure of this section must be strictly fulfilled. Every precaution must be taken to safeguard the interests of the minor, and on this principle, the minor should always have the benefit of any doubt that may exist, where it is a question whether the procedure in a case has been of a nature to bind him or not—*Shivnath v. Manohar*, supra. The procedure is consequent upon the deposit having been made and not precedent to an intention to make a deposit—*Ganeshi v. Rohni*, A.I.R. 1928 All. 311 (312), 50 All. 655, 108 I.C. 570.

104. The High Court may, from time to time, make rules consistent with this Act for carrying out, in itself and in the Courts of Civil Judicature subject to its superintendence, the provisions contained in this Chapter.

541. Power to make rules :—The section is an *enabling one*; it merely empowers the High Court to make rules for carrying out the provisions of this Act, but it does not make it compulsory on the High Court to do so—*Mallikarjunadu v. Lingamurti*, 25 Mad. 244 (F.B.), 12 M.L.J. 279. In the absence of rules framed under this section, the procedure applicable to suits for the enforcement or realisation of mortgages prescribed by the Code of Civil Procedure will apply—*Dakhina Mohan v. Basumati*, 4 C.W.N. 474; *Raja Ram Singhji v. Chunni Lal*, 19 All. 205 (208).

Before the procedural section of this Act (*i.e.*, secs. 85—90 etc.) were relegated to the Civil Procedure Code, it was held in a Madras case that this section was wide enough to enable the High Court to make rules for the execution of decrees—*Mallikarjunadu v. Lingamurti*, 25 Mad. 244 (F.B.). But this decision is no longer of any practical value: for the procedural sections being now incorporated into the new C. P. Code, the rules for the execution of decrees would now be framed under

the powers conferred on the High Court by sec. 122 of the Code, and not under this Act.

In the same Madras case, it has been held that this section must be read subject to sec. 15 of the Charter Act (24 and 25 Vict. c. 104) which provides that the High Court shall have power to make and issue general rules for regulating the practice and proceedings of all Courts subject to its *appellate* jurisdiction—*Ibid.* That is, the rules framed under this section would not be binding upon the High Court in the exercise of its *original* jurisdiction in suits on mortgages. And so it has also been held in a Calcutta case that the practice and procedure on the Original Side of the High Court in suits on mortgages differ altogether from the practice and procedure in force in the Courts outside Calcutta. The practice on the Original Side of the High Court is based partly on the rules of the old Courts of Equity in England, partly on the present practice in the Courts in England and partly on its own rules, and is not governed by the provisions of the Transfer of Property Act. In the Courts outside Calcutta, the practice and procedure has been, and must be, governed by this Act—*Mackintosh v. Watkins*, 1 C.L.J. 31.

CHAPTER V.

OF LEASES OF IMMOVEABLE PROPERTY.

105. A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service, or other thing to be so rendered is called the rent.

“Lessor,” “lessee,”
“premium,” and “rent”
defined.

541A. This Act codifies for the first time the law relating to landlord and tenant. Prior to the passing of this Act, the Hindu law was held to be strictly applicable to a tenancy created by express contract between Hindus—see *Russick Lall v. Lokenath*, 5 Cal. 688; and the English rules regarding the relation of landlord and tenant were applied whenever no precise rule regarding the subject was to be found in Hindu law or other laws—*Tara Chand v. Ram Gobind*, 4 Cal. 778.

Even in case of a tenancy created after the passing of the Transfer of Property Act, if it does not come strictly within this Act, the rule of

English law may be applied—*Kishori Mohun v. Nund Kumar*, 24 Cal. 720. (723). But it has been held by the Privy Council that the Act, though founded on English law and drafted in the first instance by eminent lawyers in England, has only applied the English law so far as it was considered to apply to India. Before therefore resorting to English decisions for determining the relations of landlord and tenant, it should be seen what the law in India is—*Hansraj v. Bejoy Lal*, A.I.R. 1930 P.C. 59 (59-60), 57 Cal. 1176, 57 I.A. 110, 34 C.W.N. 342, 122 I.C. 20.

Before the Act "lease" meant that if the owner of land consented by deed that another person should occupy the land for a certain time, there was a lease—*Nagindra v. Purna*, 39 C.W.N. 98.

542. Essentials of a lease :—The following things must concur in the making of every good lease :—

(i) There must be a lessor, who is able to make the lease. If any lease is granted by one against whom a decree for recovery of possession on declaration of title has been passed, the lessee gets no title—*Rentala Lachaiiah v. Chimmappudi Subrahmanyam*, A.I.R. 1967 S.C. 1793.

(ii) There must be a lessee, who is capable of taking the thing demised.

(iii) There must be a thing demised which is demisable.

(iv) If the thing demised or the thing expressed to be granted be not grantable without a deed, the lease must be made by a deed, containing a sufficient description of the lessor, the lessee, the thing demised, the term granted, and the rent and covenants; and all necessary circumstances must be observed.

(v) If it be a lease for years, it must have a certain commencement, at least when it takes effect in interest or possession, and a certain determination either by an express enumeration of years or by reference to a certainty that is expressed, or by reducing it to a certainty upon some contingent event, which must happen before the death of the lessor or lessee, unless, it should be added, the lease is a permanent one.

(vi) There must be acceptance of the thing demised and of the estate by the lessee—Woodfall's *Landlord and Tenant*, 16 Edn., pp. 134, 135.

A lease is the outcome of the rightful separation of ownership and possession. Before the lease the owner had the right to enjoy possession of the land but by the lease he excludes himself during its currency from that right. A lease is therefore not a mere contract, but is a transfer of interest in land. It creates a right *in rem*—*Anwar Ali v. Jamini Lal*, 43 C.W.N. 797, I.L.R. (1939) 2 Cal. 254, A.I.R. 1940 Cal. 89.

A statutory tenancy under a Rent Act is a personal right which comes to an end upon the death of the tenant—*Nihal Chand v. Shiv Narain*, A.I.R. 1958 Punj. 263.

The provisions about the amount of rent, the time of payment thereof and the consequences of default relate to the essential elements of a lease—*Lalit Mohan v. Gopalchuck Coal Co.*, 39 Cal. 284 (297) (F.B.), 12 I.C. 723.

Moreover, it is essential for a lease that the exclusive possession of the property leased should be intended to be vested in the transferee. A right of access to a land for the enjoyment of specific interest therein (e.g., cutting and removing trees) attended by a simultaneous right of possession by some other person does not amount to a lease—*Seeni Chettiar v. Santanathan Chettiar*, 20 Mad. 58 (F.B.). A lease for undefined area is void—*Beharilal v. State of M.P.*, 1960 M.P.L.J. (Notes) 58.

In order to come within the purview of a lease it should be transfer of a right to the enjoyment of immoveable property—*Kadulal v. Beharilal*, A.I.R. 1932 Sind 60. An agreement under which a contractor agrees to pay a lump sum in consideration of a right to recover bazar dues or tolls, does not amount to a lease—*Kamaludin v. M. C. Bhandara*, 1962 Nag. L.J. (Notes) 23. The essential characteristic of a lease is that the subject of it is one which is occupied and enjoyed and the corpus of which does not in the nature of things and by reason of the user disappear—*Giridhari v. Meghlal*, 45 Cal. 87. (P.C.). Mining leases are leases within the meaning of this section and sec. 108 or within the legal acceptance of the word in this country—*Kamakshya v. Comr. of Income Tax*, A.I.R. 1943 P.C. 153. But where under the *hukumnama* a right was given to the grantee to dig mica with 105 Kudalis and to appropriate the mica, the *hukumnama* was not a lease—*Traders & Miners Ltd. v. Dhirendra*, A.I.R. 1944 Pat. 261, 23 Pat. 115. A coal mining settlement does not partake of his character, but still as some portion, however small, of the surface has to be used for carrying on the mining operations and taking the coal out, to that extent it may be regarded as satisfying the requirements of this section and treated as a lease—*Fala Krista v. Jagannath*, 59 Cal. 1314, 36 C.W.N. 709 (719, 820), 140 I.C. 788, A.I.R. 1932 Cal. 775. A document of lease may contain a direction that the lessee might enjoy all kinds of rights and incomes possessed by the lessor—*State of Madras v. Zakini Bivi*, A.I.R. 1957 Mad. 749. See also *State of Madras v. V. S. Ayyangar*, A.I.R. 1956 S.C. 94.

For transfer of possession it is not necessary that the transferee should be put in physical possession of the property. Transfer of the right to be in possession is sufficient—*Sanku v. Hari*, A.I.R. 1952 Tr.-Coch 333 (F.B.). Where a proprietor of *sir* rights parts with only the occupancy rights in a field and the parties agree that a specified rent shall be paid, then the transfer amounts to a lease—*Balram v. Mahadeo*, A.I.R. 1949 Nag. 389, I.L.R. 1949 Nag. 849. Where the terms of the document clearly indicated that what was granted was a right to a furnished cinema house and an exclusive right to the enjoyment thereof was conferred in consideration of a lump sum per month, the transaction was a lease—*Kali Prasad v. Jagadish*, A.I.R. 1953 Cal. 149. Delivery of possession of the property demised is not a condition precedent to the creation of a lease. A lessee out of possession can sue for possession but cannot sue for specific performance—*H. V. Rajan v. C. N. Gopal*, A.I.R. 1961 Mys. 29.

Under a *kirayanama* executed by the tenant it was agreed that he was taking a plot of land from the landlord for constructing a *katcha* house on it and to live in it as a *reyeya*, and it was further agreed that

whenever the landlord wanted he could get the land vacated. In a suit by the landlord for possession of the plot and recovery of ground rent, *held* (1) that the *kirayanama* could not operate as a lease, nor as a license; (2) but it was perfectly legal, and having been executed by the tenant he was bound by its terms—*Ganga Sahai v. Badrul Islam*, A.I.R. 1942 All. 330, (1942) A.L.J. 386. If possession is given under a transaction purporting to be a sublease, the transaction being illegal, such possession is not of a licensee but of a trespasser—*Jaswantlal Jagjiwandas v. Westrex Company*, I.L.R. (1959) Bom. 1482.

Where the user and enjoyment of certain land acquired by the Government under the Land Acquisition Act was granted by it to a railway company which was expressly allowed to have possession of the land for the period of the contract, it was held that the requirements of a lease under this section were present and the company was a lessee from the Government—*District Board v. B. N. Railway*, A.I.R. 1945 Pat. 200, 23 Pat. 931. An annual patta is a lease for one year. It confers no right of transfer or inheritance—*Mafizuddin v. Manindra*, A.I.R. 1951 Ass. 140, I.L.R. (1951) 3 Ass. 35.

Sec. 107 requires that an instrument of lease must be executed both by the lessor and the lessee or the counter parts by each and if the lease be for more than one year it should be registered also. A kabuliyat executed by the lessee alone does not therefore operate as a lease, but it is admissible in evidence for determining the nature of possession—*Chotey Lal v. Durga Bai*, A.I.R. 1950 All. 661. See also *Mohan Lal v. Ganda Singh*, A.I.R. 1943 Lah. 127 (F.B.), I.L.R. 1943 Lah. 695; *Maqbool v. Debi*, A.I.R. 1949 All. 55; *Md. Liaqat Ali v. Ajudhia Prasad*, A.I.R. 1948 All. 212, 1948 A.L.J. 66. In such a case if the lessee remains in possession for 12 years, he acquires a title which a valid lease would have conferred upon him—*ibid*. Similarly a rent chit executed by the tenant does not amount to a lease. It would however be admissible to prove admission of lease—*Ramanna v. Rangaswamy*, A.I.R. 1951 Mys. 13. Receipt of rent under misrepresentation does not create a relationship of landlord and tenant—*Shamsuddin v. Asst. Custodian, Evacuee Property*, A.I.R. 1953 Sou. 73. If a limited company takes some land on perpetual lease the leasehold interest reverts to the lessor on the dissolution of the company unless it is validly assigned by the company before dissolution—*Shankar Lal v. Narendra Bahadur Tandon*, (1968) 1 Company L.J. 31.

It is only within the competence of the rightful owner of property to lease out that property and a trespasser has no such right—*Mt. Lachmina v. Mt. Makfula*, A.I.R. 1938 All. 316 (318-19), I.L.R. 1938 All. 441, 175 I.C. 902. Where land belonging to several co-sharers is let out by one of them without the consent of other co-sharers, the lessee does not acquire the right of a statutory tenant and is not entitled to retain possession of the land as such—*Ibid*, at p. 319.

Where the co-sharer in exclusive possession of certain lands settles them the settlee is entitled to remain on the lands, until the other co-sharers raise any objection and sue trespassers for ejectment, claiming khas possession, whereon a decree for khas possession and not joint

possession may be passed—*Dassain Nonia v. Ramdeo Prasad*, A.I.R. 1957 Pat. 692.

The agent of an owner having right to grant a lease can execute the lease—*Ugar Sen Trebhuwan*, A.I.R. 1943 All. 82, 1942 A.L.J. 671. Where the respondent agreed to pay rent to the appellant pending the completion of sale of a house by the appellant's agent there was a tenancy and the respondent was liable for rent—*Hanuman Box v. Bibhuti Prasad*, A.I.R. 1950 Ass. 17.

Where the plaintiff gave possession of certain land to the defendant under an arrangement that the defendant was to render the usual village service and to give the plaintiff a half share of the produce, it was a case of lease—*Sayi v. Subhanna*, A.I.R. 1946 Mad. 310, (1946) 1 M.L.J. 92. A *kharposh* grant of certain property made by the owner of an impartible estate in favour of a junior member is not a lease as the grantor has no interest left in the property—*Shiba Prasad v. Lakraj Shewakaram & Co.*, A.I.R. 1945 Pat. 162, 23 Pat. 871. If one person is required to pay a fixed sum periodically to another and is allowed on such payment to carry on business in his own name on the property of the other, the transaction is a lease and not partnership—68 C.W.N. 786.

The term *inam* means the grant of a freehold interest divesting the grantor of his ownership of the property. Where the instrument provided for payment of rent and cancellation of the grant for non-payment thereof and of re-entry, the grant was held to be a lease and not an *inam*—*Gobinda v. Pattavi*, A.I.R. 1954 Mad. 161. There is a difference between a lease and a sale of under-proprietary tenure in Oudh—*Sant Bux v. Ali Raza*, A.I.R. 1946 Oudh 129, 21 Luck. 194; *Kamala Prasad v. Ram Narain* A.I.R. 1948 Oudh 7.

Where a debtor in satisfaction of his debt granted the creditor the right to occupy and enjoy certain land for 20 years, the interest created was a lease and not a mortgage—*Kotayya v. Annapurnamma*, A.I.R. 1945 Mad. 189. But if on the basis of a compromise in a suit for redemption the mortgagee is allowed to retain possession of the security for a specified period in lieu of the amount payable to the mortgagee for improvement on payment of some definite amount as profits his possession is that of a mortgagee and not of a lease—*Sankaran Namboodiri v. Avira Mathai*, 1964 Ker. L.T. 75.

Renewal clause in lease :—Where a lease for 5 years contained a renewal clause and the lessee sent a notice to the lessor a few days before expiry of the lease that he was prepared to take a second settlement but in spite of this the lessor instituted a suit for ejectment after serving notice to quit, it was held that the provision of the lease gave an option of renewal to the lessee—*Girindra v. Kamini Naih*, A.I.R. 1949 Ass. 78. But where the lessee after termination of the lease did not ask for resettlement and remained in possession, the lessor not accepting rent from the lessee, it was held that the lease was not renewed—*Tarak v. Jagadish*, A.I.R. 1954 Pat. 41. See in this connection *Narendra v. Rampal*, A.I.R. 1947 Cal. 378, 51 C.W.N. 482. Where the lessee is given the option of 5 years subject only to such terms and conditions as may be agreed upon, the option is one to renew the lease on the original terms—*H. V. Rajan v. C. N. Gopal*.

543. Agreement of lease :—An instrument by which the conditions of a contract of letting are finally ascertained and which is intended to vest the right of exclusive possession in the lessee either at once (if the term is to commence immediately) or at a future date (if the term is to commence subsequently) is a lease; it is said to operate by way of actual demise, and when the lessee has entered under it, the relation of landlord and tenant is fully created. On the other hand, an instrument which only binds the parties, the one to create and the other to accept a lease *hereafter*, is an *agreement* for a lease, and although the intending lessee enters, the legal relation of landlord and tenant is not created, unless he also pays rent, in which case he becomes a tenant—*Richardson v. Gifford*, (1834) 1 Al. & E. 52. See also *Governor-General v. Indar Mani*, A.I.R. 1950 E.P. 298, 52 P.L.R. 107. Where there is no present demise, the agreement to lease does not operate as a lease, and does not affect the land. It will affect the land only when specifically enforced in a suit properly framed for the purpose, or when followed by the grant of a lease—*Rani Hemanta Kumari v. Midnapore Zemindari Co.*, 22 C.L.J. 44 (49), 19 C.W.N. 347, 28 I.C. 879; *Brijnandan v. Jamuna Prasad*, A.I.R. 1958 Pat. 589. A mere offer or agreement to grant or take a lease does not amount to a lease. Thus, a mere offer by the lessor to grant a new lease after the expiration of the current lease, without stating the terms on which the new lease will be granted, will not operate as a lease—*Macnaghten v. Rameshwar*, 30 Cal. 831. So also, where a document ran in the following terms : "I take the shop on a rent of Rs. 50 per annum. I shall pay the rent month after month. On non-payment of rent a right to eject the tenant shall at once accrue to the owner of the shop." It was held that the document was nothing more than an unilateral statement drawn up by the intended lessee in which he set out his intention as to various matters. The document was not addressed to any one, it was not accepted by any one, and no one but the executant was a party to it. It was, therefore, not a lease, nor even a counterpart of a lease for as there was no lease in existence, there could be no counterpart. It was not even an agreement to pay rent, because an agreement implies a consent of two parties—*Beni v. Puran Das*, 27 All. 190 (191). Where a patta is tendered to but is not accepted by a tenant, it is not a lease—*Bangat Singh v. Bolama*, 8 M.L.T. 371, 7 I.C. 750. As to the admissibility of such documents, see *Shubrati v. Kunj Behari*, A.I.R. 1946 All. 403, 1946 A.L.J. 236; *Hassan Sait v. Mir-Chandani*, A.I.R. 1951 Mys. 24. The commencement of a lease is a matter of intention to be ascertained from the facts and circumstances of the case—*Iswar Dayal Thakur v. Sheoprasan Singh*, A.I.R. 1964 Pat. 71.

Whether an oral agreement is a lease or amounts merely to an agreement to let, is a question of intention of the parties. If the intention was not to create immediately the relation of landlord and tenant or that something more had to be done before the relation commenced, it is to be presumed that their agreement was intended to operate only as an agreement to let and not as a lease. Where, therefore, parties enter into a verbal agreement that on the expiry of the present lease the same be renewed for a further period of three years, the lease to be renewed each year as formerly in accordance with the Waste Lands

Grants Rules, the relationship of landlord and tenant should come into existence on the signing of a new lease at the expiry of the existing lease. Such an agreement is valid, although not reduced to writing—*Syriam Land Co. v. Rodriguez*, A.I.R. 1933 Rang. 220 (222). The plaintiff wrote to the defendant: "I do hereby agree to take by our personal agreement your house and premises No..... on a lease for 21 years" and then the term followed. The defendant replied: "I do confirm your letter.....all terms will be settled on agreement": *held* that the terms contained in the two letters amounted to a present demise of the said premises and created an immediate interest therein—*Ramjoo v. Haridas*, A.I.R. 1925 Cal. 1087 (1039), 52 Cal. 695, 91 I.C. 320. Although the term of a lease is to commence at a future date or a formal document is to be executed, it does not necessarily follow that the agreement will not operate as a present demise—*Ibid*, at p. 1089. It is immaterial whether possession has passed or not—*Sultanali v. Tyeb*, A.I.R. 1930 Bom. 210 (211, 213), 32 Bom. L.R. 188, 125 I.C. 428. As to the effect of a clause for forfeiture of deposit in a contract of lease see *Parampal v. Budh Singh*, A.I.R. 1938 Lah. 62 and *H. V. Low & Co. v. Jyoti Prasad*, A.I.R. 1931 P.C. 299, 35 C.W.N. 1246, 58 I.A. 392, 135 I.C. 632. Whether an agreement for a lease operates as a present demise or is merely a contract is a matter of construction of the language of the document in each particular case—*State of Bihar v. India Copper Corporation Ltd.*, I.L.R. 38 Pat. 1160.

544. Lease and license distinguished:—The cardinal distinction between a lease and a license is that in a lease there is a *transfer of interest* in land whereas in the case of a license there is no transfer of interest, although the licensee acquires a right to occupy the land—*Secretary of State v. Karunakant*, 35 Cal. 82 (92) (F.B.); see also *Board of Revenue v. Agent, S. I. Ry. Co.*, 48 Mad. 368 (F.B.), 86 I.C. 688, A.I.R. 1925 Mad. 434, where the distinction is pointed out in detail; *Parameswaram Kartha v. Ouseph*, 1958 Ker. L.J. 541; *Krishanchand v. Gangadhar Juyal*, (1964) All. W.R. (H.C.) 329; *Shaik Mohamad Shah v. State of Madras*, A.I.R. 1966 Mad. 454; *Sohanlal Narain Das v. Laxmidas*, 68 Bom. L.R. 400. See also *In re Burma Shell*, 1933 A.L.J. 749 (F.B.), A.I.R. 1933 All. 735 and *Bengal & N. W. Ry. v. Janki Prasad*, A.I.R. 1936 Pat. 362, 163 I.C. 525 (*held* to be a license); *Jai Narain v. Ali Murtaza*, A.I.R. 1051 Pat. 190. If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself—*Secretary of State v. Bhupal*, A.I.R. 1930 Cal. 739 (743), 57 Cal. 655, 129 I.C. 177; *Sherif v. Emperor*, A.I.R. 1930 Bom. 165 (166), 126 I.C. 872; *Durjendra v. K. Shaw*, A.I.R. 1953 Cal. 147; *Ouseph v. Kunjathun*, A.I.R. 1951 Mad. 189; *Ganguly v. Kamalepat*, A.I.R. 1947 Cal. 236, 51 C.W.N. 208, *Kuber Nath v. Gorakh Prasad*, A.I.R. 1957 All. 369. Each case must be decided on its own facts and regard must be had to the substance of the agreement and the intention of the parties—*ibid*; *Baldeo v. Rawaram*, A.I.R. 1950 Nag. 107, I.L.R. 1950 Nag. 218; *Dammulal v. Mohammad Bhai*, A.I.R. 1955 Nag. 306. If the land of a *hat* is leased for a term and an aggregate rent is payable and the control of the *hat* is in the lessees subject to certain restrictions and reservation in favour of the lessor, it amounts to a transfer of interest

in the land—*Sherif v. Emperor*, supra. Where defendant enters into possession of land as tenant but the deed of lease is inadmissible in evidence, the defendant cannot be deemed to be a licensee—*Dammulal v. Mohammad Bhui*, A.I.R. 1955 Nag. 306.

Where a licensee, a potter, was allowed to erect a mud house by the landlord and the defendant purchased the potter's rights and erected pucca structures without the landlord's consent, it was held that the potter had no transferable rights—*Ramkrishna v. Bibi Sohila*, A.I.R. 1933 Pat. 561 (562), 145 I.C. 567. Where the landlord provides for the use of his tenant residing in a number of rooms a privy which is not expressly included in the lease of the rooms, the tenants are mere licensees in respect of the privy and it remains under the control of the landlord, both as regards user and repairs—*Lakhmichand v. Ratanbai*, A.I.R. 1927 Bom. 115 (117), 51 Bom. 274, 101 I.C. 210. An agreement by a lessee of a limestone mine authorizing a third party to extract and remove limestone on his own behalf is in the nature of a license and not a sub-lease—*Kuchwar Lime & Stone Co. v. Secretary of State*, A.I.R. 1936 Pat. 372 (379), 15 Pat. 460, 163 I.C. 501; *Sri Mungaliamma Temple v. Loganatha Naicker*, (1962) 1 Mad. L.J. 128, *Gugarmal v. Moti Lal*, I.L.R. (1962) 2 Punj. 98. A right to collect and remove leaves from trees for a certain period is a license coupled with a grant amounting to *profits a pendre* and not lease—*Mulji Sicca & Co. v. Nur Mohammad*, A.I.R. 1938 Nag. 377 (379, 382).

A document which purports to grant a right to cut and remove trees of a certain description for a certain period, and which expressly provides that the grantee has *no right* to the land, is not a lease, but a mere license to cut trees—*Mammi Kutti v. Pazhakkhal*, 29 Mad. 353; see also *Seeni v. Santanathan*, 20 Mad. 58 (F.B.). Where the plaintiff permitted the defendant to occupy his house-site so long as the latter did blacksmith's work for the plaintiff, *held* that there was no lease but a mere license—*Athakutti v. Gobinda*, 16 Mad. 97.

An agreement was made by which a certain quantity of grain was agreed to be paid to the owner of a strip of land every year on account of the damage to be sustained by him by his allowing the other party (defendants) to take their cattle or carts over the strip of land, and this agreement created a right in the defendants which could be exercised by their transferees or their servants or agents and could not be revoked by the grantor. *Held* that this agreement was a lease and not a mere license or easement—*Indal v. Debi*, 92 I.C. 683, A.I.R. 1926 Nag. 174.

Where the document did not create an interest in land it was not a lease but a license coupled with a grant giving exclusive right to cultivate and collect lac—*Samarthmal v. Sunderbai*, A.I.R. 1952 Nag. 325. Where a person has a licence to enter on the land, not for the purpose of enjoying the land, but for removing something from it, namely, a part of the produce of the soil he is not a lessee but a grantee of a profit a prandre—*Shantabai v. State of Bombay*, A.I.R. 1958 S.C. 532. When by a deed the right to rear and pluck fruits for some years from the forests of certain villages is granted no interest in land is created thereby—*Manohar Lal Rameswardas v. State of M. P.*, A.I.R. 1959 Madh. Pra. 120. Where a

Kabuliat executed by one party only provided for payment certain rent every month in lieu of occupation of the house, it was not a lease, but a license—*Dau Dayal v. Brej Mohan*, A.I.R. 1952 All. 344. Where a house belonging to a bank was allowed to be occupied by its manager without payment of rent, so long as he occupied the post, the occupation was as a licensee—*Corporation of Calcutta v. Allahabad Bank*, A.I.R. 1949 Cal. 109. See in this connection *Governor General v. Corpn. of Calcutta*, A.I.R. 1948 Cal. 8, 51 C.W.N. 517. Where a Municipality by an instrument granted for 3 years a right to collect fees from the butchers at its slaughter house, it was a license and not a lease—*Gopaldas v. Municipality, Hyderabad*, A.I.R. 1949 Sind 1. Where the defendant by an agreement obtained the right to enjoy the toddy yield from a coconut garden, but had no right in the land, it was held that he was a licensee and not a lessee of the garden—*Vennogopala v. Thirunavakkarasu*, A.I.R. 1948 Mad. 148, (1948) 2 M.L.J. 155. But where the document was styled as a lease in perpetuity granted for the *nistar* of *cholla* grass land in occupancy right stating a yearly rent and that in spite of this the lessor will be entitled to take away wood for fuel and to every other kind of *nistar*, it was held that the transaction was a lease and not a license—*Baldeo v. Rewaram*, A.I.R. 1950 Nag. 107, I.L.R. 1950 Nag. 218. If the stall holders in a market are not allowed to remain in occupation of the stalls beyond the closing hour and pay rent for each day of occupation they are licensees—*M. N. Clubwala v. Fida Hussain Saheb*, A.I.R. 1965 S.C. 610. The right to collect coconut during the period of its growth amounts to a lease—*Arumugha Vettian v. Angamuthu Nattar*, I.L.R. (1965) 2 Mad. 518. If a divorced wife is allowed to reside in the house to look after the issue of marriage she is a licensee and not a tenant—*Bai Hanifa Jusab v. Memin Dadu*, A.I.R. 1964 Guj. 44. A right to tap palm trees for making toddy is a lease—*Sheikh Jan Mahomed v. Umanath Misra*, A.I.R. 1962 Pat. 440. A document whereby a tenant agrees to give certain premises to B for five years with an option to renew for another five years and the document is registered as an agreement and not as a lease, it creates a license and not a lease—*Sm. Mina Ghosh v. Daulatram Arora*, A.I.R. 1967 Cal. 633. If an employee is given a personal privilege to stay in a house for the greater convenience of his work he is a licensee even if the employer reserves the right of charging fee for such occupation. A person in exclusive possession is not necessarily a tenant—*B. M. Lall v. Dunlop Rubber Co.*, A.I.R. 1968 S.C. 175; *Narayanan Namboodiri v. Appukutty Nair*, A.I.R. 1969 Ker. 34. Where after a suit for ejectment has been decreed by a trial court a compromise is arrived at in the appellate court whereby the tenant is allowed to remain in occupation for another five years on payment of rent month by month, the landlord reserving the right to execute the decree on the tenant's failure to pay rent for three consecutive months, the compromise creates a license and not a lease—*Konchada Ramamurthy v. Gopinath Naik*, A.I.R. 1968 S.C. 919. See also *Associated Hotels of India Ltd. v. Sardar Ranjit Singh*, A.I.R. 1968 S.C. 933 where tests have been laid down for ascertaining whether the occupier is a licensee or a tenant. Where residential right is given to a person in respect of a house belonging to a Society on condition that the Society shall have the right to have the house vacated if the occupants fails to keep the house neat and clean or violates the rules of the Society, the occupant is a licensee

even though he is in exclusive possession on payment of rent—*Santi Sarup v. Radhaswami Satsanga Sabha, Dayalbagh*, A.I.R. 1969 All. 248. See also *Rajappan Nair K. R. v. Veeraraghavan*, I.L.R. (1969) 1 Ker. 1; *Chinna Pillai v. N. Govindaswami Naidu*, A.I.R. 1969 Mad. 191. Where a municipal committee without executing a written lease in accordance with law by a resolution allows a club to occupy a building for one year during specified hours on payment of rent, the transaction is a licence and not a lease—*Punjab State Club v. Municipal Committee, Simla*, A.I.R. 1959 Punj. 220. A Kabuliyat authorising the executant to realise dues from the market does not operate as a lease—*Sada Sheo v. Raja Jagadambika Pratap Narain Singh*, I.L.R. (1957) 2 All. 261. If rooms in a building where a hotel is run are let out the occupants of the rooms are tenants and not licensees—*Associated Hotels of India Ltd. v. R. N. Kapoor*, A.I.R. 1959 S.C. 1262. Where by an indenture P is given the right to remove sludge and occupy a specified area to facilitate such removal, the indenture operates, not as a lease but as a licence—*Bengal Agr. & Industrial Corporation Ltd. v. Corporation of Calcutta*, A.I.R. 1960 Cal. 123.

A license is not determined by forfeiture, even if the licensor's title is denied by the licensee—*Punnamma v. Subba Rao*, A.I.R. 1953 Mad. 456, (1952) 2 M.L.J. 473.

As to the difference between an occupier and a tenant see *Dinendro v. Union of India*, A.I.R. 1952 Cal. 915; *Nihalchand v. Noratmal*, I.L.R. (1965) 15 Raj. 450; *Velayudhan Kesava Panicker v. Ibrahim Ismail Saif*, (1963) 1 Ker. L.R. 453.

544A. Difference between lease and easement :—The difference between a lease and an easement is well defined. By a lease the owner of the land retains his ownership, but parts with possession. The lessee is entitled to possess the land to the exclusion of all others. But by the granting of an easement the owner of the land retains not only his ownership but also his possession. The grantee does not get possession of the land, but get merely a right to the limited use of the land. Thus where by a Kabuliyat a person has been given merely a passage over the land, the Kabuliyat is not a lease. It merely seeks to create an easement in favour of the grantee—*Haran Chandra v. Shyama Charan*, A.I.R. 1940 Cal. 447, 71 C.L.J. 248, 190 I.C. 433; *Ram Prosad Mondal v. Sri Snehalata Ghosh*, 71 C.W.N. 17.

544B. Tenancy-at-will :—A tenancy-at-will in English law is determined by the death of either party or by doing any act inconsistent with the continuance of the tenancy—*James v. Dean*, 11 Ves. 383; see also *Anwar Ali v. Jamini Lal*, I.L.R. (1939) 2 Cal. 254, 43 C.W.N. 797, A.I.R. 1940 Cal. 89. The law in India appears to recognize a tenancy-at-sufferance—*Abdul Razak v. Seth Nandlal*, A.I.R. 1938 Nag. 506, (1938) N.L.J. 317. A tenancy-at-will or at sufferance arises by implication of law and is not a creature of a contract—*Mozam v. Annala*, 46 C.W.N. 366; 75 C.L.J. 444. A tenancy-at-will is determined at the will either of the landlord or of the tenant. The law implies a tenancy-at-will of one party to be a tenancy-at-will of either party. It arises by implication of law in cases of permissive occupation or it may arise expressly by an agreement to let for an indefinite term for a compensation accruing from

day to day so long as both parties please. A tenant-at-will is not entitled to notice to quit—*Bansidhar v. Ram Charan*, A.I.R. 1940 Oudh 401, 1940 O.W.N. 586, 189 I.C. 488; see also *Ramdhani v. Scott*, A.I.R. 1925 Pat. 256, 6 P.L.T. 577, 85 I.C. 77; *Ram Kishun v. Bibi Sohila*, A.I.R. 1933 Pat. 561, 14 P.L.T. 685, 145 I.C. 567 and *Janki v. Kanhaiya*, A.I.R. 1936 Oudh 102, 1935 O.W.N. 1238, 159 I.C. 316. Where a tenant who has no right to alienate his right of residence without the permission of the owner of the site, sells it without such permission and the owner of the site takes rent from the purchaser and there is no written document to witness the new tenancy, the purchaser is a tenant-at-will—*Abdul Ghafur v. Jeta Mal*, A.I.R. 1942 Pesh. 74. The distinction between a tenancy-at-will and a tenancy from month to month has been pointed out in *Shiv Nath v. Ram Bharosey Lal*, A.I.R. 1969 All. 333.

Where a rent note provided that after 11 months the landlord could at his will give the lessee a month's notice to vacate and *vice versa*, it was held that the lessee was a tenant-at-will at the time of his death—*Raman v. Bhagwan*, A.I.R. 1950 All. 583, 1951 A.L.J. 179. See also *Thacker v. Bhatia*, A.I.R. 1952 Kutch 13.

A tenant holding over is a tenant-at-will—*Kumaraswamy v. Thiruchettambalam*, A.I.R. 1953 Tr.-Coch. 369; *Gopi Kishan v. Murlidhar*, A.I.R. 1953 Aj. 24 (2). Where there was possession under an invalid lease, it was a case of a tenancy-at-will. The law implied this in the first instance and it might be converted into a tenancy from year to year or from month to month as the case might be—*Muralidhar v. Tara Dye*, A.I.R. 1953 Cal. 349. A tenancy-at-will is to be implied from permissive occupation under a void lease. The tenancy-at-will is a license to occupy—*Sudhir Kumar v. Dharendra Nath*, A.I.R. 1957 Cal. 625; but see *Sudhir Kumar v. Dharendra Nath*, A.I.R. 1957 Cal. 625 where it has been held that a lease is made by possession under a void lease accompanied by payment and acceptance of rent.

There is a distinction between a tenancy-at-will and a tenancy for a fixed term. In the former case the tenancy does not determine until notice to quit has been served on the tenant or he has denied the landlord's title. In the latter case the tenancy is determined automatically at the expiry of the term of the lease, and after that date the relationship of landlord and tenant does not subsist, unless it is proved that there was a novation of contract, express or implied, and the tenancy has been converted into a tenancy-at-will or a tenancy from year to year—*Banwari Lal v. Mt. Hussaini*, A.I.R. 1940 Lah. 410, 42 P.L.R. 535, 191 I.C. 289. Where a tenancy is terminable at the will of the tenant, it is terminable at the will of the landlord also—*Ram Lal v. Bibi Zohra*, 20 Pat. 115, A.I.R. 1941 Pat. 228; *Kanwar Lal v. Kamkhya Narayan*, A.I.R. 1957 Pat. 350. Where the lessee undertakes to vacate on demand by the lessor, the lessee too can terminate the tenancy whenever he expresses his desire to do so to the lessor—*Harish Chandra v. Choithmal*, 1959 Raj. L.W. 353. The interest of the lessee, unless terminated by terms of the lease, is heritable—*Narayana Narasimha. Desh Pande v. Kashiraya Sengappa*, A.I.R. 1961 Mys. 35. The interest of a tenant from year to year as well as a tenant from month to month is heritable—*Shiv Nath v. Ram Bharosey Lal*, A.I.R. 1969 All. 333 (F.B.).

544C. Lease by minor :—A lease granted by a minor through his next friend is not invalid. Where in such a lease a contract of renewal is not enforceable against the minor on account of his disability, such partial failure would not exonerate the lessee from liability to pay the stipulated rent nor entitle him to treat the lease as void. Principles recognized or enacted for the benefit or protection of minors should not be held to apply to their prejudice—*Zeebunnissa v. Danagher*, A.I.R. 1936 Mad. 564 (568, 570), 59 Mad. 942 165 I.C. 384.

545. Lease for indefinite period :—The Calcutta High Court is of opinion that if a lease is made for an *indefinite* period, the Court should apply the general rule of construction that such a grant enures generally for the *life-time of the grantee*, unless there are some words showing the intention that a heritable grant is made—*Ashutosh v. Chandi Charan*, 31 C.W.N. 46, A.I.R. 1927 Cal. 179, 99 I.C. 200; *Jogesh Chandra v. Makbul Ali*, 47 Cal. 979; 25 C.W.N. 857, 60 I.C. 984; *Jagadisa v. Bisweswari*, 41 I.C. 227 (230) (Cal.); *Higgins v. Nobin Chander*, 11 C.W.N. 809. See also *Md. Azizal Bari v. Raziuddin*, 43 C.W.N. 794, A.I.R. 1939 Cal. 423, 184 I.C. 216. This rule of construction ought to be applied in spite of the terms of the next section—*Ibid*. But this rule of construction does not apply if the term for which the grant is made can be definitely ascertained. Thus, the word “taluk” or “etman” used in the deed of grant imports a permanent tenancy—*Jogesh v. Makbul*, *supra*. The Bombay High Court, however, is of opinion that in order that there may be a valid lease, it is necessary that there should be fixed a *definite period* during which the lease is to continue, or that there should be words indicating that the lease is to continue in perpetuity. A disposition of land which purports to be a transfer of the right to enjoy the property neither for a certain time nor in perpetuity is an attempt to create by lease an interest not known to law and as such is bad—*Municipal Corporation of Bombay v. Secretary of State*, 29 Bom. 580.

In the absence of a provision that the tenancy will not continue after the lessee's life-time, a lease for a definite period does not terminate on his death. A lease for an indefinite period on the other hand enures for the life-time only of the lessee, unless there are words in the document or other circumstances indicating an intention to grant a perpetual lease—*Rammohanrai v. Sonabai*, A.I.R. 1950 Bom. 161, 52 Bom. L.R. 97; see also *Donkangouda v. Revanshiddappa*, A.I.R. 1943 Bom. 148, 45 Bom. L.R. 194. In *Ram Krishna v. Bargavi*, A.I.R. 1947 Mad. 424, (1947) 1 M.L.J. 205 though the lease was only for 1 year, the terms thereof contemplated the tenancy to continue beyond the lease on the same terms. A characteristic of a periodical tenancy is that as each period begins it is an accretion to the old tenancy—*Utility Articles Manufacturing Co. v. R. B. M. Bombay Mills Ltd.*, A.I.R. 1943 Bom. 306, 45 Bom. L.R. 605. It is not necessary under this section that every lease must be for a term or in perpetuity. A periodical lease is recognized as one of the lease under this section and is covered by sec. 106—*ibid*.

Where the lease is totally silent as to duration, the presumption of sec. 106 will apply. A lease for which no term is fixed is a lease running from month to month terminable upon proper notice. Such a lease is heritable—*Rajib v. Yanus*, A.I.R. 1937 Nag. 321 (322), 172 I.C. 543;

Abdul Razak v. Seth Nandlal, A.I.R. 1938 Nag. 506 (509), (1938) N.L.J. 317. But it has been held by Nāsim Ali, J. that a grant made for an indefinite period enures, generally speaking, for the life-time of the grantee and such a grant passes no perpetual or heritable interest in the absence of words to that effect or in the absence of it appearing from the object of the grant, the circumstances under which it was created and the subsequent conduct of the parties that a perpetual grant was intended—*Chandi Charan v. Ashutosh*, 40 C.W.N. 52. His Lordship has further held that a lease which is silent as to the duration of its terms would not be a lease within the meaning of this section—*Anwar Ali v. Jamini Lal*, 43 C.W.N. 797, A.I.R. 1940 Cal. 89, I.L.R. (1939) 2 Cal. 254.

A tenancy for a period during which a tenant remained in the station is not bad for uncertainty. The term is definite, if it is defined either by express limitation or by reference to some event which will afterwards fix its exact length—*Rām Chand v. Lush*, A.I.R. 1936 Lah. 890.

The duration of time may be express or implied. A lease between the mortgagor and the mortgagee to last during the pendency of the mortgage is not bad, as the lease is not for an indefinite period but is dependent upon a contingency—*Mohammad Cassum v. Ezekial*, 7 Bom. L.R. 772; *Ramchandra v. Narasinha*, 33 Bom. L.R. 590, A.I.R. 1931 Bom. 466, 133 I.C. 839.

A lease for a particular period after which an option is given to the lessee to continue in possession on payment of rent, enures for the lessee's benefit. After the expiry of the lease, the lessee can continue in possession as long as he pays the rent, that is, it enures during the lessee's life-time—*Abdulrahim v. Sarafalli*, A.I.R. 1929 Bom. 66 (67), 30 Bom. L.R. 1596, 114 I.C. 374.

546. Lease in perpetuity :—The words "perpetual" and "for ever" are words of fixible amplitude and it the circumstances under which the instrument is made and the subsequent conduct of the parties show an intention with clearness and certainty that a heritable and transferable grant was made, then it is open to the Court to give that meaning to these words—*Amar, Krishna v. Nazir Hasan*, 14 Luck. 723, A.I.R. 1939 Oudh 257 (265), 1939 O.W.N. 825. The words '*istimrari mourasi mokarari*' in a lease create a permanent and heritable estate and not merely for the life-time of the grantee, even though no other words indicating a heritable interest (such as, the grantee, his sons and grandsons in succession should enjoy the property in perpetuity) are used in the document—*Baikanta v. Lakshman*, 41 I.C. 875 (876) (Cal.); *Monmohini v. Kalidas*, 2 C.W.N. 292. The word '*taluk*' used in a lease implies a permanent tenancy; as also, the word '*etman*' (used in Chittagong) imports a permanent, heritable and transferable tenure—*Jogesh v. Makbul*, 47 Cal. 979, 25 C.W.N. 857, 60 I.C. 984. But a lease described as '*istimrari*' only is good only for the life-time of the lessee, and cannot create an estate of inheritance in the lessee, in the absence of specific clauses referring to succession and transfer—*Haddutt v. Jaikaran*, 56 I.C. 656; *Gaya v. Ramjiwan*, 8 All. 569. So also, the term '*istimrari mokurari*' in a lease does not primarily imply a heritable character in the grant as the term.

maunasi does—*Naras Singh v. Ram Narain*, 30 Cal. 883 (892); *Tulshi Pershad v. Narain*, 12 Cal. 117 (130) (P.C.); *Agin Bindh v. Mohan Bikram*, 30 Cal. 20 (31); *Beni Pershad v. Dudh Nath*, 27 Cal. 156 (165) (P.C.). The words '*istimrari mokarari*' do not *per se* convey an estate of inheritance, but an *istimrari mokarari patta*, notwithstanding the absence of words indicative of heritability (as *ba farzandan*, *naslan bad naslan*, or *al-aulal*) may be perpetual grant, if the other terms of the instrument, the circumstances under which it was made or the subsequent conduct of the parties show such an intention with sufficient certainty—*Ram Narain v. Chota Nagpur Banking Association*, 43 Cal. 332, 36 I.C. 321; *Tulshi Pershad v. Ram Narain*, 12 Cal. 167 (P.C.); *Narsingh v. Ram Narain*, 30 Cal. 883 (893). A *bayam saswatham patta* is a lease of a permanent character—*Rama Iyenger v. Anga Guruswami*, 35 M.L.J. 129, 46 I.C. 62. A *mirasidar* is a permanent tenant—*Ramchandra v. Sidu*, 1888 P.J. 30. *Mourasi* tenures are permanent tenures because the word "*mourasi*" meaning a succession from generation to generation conveys the idea of permanency—*Giribala v. Kedar Nath*, A.I.R. 1929 Cal. 454 (456), 56 Cal. 180, 117 I.C. 534. The term '*mulgeni*' when used in a tenure denotes its permanent character—*Nagapaya v. Anantaya*, 1891 P.J. 248; *Unhamma v. Vaikunta*, 17 Mad. 218. The *Mukaddami* tenure in the United Provinces does not create any permanent or heritable interest in the lessee—*Bhagwati v. Hanuman*, 23 All. 67. The words '*patni tenure*' imply a tenancy of a permanent and heritable character—*Turini v. Watson*, 3 B.L.R. (A.C.) 437; *Modhu Sudan v. Rooke*, 25 Cal. 13. A lease for five years stated that at the expiration of the term the lessee was to take a fresh settlement under a fresh *kabuliyat*, and it further stipulated that the lessee was not to make a gift, sale or mortgage of the tenure to any body. *Held* that as there were no words of inheritance in the lease, the tenure could not be presumed to be heritable or permanent, and that the tenancy at the end of the five years was for an indefinite period and not in perpetuity—*Jagadisa v. Bisweswar*, 41 I.C. 227 (230) (Cal.). A lease in which no period is specifically mentioned is not necessarily a perpetual lease—*Chandi Charan v. Ashutosh*, 40 C.W.N. 52. A lease for five years with a condition that after that period the lessee should hold the property as long as he pleased on the same terms, is a lease merely for the life of the lessee—*Higgins v. Nobin*, 11 C.W.N. 809.

The omission of the words of inheritance is not conclusive that the lease is not hereditary. So also the prohibition of alienation of the leasehold right does not take away from the permanent character of the tenancy—*Rammohanrai v. Sonabai*, A.I.R. 1950 Bom. 161, 52 Bom. L.R. 97. See also *Donkangouda v. Revanshiddappa*, A.I.R. 1943 Bom. 148, 45 Bom. L.R. 194. A right of transfer is not a necessary incident of the legal status of a perpetual lessee, and therefore a condition making the rights of the perpetual lessee of a village non-transferable, but heritable, is not illegal—*Bhairo v. Ambika*, A.I.R. 1942 Oudh 374, (1942) O.W.N. 225, 199 I.C. 776. On the other hand the fact that the lessee's interest has been made transferable does not show that it is heritable; for a tenancy for life is transferable under cl. (j) of sec. 108, but not heritable—*Donkangouda v. Revanshiddappa*, *supra*.

A lease for building purposes, in the absence of any definite terms

in the grant, should be presumed to be a permanent one. The absence of the words '*maurasi mokarari*' in such a lease does not necessarily indicate that it was not the lessor's intention to grant a permanent lease—*Pramadanath v. Srigobind*, 32 Cal. 648; *Hira Lal v. Secretary of State*, A.I.R. 1931 Bom. 436, 134 I.C. 721; *Chapsibhai Dhanjibhai v. Pursottam Matilal*, A.I.R. 1964 Bom. 287; *Sivayogeswara Cotton Press v. M. Pan-chakoharappa*, A.I.R. 1962 S.C. 413. It is extremely unlikely that a lease for residential purposes in a town would be taken on precarious terms. Hence, it has been held by Henderson, J., the fact that premises which are situated in a town are being and have been used for the purpose of residence shows that the lease is permanent—*Sukumar v. Nagendrabala*, 71 C.L.J. 209, A.I.R. 1940 Cal. 393, 190 I.C. 622. See in this connection *Commissioners of Income Tax v. Visheswar*, 18 Pat. 805, A.I.R. 1940 Pat. 24. Where the land is given for building purposes and the tenancy is an ancient one, there is a presumption that it is a permanent lease—*Ven-katesh v. Bhujaballi*, A.I.R. 1933 Bom. 97 (98), 57 Bom. 194, 142 I.C. 481; *Kanhaiya v. Abdullah*, A.I.R. 1936 All. 385 (386), (1936) A.L.J. 1218, 165 I.C. 402; even in cases of holdings created before the T. P. Act where permanent structures have been built for many years with the landlord's acquiescence and there have been transfers in the past and the rent has throughout remained unchanged, the tenancy is permanent and transferable—*Kumud v. Himanshu*, A.I.R. 1937 Cal. 373 (374), 65 C.L.J. 333; *Kamala Moyee v. Nibaran*, A.I.R. 1932 Cal. 431, 36 C.W.N. 149, 138 I.C. 72; *Ambika v. Baldeo*, 20 C.W.N. 1113, 1 Pat. L.J. 253, 36 I.C. 125. Where the rent is variable the mere fact that buildings have been erected with the knowledge of the landlord is not sufficient to raise the presumption that the tenancy is permanent—*Secretary of State v. Beni Prasad*, A.I.R. 1937 Pat. 444, 170 I.C. 677. The mere fact that permanent buildings have been erected on the land cannot in any way alter the incidence of the tenancy. At most it can be said that if there has been a representation by the landlord which leads the tenant to believe that he has a permanent tenancy and therefore a right to erect buildings there might be an estoppel—*Bansi v. Chakradhar*, A.I.R. 1938 Pat. 569 (572), 17 Pat. 358, 19 P.L.T. 731. See also *Ariff v. Jadunath*, A.I.R. 1931 P.C. 79 (81), 58 Cal. 1235, 58 I.A. 91, 35 C.W.N. 550, 131 I.C. 762. As an instance of such estoppel see *Forbes v. Ralli*, A.I.R. 1925 P.C. 146 (149), 4 Pat. 707, 52 I.A. 178, 30 C.W.N. 49, 87 I.C. 318. Where a Muk-tear took a *bemeadi* lease in a municipal town for building a *basha*, erection of corrugated iron sheds with pucca plinths and a pucca compound wall was not inconsistent with the lease being for his life-time and erection of such structures being within his rights, consent to the erection did not import an intention on the part of the lessor to grant a permanent lease or attract the doctrine of estoppel by acquiescence as a bar to ejectment—*Chandi Charan v. Ashutosh*, 40 C.W.N. 52. Where a lease is granted for the construction of a house with merely a titled or thatched roof and not a pucca roof, the mere fact that the lessee has constructed a pucca structure without interference by the lessor will not estop the lessor from contending that the lease is not a permanent one—*Ram Lal v. Bibi Zohra*, 20 Pat. 115, A.I.R. 1941 Pat. 228 relying on *Beni Ram v. Kundan Lal*, 26 I.A. 58, 21 All. 496, 3 C.W.N. 502 (P.C.). The mere fact that the tenant erected some valuable structures on the land including a pucca wall and a pucca building at the connivance or

with the consent of the landlord would not in itself be sufficient ground for holding that the tenancy was a permanent one—*Giridhari v. Pur-nendu*, A.I.R. 1939 Cal. 291, 68 C.L.J. 481, 182 I.C. 8. A lease for an unlimited period in favour of the lessee, her heirs, administrators and assignees at a stipulated yearly rental, for a period of ten years, to be liable thereafter to equitable adjustment as may be determined from time to time, according to the market rate prevailing at the time is a perpetual lease—*Maperaji Kumar Irfan Rasul Khan v. U. P. Govt.*, I.L.R. (1960) 2 All. 71.

In order to raise an equitable estoppel when a landlord allows the tenant to erect permanent buildings, it is incumbent upon the lessee to show that the conduct of the owner, whether active or passive, was sufficient to justify the legal inference that he had by plain implication contracted to change the tenancy into a perpetual one. The tenant must further show that he was acting under an honest, though mistaken belief, that he had a permanent right and that the landlord knowing this purposely obtained from interference—*Secretary of State v. Rajendra Prasad*, A.I.R. 1937 Pat. 391 (394, 398), 170 I.C. 316; *Syed Ali v. Manik*, 27 C.W.N. 909. Landlords may refrain for one reason or another from evicting the tenant. No inference as to permanency of the tenancy can be drawn from such conduct—*Chagganlal v. Indra Keot*, A.I.R. 1941 Pat. 495, 194 I.C. 459; see also *Abdul Hakim v. Elahi Baksh*, 52 Cal. 43, 29 C.W.N. 188, A.I.R. 1925 Cal. 309. Where a small piece of land was settled with the tenant and it was intended that the tenant should himself build a house on it and accordingly a house, not of any great value, was constructed on it, it was held that the mere fact of the house being constructed would not of itself create any great likelihood that the tenancy was intended to be a permanent one—*Chagganlal v. Indru Keot*, supra. See in this connection—*Dhammathena v. Nyanokitara*, A.I.R. 1942 Rang. 11. But where a trespasser claimed permanent possession and the landlord allowed such person to remain in possession and accepted rent from him on the basis of a permanent tenancy, the latter was estopped from setting up a claim that the tenancy was non-permanent—*Bhubaneswari v. Secretary of State*, A.I.R. 1937 Pat. 374 (379), 169 I.C. 756; see also *Peryanan v. Govinda*, A.I.R. 1932 Mad. 328 (332), 137 I.C. 487. But where a person is given possession of land as tenant, the mere fact that he asserts a permanent tenancy will not by lapse of time (60 years in this case) convert the tenancy into a permanent one—*Baman v. Khandarao*, A.I.R. 1935 Bom. 247, 37 Bom. L.R. 376, 156 I.C. 120. No tenant in this country can obtain any right of permanent tenancy by prescription against his landlord from whom he holds the land—*Nainapillai v. Ramanathan*, A.I.R. 1924 P.C. 65, 47 Mad. 337, 51 I.A. 83, 82 I.C. 226; *Md. Mumtaz Ali v. Mohan Singh*, A.I.R. 1923 P.C. 118, 50 I.A. 202, 45 All. 419, 74 I.C. 476; *Gopala v. Juvappa*, A.I.R. 1931 Mad. 587, 133 I.C. 359.

It has however been held that possession of a limited interest in immoveable property may be just as much adverse for the purpose of barring a suit for determination of that limited interest, as adverse possession of a complete interest in the property operates to bar a suit for the whole property—*Ramasray v. Ramsurat*, A.I.R. 1940 Pat. 131, 21 P.L.T. 181, 184 I.C. 838; so also *Ishan Chandra v. Ramranjan*, 2 C.L.J. 125. But the simple assertion of a proprietary right in a judicial pro-

ceeding cannot by the mere lapse of six or twelve years convert what was an occupancy or tenant title into that of an under proprietor—*Amar Krishna v. Nazir Hasan*, A.I.R. 1939 Oudh 257, 14 Luck. 723, 1939 O.W.N. 825; *Narayana Narasimh Desh Pande v. Kashiraya Sen*, A.I.R. 1961 Mys. 35. Similarly if a landlord serves a notice to quit on a tenant and instead of taking further steps to evict him accepts rent from him for a period of more than 12 years, the tenant cannot in a subsequent suit for ejectment take the plea that he has acquired a right to remain in occupation by adverse possession—*Chagganlal v. Indra Kesh*, supra. An oral permanent lease acted upon for more than 12 years creates a permanent lease by adverse possession—*Abdul Ghafoor v. Lala Kunj Behari*, A.I.R. 1957 All. 346.

Where a permanent *mokarari* lease contained a clause that "on the lessee's failure to pay rent according to the instalments every year," the *mokarari* will be cancelled at the end of the year, held that the clause merely provided for the forfeiture of the *mokarari* tenure, but did not affect the permanency of the tenure—*Meghlal v. Rajkumar*, 34 Cal. 358 (361); *Bhagwati v. Balgobind*, A.I.R. 1933 Oudh 161 (162), 8 Luck. 377, 142 I.C. 885. A slight increase of rent, provision for eviction on default of payment of rent or relating to the cutting down of trees or digging of new tanks, prohibition against sale or mortgage do not affect in any way the permanent character of a tenancy—*Bhabataran v. Trailakhya*, A.I.R. 1932 Cal. 764 (766), 59 Cal. 1282, 36 C.W.N. 632, 140 I.C. 743; *Hafiz Mahammad v. Hari Ram*, A.I.R. 1937 Lah. 370 (377), 39 P.L.R. 602.

A mere *long and continuous possession* "for a time so long that the memory of man runneth not to the contrary" is by itself insufficient to raise a presumption of permanency—*Narayan v. Dowlata*, 15 Bom. 647; *Nahanchand v. Modi Kekhushru*, 31 Bom. 185; *Kamal v. Nandalal*, A.I.R. 1929 Cal. 37, 56 Cal. 738, 33 C.W.N. 211, 116 I.C. 378; *Subramanya v. Subramanya*, A.I.R. 1929 P.C. 156, 52 Mad. 549, 56 I.A. 248, 33 C.W.N. 734, 116 I.C. 601. Mere long possession of homestead land is not sufficient to justify the presumption of a permanent grant, and before such a presumption can be made, there must be something more, viz., that either the land was let for the erection of *pucca* buildings, or that the landlord stood by while the tenant erected permanent buildings or effected substantial improvements on the land—*Nabu v. Cholim*, 25 Cal. 896 (908); *Secretary of State v. Rajendra Prasad*, A.I.R. 1937 Pat. 391, 170 I.C. 316; *Atmakuri Rajeswar Rao v. Joinadha Patro*, 34 Cut. L.T. 1131. A distinction should be drawn between cases in which the origin of the tenancy cannot be traced, and cases in which the origin of the tenancy is known. Where the origin of the tenancy is known and the terms thereof were put in writing at the inception of the tenancy, the tenancy is not a permanent one—*Ram Lal v. Bibi Zohra*, 20 Pat. 115, A.I.R. 1941 Pat. 228 relying on *Secretary of State v. Luchmeswar Singh*, 16 I.A. 6, 16 Cal. 233. Where the origin of the tenancy and the circumstances attending its creation are not known, evidence of the mode of dealing with the land demised and of the acts and conduct of the parties generally is an evidence to prove the nature of the tenancy—*Ismail Khan v. Jaigun*, 27 Cal. 570 (582); *Syed Ali v. Manik*, 27 C.W.N. 969. In such a case, the facts of long possession of a land by the tenants and their ancestors at an unaltered rate of rent, and

of the landlord having permitted them to build a *pucca* building which has existed for a very considerable time and which has been added to by successive tenants, and of the tenure having been from time to time transferred by succession and purchase wherein the landlord acquiesced are sufficient to warrant the Court in presuming that the tenancy is a permanent one—*Caspersz v. Kedar Nath*, 28 Cal. 738; *Grant v. Robinson*, 11 C.W.N. 242; *Nilratan v. Ismail*, 32 Cal. 51 (P.C.); *Upendra v. Ismail*, 32 Cal. 41 (P.C.); *Nabakumari v. Behari*, 34 Cal. 902 (P.C.); *Debendra v. Pashupati*, 35 C.W.N. 1047 (1051), 136 I.C. 889, A.I.R. 1932 Cal. 198; *Afzalunnissa v. Abdul Karim*, 47 Cal. 1 (P.C.); *Dargahan v. Hafiz Mahammad*, A.I.R. 1938 Pat. 333 (334), 176 I.C. 562; *Pramatha v. Champa*, A.I.R. 1929 Cal. 473 (474), 56 Cal. 275, 118 I.C. 353; *Rukmini v. Rayaji*, A.I.R. 1924 Bom. 454 (455), 48 Bom. 541, 83 I.C. 45; *Madhusudan v. Durga Prasad*, A.I.R. 1938 Pat. 7 (8), 173 I.C. 259; *Satyendra v. Charu*, A.I.R. 1936 Cal. 100, 40 C.W.N. 854, 161 I.C. 427; *Hafiz Muhammad v. Shaik Dargahan*, 18 Pat. 571, 20 P.L.T. 579, A.I.R. 1939 Pat. 448; *Ram Daur v. Lachmi Prasad*, A.I.R. 1941 All. 51, 1941 A.L.J. 7; *Anant v. Ramdhan*, A.I.R. 1939 Pat. 350, 179 I.C. 940; *U. P. Government v. Church Missionary Assn.*, A.I.R. 1948 Oudh 54, 22 Luck. 93. The mere fact of the land being brought under cultivation subsequently cannot nullify the lease originally granted and alter the position of the lessee and his successors to that of agricultural tenants—*Ram Daur v. Lachmi Prasad*, supra. If, however, the origin of the tenancy is known, any presumption arising from long possession is negatived, and evidence of the acts and conduct of the parties is not admissible to prove the permanency of the tenancy; and if it is found that the tenancies were created by *kabuliyats* or *pattas* which did not contain any words of inheritance, and which limited the tenant's rights to the term of the possession of landlord who happened to be a *mativalli*, the fact that the tenants held the lands at a fixed rent for a very long period and that the holdings had been the subject of several transfers is not sufficient to warrant the presumption that the tenancy was, when first created, intended to be permanent—*Ismail Khan v. Jaigun*, 27 Cal. 570 (582, 583). Where the evidence shows the origin and the particular purpose of a tenancy, long continued possession at a low and unvaried rent does not prove a permanent tenancy—*Secretary of State v. Luchmeswar*, 16 Cal. 223, (P.C.); *Kamal v. Nandalal*, A.I.R. 1929 Cal. 37, 56 Cal. 738, 33 C.W.N. 211, 116 I.C. 378. But the fact that a tenancy has been held at a low rate of rent for a considerable number of years though the whole of the land and with it the letting value thereof has increased to a great extent is an element which with other facts leads to an inference of fixity of rent and of permanency—*Prodyot Kumar v. Radhakisen*, (1938) 42 C.W.N. 304. Where a person is unable to prove the terms of the tenancy, it must be assumed, in the absence of circumstances to the contrary, that the tenancy was from year to year or a tenancy-at-will. Such a tenancy can be determined on the expiry of the year or by a pure demand for, or suing for, possession—*Surja Mohan v. Rama Prasad*, A.I.R. 1940 Pat. 37, 189 I.C. 745 relying on *Martin v. Smith*, 30 L.T. 268. The onus of proving that a tenancy is permanent is on the tenant—*Abdul Ghafoor v. Lala Kunj Behari*, A.I.R. 1957 All. 346.

Lost grant :—Where the origin of the tenancy is unknown and is lost in antiquity, the principle of lost grant can be invoked, and from

the conduct of the parties and the surrounding circumstances the Court can make a presumption of permanency—*Tirtha Naik v. Lal Sadananda*, A.I.R. 1952 Or. 99. Where the defendant was in possession for a very long time under a claim that he was a rent-free tenant under the plaintiff and the record of rights support his claim, the presumption of lost grant arose—*Manohar v. Charu*, A.I.R. 1951 Cal. 285. See also *Kumud v. Province of Bengal*, A.I.R. 1947 Cal. 209, 81 C.L.J. 274. The presumption of lost grant of permanent tenancy is equally applicable to agricultural land—*Dinabandhu v. Gopinath*, A.I.R. 1948 Pat. 12, 13 Cut. L.T. 10. A presumption of an origin in some lawful title may in certain circumstances be made in cases of long and quiet enjoyment, but it cannot be made where there is sufficient evidence of the nature of the grant and the persons to whom it was made—*Satyanarayana v. Venkatapayya*, A.I.R. 1953 S.C. 195. There can be no presumption of a lost grant in favour of a fluctuating and unascertainable body of persons constituting the inhabitants of a village. Such right can only be acquired by custom—*Braja Sundar v. Mani Behara*, A.I.R. 1952 S.C. 247, 1951 S.C.J. 363, 30 Pat. 871. Where no custom is pleaded, the Court cannot hold that the right of tenancy has been acquired by prescription—*Sahabu v. Hari Ram*, A.I.R. 1952 Pat. 43. See in this connection *Muthegowda v. Narayanappa*, A.I.R. 1953 Mys. 29.

Service tenure :—Where the holder of a service tenure did not produce any *sanad* nor proved otherwise that the grant was of estate burdened with certain services, but merely contended that the land had been allowed to devolve from father to son and that the tenure was created many years ago and that the Zamindar did not avail himself of the services but allowed her to hold on, it was held that there was no justification for holding that the grant was of a permanent heritable character—*Hari Shankar v. Chandu Urain*, A.I.R. 1939 Pat. 362, 1939 P.W.N. 99, 183 I.C. 80, following *Radha Prasad v. Budhu Dashad*, 22 Cal. 938. Where the holder of a service tenure refuses to perform the services on the ground that no services can be demanded from her, such tenant is liable to be ejected without notice to quit, *Ibid* following *Hurrogobind v. Ramrutno*, 4 Cal. 67.

But see *Radha Gobinda Jeu v. Shyam Ray Jeu*, A.I.R. 1949 Cal. 208, 52 C.W.N. 319 where it has been held that the inability or unwillingness of the holder of the service tenure to perform the services does not entitle the grantor to put an end to the tenure, in the absence of a provision to that effect in the agreement. At any rate the tenant would be entitled to a reasonable notice before he can be evicted. Whether the notice is reasonable or not is a question of fact—*Rudra Narayan v. Chintargm*, A.I.R. 1951 Ass. 86, I.L.R. (1951) 3 Ass. 171 ; *Balarami v. Duvvuru Joya Singh*, A.I.R. 1957 Andhra Pra: 477.

A Zemindar is not entitled to resume the grant of land burdened with service, even if it is of a personal nature, so long as the grantee is willing to perform the services, whether required by the grantor or not, unless the terms of the grant establishes such a right—*Padmalochan v. Budhram*, A.I.R. 1948 Pat. 85, 27 Pat. 313. Where a grant of land was made by the jagirdars to their Patels as remuneration for future services and the grant was subsequently converted into *inam* by Government, it could

resume and regrant such lands to rotatory working Patel—*Viswarao v. Bhagwat*, A.I.R. 1954 Nag. 20. Resumption depends upon the nature and extent of the terms of the grant—*Sooramma v. Venkataratnam*, A.I.R. 1952 Mad. 166.

Once a tenure is held to be a service tenure the onus to prove that the holder thereof had the right to hold the same in his own right adversely to the Zamindar lies on the holder—*Hari Shankar v. Chandu Urain*, *supra*. There is no presumption whether the grant is one in lieu of wages or one burdened with service. The question is one of fact—*Dodla Balarami v. Duvvuru Joya Singh*, A.I.R. 1957 Andhra Pra. 477.

Onus :—Broadly speaking the burden of proof of permanent tenancy is on the tenant—*Hafiz Muhammad v. Shaik Dargahan*, 18 Pat. 571, A.I.R. 1939 Pat. 448; see also *Kamal Kumar v. Nanda Lal*, 33 C.W.N. 211, 56 Cal. 738, A.I.R. 1929 Cal. 37; and long possession with uniform payment of rent is not sufficient to prove permanent tenancy—*Bantu v. Mantha*, A.I.R. 1947 Mad. 88, (1946) 2 M.L.J. 168. Where the grantee of a lease alleges that the lease is a permanent one, it is for him to prove by definite evidence that it is so—*Secretary of State v. Chimanlal*, A.I.R. 1942 Bom. 161, 44 Bom. L.R. 295. If the lease is for 99 years, there is nothing strange if pucca structures are built by the grantee on the land, because in such a case the structures would be built in the expectation that the lease would be renewed, even though at higher rent, on the termination of the period—*Ibid*. Mere proof of long occupation at a low and uniform rent does not shift the onus from the lessee on to the lessor—*Hira Lal v. Secretary of State*, A.I.R. 1931 Bom. 436 (443, 444), 33 Bom. L.R. 828, 134 I.C. 721; *Gopala v. Juvappa*, A.I.R. 1931 Mad. 577, 133 I.C. 369. Where land is let after the passing of the T. P. Act for building purposes or otherwise it lies on the lessee to show that by the terms of the grant he was entitled to occupy the land in perpetuity. Unless he adduces evidence to rebut the presumption arising under sec. 106 in favour of the lessor, he is bound to be treated as a year to year or a month to month tenant, as the case may be. The fact that he holds under a building lease will not prevent the presumption arising in favour of the lessor—*Nand Ram v. Saraj Hussain*, A.I.R. 1938 All 42 (43), I.L.R. 1938 All. 53, 173 I.C. 153. Where a permanent tenant or his predecessor-in-title executed leases containing conditions inconsistent with permanent tenancy, a strong presumption against permanent tenancy arises, and it is for the tenant to show that the tenancy is permanent and why he or his predecessor accepted such conditions—*Hamidullah v. Abdul Khaliq*, A.I.R. 1937 Lah. 56, 165 I.C. 322.

The inference of permanence of a tenancy is an inference which requires the presence of circumstances explicable, when taken as a whole, only on the hypothesis of permanence—*Harendra v. Benoyendra*, 75 C.L.J. 431. Such inference only be drawn where the facts point irresistibly to the conclusion of permanency; and where the facts are equally consistent with permanency or a tenancy-at-will, then permanency cannot be inferred—*Ram Ranbijaya v. Ramjivan*, A.I.R. 1942 Pat. 397, 23 P.L.T. 294, 8 B.R. 727, 200 I.C. 769; *Singaraju Rama Rao v. Nellore Linga Reddy*, 1956 Andhra. W. R. 89. In the case of a non-agricultural tenancy, the origin of which is not known, the question whether the tenancy is

permanent or precarious is not only a legal inference from facts, but is also not itself a question of fact—*Ibid.* In so far as it depends upon facts, the finding of the Court of first appeal must be accepted in second appeal—*Ibid.* The payment of selami, substantial in amount, is one of the surest indications of permanency—*Bara Lal v. Bhaju Mian*, A.I.R. 1955 Pat. 499.

Bemiadi lease :—A *bemiadi* lease may or may not be permanent according to the circumstances of the case. In ascertaining the nature of the grant, the Court must construe the lease according to the expressions used in it along with the surrounding circumstances—*Dinanath v. Janaki*, 55 Cal. 435, 110 I.C. 368, A.I.R. 1928 Cal. 392 (394); *Forbes v. Hanuman Bhagat*, 2 Pat. 452, A.I.R. 1924 Pat. 88, 77 I.C. 32; *Bara Lal v. Bhaju Mian*, A.I.R. 1955 Pat. 499. In both these cases, it was held, upon a proper construction of the terms of the *bemiadi* lease, that it was a permanent grant. But in another case, where the grant of *bemiadi* lease included the minerals and was hereditary, it was held, upon a construction of the lease, that it was only a lease from year to year, and not a permanent one—*Parshan v. Tulsi*, 2 P.L.J. 180, 39 I.C. 658. A *bemiyadi* lease was obtained after the expiry of the last of the six *meyadi* leases. The lessee paid a substantial premium and agreed to pay enhanced annual rent with power to increase rent under specified circumstances, but the lessee was in no case entitled to an abatement of the fixed rent nor was he entitled to surrender. The lessee was further prevented from granting *bemiyadi* sub-lease to any shop-keeper and the lessor was entitled to take khash possession under specified circumstances: held that the lease was permanent, determinable only in the special case therein provided, and not on service of notice to quit—*Janaki Nath v. Dina Nath*, A.I.R. 1931 P.C. 207, 35 C.W.N. 902, 133 I.C. 732, affirming *Dina Nath v. Janaki*, supra. An inference of permanent tenancy is a question of fact—*Abdul Ghafoor v. Lala Kunj Behari*, A.I.R. 1957 All. 346.

547. Immoveable property :—See Notes 17-18 under sec. 3.

A right to collect dues from a weekly market is a right in immoveable property—*Sikandar v. Bahadur*, 27 All. 462. A lease of a *hat* (market) is a lease of immoveable property—*Surendra v. Bhai Lal*, 22 Cal. 752. The right to collect lac from trees is immoveable property—*Parmanandy v. Birkhu*, 5 N.L.R. 21, 1 I.C. 903.

If trees are sold for being cut and removed within a reasonable time, it is a sale of moveable property; on the other hand if during a certain period of transfer the transferee is entitled to appropriate the produce, it is a lease of immoveable property—*Dan Singh v. Janki Saran*, A.I.R. 1948 All. 386, 1949 A.L.J. 46. But a right merely to cut and remove trees and not to enjoy the produce of the trees, is not an interest in immoveable property—*Mathura v. Jadubir*, 28 All. 277 (278). A tree patta differs from an ordinary *ryotwari patta* in being more in the nature of a lease which was the original meaning of the word *patta*—*Secretary of State v. Hussain Saheb*, A.I.R. 1940 Mad. 783, (1940) 2 M.L.J. 13, 1940 M.W.N. 573. A lease of a right to take juice from fruits from palmyra trees and to cut such leaves which are necessary to be cut in drawing juice, is not, however, a lease of immoveable property and does not require registration—*Natesa v. Thangavelu*, 38 Mad. 883 (885). But in a later case the same High Court has held that the right to tap cocoanut trees for getting

toddy is in the nature of immovable property, because it is a benefit arising out of land—*Venugopala v. Thirunavukkarasu*, A.I.R. 1949 Mad. 148, (1948) 2 M.L.J. 155. A *yajman vritti*, which denotes an obligation imposed upon the priest to perform certain religious rites, and which carries with it certain emoluments, is not immoveable property in the proper sense of the term, although it is treated as such; and the transfer of the duties and obligations attached to the status of a priest cannot be said to be a transfer of a right to enjoy immoveable property so as to amount to a lease—*Kodulal v. Beharilal*, 25 S.L.R. 451, A.I.R. 1932 Sind 60, 137 I.C. 136.

The property sought to be leased must be in existence, i.e., must be under the control of the lessor. Where the subject-matter of a contract purporting to be a lease was a property not only not in the possession of the transferor, (*viz.*, a property which was mortgaged and was in the possession of the mortgagee), but also was one to which the transferor might never establish a title to redeem, and the document of lease provided that a suit was to be brought to redeem the property, and upon possession being recovered the rent agreed upon in the contract should become payable, *held* that having regard to the terms of the lease it was not operative in effecting a present transfer of the property leased, but was only a contract of lease to be performed in future—*Mohendra Nath v. Kali Proshad*, 30 Cal. 265.

There is nothing in the T. P. Act to preclude the lease of a reversion. If a document has mentioned simply that a lease of the lands which were also the subject matter of a prior lease is being granted, that would in law, without anything more, operate as an assignment of the reversion and entitle the lessee under the later lease to recover the rent due and payable under the former lease—*Rathnaswami v. Nagaraja*, A.I.R. 1938 Mad. 100 (101, 102), 46 M.L.W. 730. The distinction between the assignment of rents and profits and the lease of a reversion has been pointed out in this case.

Commencement of a lease:—When a lease executed on a particular date provides that the lease shall commence from a subsequent date, the grantee becomes a tenant not from the date when it is executed but from the date when the lease is to commence—*Birendra Pratap Singh v. Gulwant Singh*, A.I.R. 1968 S.C. 1068.

548. *Consideration of lease*:—In India there may be a lease even if no rent is payable. But where rent is payable annually, the agreement to pay rent is a valuable consideration although no salami is paid—*Rajendra v. Jogjiban*, A.I.R. 1947 Cal. 440, 51 C.W.N. 767. One of the essentials of a lease is that there should be a consideration to be rendered periodically or on specified occasions to the lessor. Plaintiff and defendants purchased certain shares in a certain village and entered into an agreement by which one of the defendants was to realise his share of profits from certain tenants, and the plaintiff and the remaining defendants were each to realise the rent from all the other tenants of the village and take all the profits for a period of six years in turn. *Held* that the agreement was not a lease because one of the essentials of a lease, *viz.*, consideration to be rendered periodically or on *specified* occasions to the

lessor, was entirely absent in it. The agreement was nothing but an agreement between co-sharers as to the method of distribution of profits. Instead of dividing the profits each year, it was agreed that each party should take the profits for six years in turn—*Sita Ram v. Sarju Prasad*, 25 O.C. 39, A.I.R. 1929 Oudh 201, 68 I.C. 333.

When the owner of a piece of land grants a perpetual lease of it in consideration of rent to be paid as well as premium, he has got no charge on the lease-hold right for the premium as the grant was not a sale—*Venkatacharyulu v. Venkatasubba*, A.I.R. 1926 Mad. 55 (56), 48 Mad. 821, 90 I.C. 725.

As to whether a particular sum is a premium or purchase price of an electric generating station purported to be let out, see *U. P. Electric Supply Co.*, in re, A.I.R. 1934 Cal. 803, 38 C.W.N. 627, 61 Cal. 556, 152 I.C. 601.

Price paid:—The price paid may be an outstanding debt. A document may amount to a lease though the consideration partly consists of an advance made long before the date of execution of the lease—*Beni Prasad v. Mulchand*, 6 I.C. 817, 6 N.L.R. 65 ; *Nidha Shah v. Muralidhar*, 25 All. 115 (P.C.). A premium cannot be regarded as rent simply because it is payable in instalments—*Commissioner of Income tax v. Panbari Tea Co.*, A.I.R. 1965 S.C. 1871.

549. Rent :—One of the indicia of rent is its recurring character on specified occasions—*Harimohan v. C. K. Sen & Co.*, A.I.R. 1952 Cal. 391. But personal agreement by the lessee to pay a certain annual sum may not be rent—*Ananta v. Bibhuti*, A.I.R. 1944 Pat. 293, 23 Pat. 334. Where the covenant does not provide for the place where rent is payable, the tenant is to find the landlord—*Satibai v. Vishnebai*, A.I.R. 1953 Bom. 280, 55 Bom.L.R. 242. Unless there is an express agreement to pay enhanced rent or there are circumstances or conduct from which one can be inferred, a claim for enhanced rent is not maintainable—*Ranjilal v. Ahmad Ali*, A.I.R. 1952 M.B. 56. Municipal Taxes paid by a lessee can be regarded as part of the rent—*S. Yusufuddin v. A. V. Ramalingam & Co.*, 1958 Andh. L. T. 723 ; *Rupeswari Devi v. Lokey Nath Hosiery Mills*, A.I.R. 1962 Cal. 608.

Where a fixed quantity of paddy was payable at rent and in case of default a fixed sum was payable as its price, on default it was held that the landlord was entitled to recover only the stipulated sum and not the price of the crop at the market rate—*Md. Sheikh v. Ramesh*, A.I.R. 1954 Ass. 45 ; *Mulluk Chand v. Surendranath*, A.I.R. 1957 Cal. 217 ; *Raman Kunhappu v. Ali Ahmed*, A.I.R. 1957 Ker. 80.

A servant who occupies land rent-free by way of remuneration for his service is a tenant, and the service rendered by him is to be deemed as rent—*Bandhu v. Balram*, 15 C.P.L.R. 42. So also, where it was agreed that instead of paying rent, the defendant was to give his service as a family doctor to the plaintiff, it was held that the agreement between the parties amounted to a lease—*Jyotish Chandra v. Ramanath*, 32 Cal. 243, 8 C.W.N. 904.

A and B as owners and C as their tenant bring a suit for possession

against the defendants as trespassers. The suit is comprised on the terms that the defendants are to hand over possession to C by a certain date and that in the meantime they are to pay rent at a certain sum per month. No lease is created by the decree between C and the defendants—*Bui Manuben v. Bhimabhai Nagariji*, A.I.R. 1958 Bom. 471.

In the case of a coal mine, the rent is a royalty on the amount of minerals extracted, payable at fixed intervals of time—*Manindra Chandra Nandy v. Secretary of State*, 5 C.L.J. 148 (172).

A certain sum described as collection charges and mentioned in the lease as payable annually in addition to rent and forming part of the consideration for the lease, is not to be regarded as *abwab* but as part of the rent—*Radha Charan v. Golak*, 31 Cal. 834. So also, the stipulation to pay collection charges at 2 annas in the rupee is in reality a part of the consideration of the lease, and so long as it is certain and definite in its nature, it would be enforced—*Muhammad Fayez v. Janoo*, 8 Cal. 730.

The payment of *muhtarifa* is not necessarily a payment of cess, but is in the nature of rent by non-agricultural tenants for occupation of the village Abadi—*Muhammad Abdul Hai v. Nathu*, 27 All. 183.

The amount which a patnidar agrees to pay to the Zemindar on account of Chowkidari tax is considered as rent—*Assanulla v. Thirthabasini*, 22 Cal. 680. But the amount which the tenant agrees to pay to the Government as land revenue on behalf of the Zemindar is not rent—*Sheikh Gulam v. Kashinath*—25 Bom. 244. Where a lease provides that municipal taxes and electric charges are payable by the tenant, both items form part of rent—*Khemchand Dayalji & Co. v. Mohamadbhai Chandbhai*, (1965) 6 Guj. L. J. 829. But where accommodation is provided rent free to the employees, money paid by them for conservancy and repairs is not rent—*Br. India Corporation Ltd. v. Excise and Taxation Commissioner, Punjab*, I.L.R. (1957) 2 Punjab. 1840.

By payment of rent of a particular amount no permanent tenancy can be established by prescription. The acceptance of rent specified in an unregistered document which required registration creates no estoppel in a suit to eject the tenant, for there is no representation that the acceptance of the rent should confer tenancy on the terms suggested—*Datto v. Babasaheb*, A.I.R. 1934 Bom. 194 (197), 58 Bom. 419, 150 I.C. 555. Displaced persons from Pakistan put up structures on a vacant site controlled by the Improvement Trust without the consent of the Trust. Some compensation wrongly described as rent was paid by them for use and occupation. Held that they were trespassers even though rent was accepted from them—*Gurcharan Singh v. Delhi Improvement Trust*, A.I.R. 1955 Punjab 34. From the use of the word rent in the receipt it cannot be inferred that a tenancy has been created—*Dr. Rikhy H. S. v. The New Delhi Municipal Committee*, A.I.R. 1962 S.C. 554.

550. Lease with security :—In consideration of the lessee paying to the lessor Rs. 4,000 by way of security without interest, the lessor leased certain lands to the lessee for a term of years, with a provision for return of the deposit of Rs. 4,000 after the expiry of the term. Held that the transaction amounted to a lease and not a mortgage—*Sital Prosad v.*

Dildar Ali, 1 P.L.J. 1, 33 I.C. 408; *Sitaramma v. Ankaiah*, A.I.R. 1957 Andhra Pra. 504; *Krishnan v. Krishna*, A.I.R. 1957 Trav.-Co. 239.

As regards *Zur-i-pesghi* leases, see Note 344 under sec. 58.

106. In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.

Every notice under this section must be in writing, signed by or on behalf of the person giving it, and tendered or delivered either personally or to the party who is intended to be bound by it, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

Every notice under this section must be in writing signed by or on behalf of the person giving it, and *either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party*, or to one of his family or servants, at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

Amendment :—This section has been amended by sec. 54 of the T. P. Amendment Act (XX of 1929).

551. Agricultural lease :—Although this section speaks of leases for agricultural purposes, still such leases have been expressly exempted from the provisions of this Act by sec. 117, *infra*. The presumption of this section should not be applied to agricultural tenancies. The reason is that agricultural tenants hold lands for an unlimited period subject to the performance of the obligations incident to the tenure. Any presumption such as is warranted by this section if made in the case of agricultural tenancies would be incompatible with the ordinary local conditions—*Cheekati v. Ranasooru*, 23 Mad. 318; *Venkata v. Dandamudi*, 20 Mad. 299; *Narayana v. Orr*, 12 M.L.J. 447; *Venkatachala v. Ranganatha*, 24 M.L.J. 571, 20 I.C. 374; *Moore v. Makhan Singh*, 53 I.C. 180 (Pat.); *Veeranna v. Annasami*, 21 M.L.J. 845, 12 I.C. 1; *Mahomed Ayejuddin v. Prodyat Kumar*, 25 C.W.N. 13, 61 I.C. 503.

But although by virtue of sec. 117, the present section does not apply to agricultural leases, the rules in this section being founded on reason and equity apply, and a notice giving a reasonable time to the tenant to vacate is sufficient—*Brahmayya v. Sundaramma*, A.I.R. 1948 Mad. 275

(F.B.), I.L.R. 1948 Mad. 757; *Narayanan v. Maunadier*, A.I.R. 1949 Mad. 127, (1949) 2 M.L.J. 559; *Bapayya v. Venkataratnam*, A.I.R. 1953 Mad. 884; *Verugopala v. Thirunavukharasu*, A.I.R. 1949 Mad. 148, (1948) 2 M.L.J. 155. It has been held by the Nagpur High Court that where such a lease is invalid for want of registration, the relation of the parties will be governed by sec. 106 and the tenant will be one from year to year—*Karimullakhan v. Bhanupratap Singh*, A.I.R. 1949 Nag. 265, I.L.R. 1948 Nag. 978.

The requirement of this section as to notice does not apply to an agricultural lease, unless it is required by the special enactment governing the lease. Thus, the Chota Nagpur Tenancy Act does not require that the raiyat seeking to eject an underraiyat should serve him with notice before the expiry of the agricultural year; and the provisions of this section as to notice will not apply to the case—*Jhagru v. Raghunath*, 10 P.L.T. 625, 119 I.C. 551, A.I.R. 1929 Pat. 630 (633).

The reasonable notice to quit mentioned above need not necessarily determine the tenancy at the end of a year. It will be for the final Court of fact in each case to determine what is reasonable notice having regard to all the circumstances and whether it would be reasonable for it to determine with the year—*Damodar v. Lachimi*, A.I.R. 1928 Pat. 354 (356), 7 Pat. 496, 110 I.C. 642; *Nabin v. Ramesh*, A.I.R. 1933 Cal. 745, 37 C.W.N. 727, 60 Cal. 771, 116 I.C. 858.

For the meaning of the word 'agricultural' see under section 117.

551A. Manufacturing lease :—The word "manufacturing" in this section should be given its commonly understood meaning. The popular concept is that there must be the production of a new or a different article. In this sense printing *simpliciter* is not manufacturing—*Sati Prasanna v. Md. Fazel*, A.I.R. 1952 Cal. 320. At the time of creation of the lease, if both parties know that, it is for manufacturing purposes. If not, then subsequent user of the premises by the tenant without the landlord's consent will not convert the lease into one for manufacturing purposes—*ibid.*; *Bulkan Sah v. Gaga Devi Nathani*, A.I.R. 1964 Pat. 214. A lease for mixed purposes like dwelling, setting up printing press and for ordinary business purposes is not a lease for "manufacturing purposes." It is for "any other purposes" within sec. 106—*ibid.* But where the essential part of a hosiery manufacture, namely, the knitting and cutting operations were carried on in the premises, the lease was held to be for manufacturing purposes. The fact that the yarn was not produced in the premises is immaterial—*Jayanti Hosiery Mills v. Upendra*, A.I.R. 1946 Cal. 317, 50 C.W.N. 441. In deciding whether a lease is for manufacturing purposes, the original intention of the parties must be looked into and not the subsequent conduct of the lessee. Where after taking a lease for a show room, the lessee began to carry on a manufacturing operation in the premises, the lease is not converted into one for manufacturing purposes—*Manzoor Ali v. Lal Devi*, A.I.R. 1951 All. 396, 1951 A.L.J. 154. Where the tenancy is for residential and manufacturing purposes the tenancy is for any other purpose and not for manufacturing purposes—*L. A. Saunders v. Land Corporation of Bengal*, A.I.R. 1955 Cal. 169; *Ramesh v. Surya Properties Ltd.*, A.I.R. 1957 Cal. 198. In the

case of a lease to a company the purpose of the lease is to be ascertained not with reference to the memorandum of business but with reference to the actual business done by the company—*Steurat & Co. Ltd. v. C. Mackertich*, A.I.R. 1963 Cal. 198. A lease for both building and repairing of coaches and motor cars is one for manufacturing purpose—*Ibid.* If a lessee to the knowledge of the lessor uses the land for manufacturing purposes, then, in the absence of a contract to the contrary, he is entitled to six months' notice—*Ibid.* If hosiery goods are manufactured in a rented premises the tenancy is one for manufacturing purpose even if one room is occupied by an officer for residence—*Rupeswari Devi v. Lokenath Hosiery Mills*, A.I.R. 1962 Cal. 608. Where a tenant under a lease for manufacturing purposes admits in his written statement and evidence payment of monthly rent, the deed of lease being inadmissible in evidence, the lease is from month to month—*Binda Din v. Sm. Prun*, 1968 All. L.J. 721. A lease for starting a motor repairing workshop is not a manufacturing lease—*Krishna Das v. Bidhan Chandra*, A.I.R. 1959 Cal. 181.

552. Scope of section :—The provisions of this section relating to notice do not apply to suits instituted before this Act came into operation—*Amabai v. Bhau*, 20 Bom. 759; or to a tenancy which commenced prior to this Act—*Haridas v. Upendra*, 22 C.L.J. 75, 16 I.C. 937; *Debendra v. Pashupati*, 35 C.W.N. 1047 (1055), 136 I.C. 889.

Where the relationship of landlord and tenant between the parties was created not by lease but by a decision of Court, no question of serving a notice to quit under this section arises—*Sazwar v. Satyendra*, A.I.R. 1942 Cal. 406, 46 C.W.N. 464. Where a tenancy which is found to be non-permanent, is in existence from before the T. P. Act, the provisions hereof do not apply, and the tenants are only entitled to a reasonable notice to quit—*Harendra v. Benoyendra*, 75 C.L.J. 431. In such a case, on the analogy of the provisions of this Act, 6 months' notice was deemed reasonable, but if such notice fell short by a few days, that would not render it unreasonable—*Ibid.* What is reasonable notice is largely a question of fact—*Faguneswari v. Dhum Lal*, A.I.R. 1951 Cal. 269.

Sec. 105 does not say that the period of a lease should be certain on the date of the lease. The period of the lease can be express or implied by law or usage. Normally in the absence of a written lease a presumption of annual tenancy may be drawn from the fact that rent is payable annually—*Hamida Khatoon v. Shibananda*, A.I.R. 1954 Ass. 58. But where the agreement of lease for residential purpose is not in writing, the stipulation as to payment of annual rent is a condition of an in-operative lease and sec. 106 comes into play. Consequently, the tenancy would be from month to month and fifteen days' notice expiring with the end of the month of the tenancy would be sufficient—*Ibid.*

The only leases recognized by sec. 105 are leases for a certain time, periodical leases and leases in perpetuity. Where, therefore, the status of a person does not fall under any of these heads he cannot be a lessee, and hence he cannot insist upon a notice to quit as contemplated by this section—*Ma Gyi v. Maung Tet*, A.I.R. 1934 Rang. 291, 151 I.C. 971. This section does not apply to the case of a lease for a fixed term when

the term expires—*Bishen Sarup v. Abdul Samad*, A.I.R. 1931 All. 649 (650), (1931) A.L.J. 666; *Bansidhar v. Ram Charan*, A.I.R. 1940 Oudh 401, 1940 O.W.N. 586, 189 I.C. 488. On the expiry of the period the tenant is only a tenant at sufferance and is not entitled to any notice to quit—*Kundan Lal v. Deep Chand*, A.I.R. 1933 All. 756 (758), 146 I.C. 762. In the case of a tenant-at-will also no formal notice to quit is necessary—*Ram Krishna v. Bibi Sohila*, A.I.R. 1933 Pat. 561 (562), 145 I.C. 567.

Where a tenancy becomes one for a definite term and expires by efflux of time, it is not governed by this section and no notice terminating the tenancy is necessary—*Bharat Insurance Co. v. Bivathu*, A.I.R. 1953 Tr-coch. 577.

This section has no application to a notice under sec. 108 (e) avoiding the lease on the ground of destruction of the lease-hold property by irresistible force. Such a notice takes effect immediately on service—*Damoda Coal Co. v. Hurmook Marwari*, 19 C.W.N. 1019, 31 I.C. 677.

In case of *utbandi* holding, the rights to occupy the land does not enure beyond a particular season or a particular year, and the tenancy not being a lease from year to year, this section has no application—*Surendra v. Baidya Nath*, 60 Cal. 681, 37 C.W.N. 335.

The principle of this section has been applied to the Punjab. Thus, where there was a condition in the lease that the landlord would give one month's notice if he wanted to have the premises vacated, held that it did not mean that notice could be given at any time but that the rule of this section should be applied and the notice must be one expiring with the end of a month of the tenancy—*Chumilal v. Chumilal*, 79 I.C. 957, A.I.R. 1923 Lah. 659 (distinguishing 56 I.C. 7). In the case of a monthly tenancy in the Punjab, in the absence of a specific contract, the lessee is entitled to at least 15 days' notice ending with the month of the tenancy—*Rattan v. Krishna Kaur*, A.I.R. 1933 Lah. 135, 141 I.C. 400.

Even though a case does not come strictly within this section, still the principle of this section in regard to the giving of notice may be applied to the case—*Kishori Mohun v. Nund Kumar*, 24 Cal. 720 (723).

Leases granted by a Municipality are subject to the provisions of this Act, and a Municipality can determine a lease only by giving a proper notice under this section—*Aminullah v. Emp.*, 26 A.L.J. 328, A.I.R. 1928 All. 95, 107 I.C. 690.

Contract to the contrary.—The rule in this section is made subject to any 'contract to the contrary'. It is only in cases where there is no contract as to notice, that the provisions of this section would be applicable. But where there is a contract as to giving notice or waiving notice, the parties are governed by the terms of the contract, and the law enacted in this section cannot apply—*Moosa Kutty v. Thekke*, A.I.R. 1928 Mad. 687 (689), 110 I.C. 396. Thus, the parties may validly stipulate for two months' notice on either side; see *Bholanath v. Durga Prosad*, 12 C.W.N. 724; or for a week's notice—*Shibdayal v. Dhanpat*, A.I.R. 1923 Lah. 281, 75 I.C. 490; or there may be a covenant in a lease for a term of one year that the tenant should vacate the house as soon as the landlord desired

him to do so, in which case no notice would be necessary before suing the tenant in ejectment—*Khuda Baksh v. Abid Husain*, 3 I.C. 873, 12 O.C. 279; *Kelu v. Ammad*, 9 M.L.T. 198, 1910 M.W.N. 794, 8 I.C. 362; *Mukat Singh v. Misra Paras Ram*, 79 I.C. 106, A.I.R. 1924 All. 726 (727); *Moosa Kutty v. Thekke*, supra; or there may be a contract in a lease that the tenant should vacate within one week or one month or two months of the receipt of notice, whatever be the day of the month, and that the week or month or two months would count from the *date of receipt of notice*; in such a case the notice need not expire with the end of a month of the tenancy—*Rure v. Ghulam*, A.I.R. 1924 Lah. 643, 75 I.C. 1034; *Sh. Kasim v. Haji Yusuf*, A.I.R. 1924 Nag. 220; *Rudha Kisen v. Rattan Lal*, 56 I.C. 7; *Ram Nath v. Badri*, A.I.R. 1928 Lah. 348, 106 I.C. 537. So again where a lease provides that the landlord may at any time resume possession of the land on payment of full compensation to the lessee for the buildings he may have erected thereon, such a provision is a 'contract to the contrary'; and no notice to quit is necessary in order to entitle the landlord to get back khas possession—*Monindra v. Radha Prasanna*, 47 I.C. 19 (Cal.). But the contract between the parties must be a valid one—*Debendra v. Syama Prosanna*, 11, C.W.N. 1124 (1126). If there is a covenant in a lease giving option to the lessor to determine the lease under specified conditions, the heirs of the lessor can determine the lease according to the covenant without any notice under sec. 106. Such a covenant does not violate the rule against perpetuity—*Ganesh Sona v. Purnendu*, A.I.R. 1962 Pat. 201.

The *contract to the contrary* mentioned in para 1 is not necessarily an express contract. It may be implied but should be a valid one. Where the rent for a house taken for manufacturing purpose is payable by the month fifteen days' notice is sufficient as there is an implied agreement to the contrary—*Fatesh Chand v. Mst. Radha Rani* (1956) All. L.J. 625. *Mangilal v. Pyarchand*, 1966 Jab. L.J. 490. The section will regulate the duration of the lease where there is no contract to the contrary—*Ram Kumar v. Jagadish*, A.I.R. 1952 S.C. 23, (1951) S.C.J. 813; *Hamisa Khatoon v. Shibananda*, A.I.R. 1954 Ass. 58. If the contract contains a stipulation as to the period of notice only it does not affect the other requirement of this section, *viz.*, that the notice should expire with the end of a month of the tenancy—*Sundarji v. Gangabai*, A.I.R. 1951 Sau. 64; see also *Mukanchand v. Gulabchand*, A.I.R. 1950 Aj. 79. If the rent-deed provide for a notice of one month not expiring with the end of the month of the tenancy, it is a perfectly valid notice—*Ghulam Md. Lakshmi Bux*, A.I.R. 1951 Raj. 88. In the case of a manufacturing lease, if the lease deed provide that the lease would be determined by one month's notice, six months' notice is not necessary—*Nagendra v. Jotish*, A.I.R. 1952 Cal. 221; *Jewan Singh v. Mandalal Agarwala*, A.I.R. 1955 Assam 102. A condition in the rent note that the tenant should deliver possession to the landlord whenever he makes the demand merely means that the tenancy is not for a fixed period. It is not a contract to the contrary—*Keshab-lal v. Bai Ajawali*, A.I.R. 1953 Sau. 119. When a contract governs the question, the Court should read the contract in a reasonable way and ascertain the real intention of the parties—*Arunachala v. Ghulam Mahmood*, A.I.R. 1951 Mad. 408, (1950) 2 M.L.J. 535. Where there is a specific contract that rent will be paid from month to month and the lease is for a fixed

period of eleven months only, the lease is not from year to year even though it was for a manufacturing purpose—*Radha Ballabh v. Ramchand*, A.I.R. 1955 All. 679. Where a deed of lease, admissible in evidence but incapable of creating a lease, contains a contract to the contrary as to the service of the notice to quit, any notice in accordance with the contract to the contrary is valid in law—*Lal Chand v. Radha Ballabh*, A.I.R. 1959 Raj. 240.

There was an agreement for a yearly lease which could not be used in evidence for want of registration, but there were subsequent letters, one from the landlord stating that the lessee would be a monthly tenant after 1st July, 1933 and that the tenancy would be terminable by either party on 15 days' notice expiring with the end of a calendar month, and a reply from the lessee stating that he would remain as an "ordinary" tenant from the 1st of July, 1933, "subject to the termination by giving you 15 days' notice in writing". The lessor gave 15 days' notice ending with the month. The lessee contended that his was the yearly lease of an agricultural or manufacturing tenant under this section, and then even as a monthly tenant his tenancy could not be terminated on the last day of a month as his original tenancy had commenced either on a 12th or a 1st: *Held* by the Privy Council—(i) that assuming that the tenancy was for an agricultural or a manufacturing purpose, there was a "contract to the contrary" constituted by the two letters; (ii) that reading the two letters together the second was an acceptance of the first, although the term "ordinary" was used for a "monthly", and although no reference was made to the landlord's right to give notice which was a right under the ordinary law.—*Prahaladrai v. Commissioners for the Port of Calcutta*, A.I.R. 1938 P.C. 11, 48 C.W.N. 309. Unless there is some indication to the contrary the term "ordinary tenant" would in Calcutta mean monthly tenant, even though there be no reference to payments of monthly rent and such a tenancy would be terminable on 15 days' notice expiring with the end of the month of the tenancy—*Ibid*.

If there is a contract between the parties, such a contract will be strictly enforced. Thus, where a kabuliyat provided for full two months' notice, a notice less by one day was held to be not a valid one—*Bhola Nath v. Durga Prosad*, 12 C.W.N. 724.

Where a tenancy was created by a writing in the following terms : "We rent the vacant land on a rent of Rs. 31 per month and declare that we will pay the rent by the 5th of each month, and when it will be necessary to give *khaski* possession we will do the same within 7 days;" *held* that it was a tenancy from month to month and there was no "contract to the contrary." A 7 days' notice was therefore ineffective. Even if the period of notice is so reduced, such notice must expire with the end of a month of tenancy—*Baidyanath v. Onkarmull*, 42 C.W.N. 598, I.L.R. (1938) Cal. 656. See also *M/s. Mehra C. L. v. Kharak Singh* 70 Punj. L.R. (D.) 55.

The landlord can avail himself of the statutory period of the notice even though the period of notice has been made by agreement longer than the statutory period in the case of the tenant—*Sister, Louise v. Jatindra Nath Mondal*, A.I.R. 1957 Cal. 475.

Local law to the contrary:—Where the local law provides for six months' notice in place of fifteen days' notice, it does not relieve the landlord from complying with the requirements of this section that the notice must expire with the end of the month of the tenancy—*Vishwa Nath v. Bishen Dass*, A.I.R. 1953 J. & K. 15. The Bombay tenancy Act displaces the presumption arising under the present section—*Jagannath v. Vasant*, A.I.R. 1953 Bom. 332, 55 Bom. L.R. 341.

"Usage to the contrary" :—In an old case, *viz.*, *Nocoor Das v. Jewraj*, 12 Beng. L.R. 263, it was held that in Calcutta a month's notice was necessary to determine a tenancy from month to month. This has, however, been dissented from recently by Macnair, J. in *Prafulla v. Nandalal*, 39 C.W.N. 1069, where it has been held that in *Nocoor Das v. Jewraj*, no prevailing custom in Calcutta was proved or even asserted which rendered a month's notice obligatory; so 15 days' notice under the provisions of this section is quite sufficient to terminate a monthly tenancy in Calcutta.

Where a tenant of Calcutta premises under a lease for 3 years holds over after the expiry of the term, he does so as a monthly tenant, and each month of the tenancy expires on the midnight of the 1st day of the succeeding month—*Sushil v. Birendrajit*, A.I.R. 1934 Cal. 837, 38 C.W.N. 782.

553. Presumption as to duration of lease :—The rule of construction embodied in this section applies not only to express leases of uncertain duration, but also to leases implied by law from possession, acceptance of rent and other circumstances—*Ram Kumar v. Jagadish*, A.I.R. 1952 S.C. 23, 1951 S.C.J. 813; *Jewan Singh v. Mandalal Agarwal*, A.I.R. 1955 Assam 102. Where the Kabuliyat was not an operative document under sec. 107, the tenancy created by implication of law is from month to month. The stipulation for payment of annual rent would certainly raise a presumption of its being a tenancy from year to year, but being contained in an inoperative document, would not come in the way of raising a presumption under this section—*Ibid.* A lease for one year certain could not also be inferred, for that would be substituting a new agreement which the parties never intended to do—*Ibid.* See in this connection *Kamakshya v. Harkhu*, A.I.R. 1949 Pat. 265; *Darbari Lal v. Ranegganj Coal Assn.*, A.I.R. 1944 Pat. 30, 22 Pat. 552; *Adinath v. Krishna Chandra*, A.I.R. 1943 Cal. 474, 47 C.W.N. 127; *Muralidhar v. Tara Dye*, A.I.R. 1953 Cal. 349. Where the defendants admit that there is a relationship of landlord and tenant between them and the predecessors-in-interest of the plaintiffs, but there is no valid lease in their favour, the duration of the tenancy in such a case must be determined by sec. 106; they cannot claim permanent tenancy by reason of their possession for 15 years—*Dr. Sudhir Kumar Mukherjee v. Nirsi Dhobin*, A.I.R. 1961 Pat. 321 (F.B.) Where by an oral contract it was stipulated that the tenant should occupy the premises at least for one year and thereafter the tenancy would be terminable by one month's notice, the lease was deemed to be one from month to month—*Ram v. Lalit*, A.I.R. 1947 Cal. 351. But where an annual rent is fixed, the tenancy cannot be from month to month because a house stands on the land—*Banamali v. Padmalava*, A.I.R. 1951 Or. 262. A lease from year to year is, one for uncertain duration. Such

a tenant has an interest for one year certain with a growing interest during every year thereafter—*Kamakshya v. Harkhu*, supra. Where it is alleged that a monthly rent is paid in respect of a tenancy for residential purposes and there is no allegation of a tenancy-at-will, it is a monthly tenancy—*Chhoti Dei v. Gangadhar*, A.I.R. 1953 Or. 245, 19 Cut. L.T. 29. Where even though the parties intended to create a permanent lease, no operative lease came into existence but the defendant remained in possession on payment of rent, the tenancy should be deemed to be from month to month—*Sm. Durgesh Nandini Devi v. Aolad Shaikh*, A.I.R. 1955 Cal. 502.

When the tenant holds no written or registered lease and the land is let for other than agricultural or manufacturing purposes, the tenant has only a monthly tenancy of the land terminable by fifteen days' notice, even though the rent appears to have been payable annually—*Debendra v. Syama Prosanna*, 11 C.W.N. 1124; *Sheikh Akloo v. Emanon*, 44 Cal. 403, 33 I.C. 889; *Mangal Singh v. Atra*, 3 Lah. L.J. 222, 60 I.C. 226; *Sarat Chandra Chandra v. Jadab Chandra*, 44 Cal. 214; *Anwar Ali v. Jamini Lal*, I.L.R. (1939) 2 Cal. 254, A.I.R. 1939 Cal. 89, 43 C.W.N. 797. See also *Chinti v. Kripashankar*, A.I.R. 1941 Pat. 488, 194 I.C. 300; *Surya Kumar Manji v. Trilochan Nath*, 59 C.W.N. 526, A.I.R. 1955 Cal. 495. Similarly when a shop is taken on lease for manufacturing purpose without any registered instrument it is lease from year to year terminable on six months' notice—*Balwant Singh v. Murari Lal*, A.I.R. 1965 All. 187. If a usufructuary mortgagee leases back on monthly rent to the mortgagor who executes an unregistered Kerayanama, a tenancy from month to month is created on acceptance of rent—*Ganpat Turi v. Mohammad Asraf Ali*, A.I.R. 1961 Pat. 133. The mere fact that the rent of a holding or dwelling house is payable in one sum yearly is not sufficient to make the tenancy a tenancy from year to year—*Mohendra v. Narendra*, 50 I.C. 918 (Cal.); *Biseswar v. Pitambar*, 51 I.C. 44 (Cal.); *Durgi Nikarini v. Gobardhan*, 19 C.W.N. 525 (530), 24 I.C. 183. Where a co-sharer got an oral lease of a tank from the joint owners on an annual rent, no period being fixed and had been in possession for 15 years on payment of rent, the tenancy was held to be from month to month—*Adinath v. Krishna Chandra*, 47 C.W.N. 127. The mere payment of rent annually would not make the tenancy on annual tenancy, if there are clear indication to show that the rent is calculated on a monthly basis—*Nanakram Das v. Nagarmal*, A.I.R. 1956 Orissa 95.

In this country the practice of letting shops and dwelling houses on monthly tenancies is so widespread as to warrant the legislature in raising a presumption in favour of monthly tenancies by this section, unless it is proved by a written contract that the lease was an annual one—*Aruneche-lla v. Ramiah*, 30 Mad. 109 (112); *Sanker Ram v. Tulshi*, 2 P.L.T. 178, 61 I.C. 976. The ordinary inference as to leases of buildings in Calcutta would appear to be that the tenancy is from month to month—*Kally Das v. Monmohini*, 24 Cal. 440; *Nocordas v. Jewraj*, 12 B.L.R. 263.

A lease of land, which did not specify any period, provided that the tenant should enjoy and possess the land after building a *bashabari* upon it. Held, that as no period was fixed, the lease was a lease from month to month—*Mohim v. Anil Bandhu*, 13 C.W.N. 513, 1 I.C. 66, 9

C.L.J. 362. Where rent has all along been paid for one or more full years commencing from the 1st of Baisakh and there is nothing in the lease to indicate that it shall commence from the date of execution, the lease commences from the 1st of Baisakh—*Tirtha Nath v. Ishwar Bamlingadeba*, 61 C.W.N. 170.

In view of the provisions of this section the lease of land for the purpose of putting up a permanent construction, that is, for building purposes cannot be deemed to be a permanent lease. Such a lease in the absence of a contract or local usage to the contrary must be deemed to be a lease from month to month—*Bajrang Sahai v. Mt. Mulia*, A.I.R. 1941 All. 399, 1941 A.L.J. 557. See also *Ram Lal v. Bibi Zohra*, A.I.R. 1939 Pat. 296, 182 I.C. 618; *Shanmugha v. Ananthakrishnaswami*, A.I.R. 1939 Mad. 247, 1939 M.W.N. 1236, 48 M.L.W. 894; *Tirtha Nath v. Bamalingadeva*, 61 C.W.N. 170. Where a lease is created verbally after the commencement of the T.P. Act it cannot be regarded as a permanent lease simply because the tenant has been in possession for a long time and has constructed substantial building, because the doctrine of lost grant cannot apply to such a lease—*Ambika Devi v. Sachita Nandan Prasad*, A.I.R. 1960 Pat. 289. Where the lessee is allowed to construct building on the land leased and the lease is found to be one from month to month, it is unjust for the lessor to claim the structure to be demolished. He should give the lessee a notice to quit—*Jadunandan v. Mt. Maho*, A.I.R. 1939 Pat. 428, 185 I.C. 284. There can be an agreement to pay rent annually in a tenancy from month to month—*Gussainram v. Mohammad Siddiqu*, 1966 All. L.J. 414.

Where a certain property was let out by Government for building purposes without any mention of or agreement about the duration of the term, the tenancy was a tenancy-at-will which became converted by payment of rent into a tenancy from year to year—*Secretary of State v. Sarat*, A.I.R. 1937 Pat. 399 (406), 171 I.C. 461. If a registered lease is granted by the Administrator of a superseded municipality, who had no such power to grant such lease, and permission is granted subsequently by the Municipal Committee regularly constituted to construct buildings, then a tenancy on the terms contained in the lease deed is created by the acceptance of the stipulated rent from the lessee—*Hitkarini Sabha, Jabalpur v. Corporation of the City of Jabalpur*, A.I.R. 1961 Madh. Pra. 324.

Holding over :—Where there is no agreement as to the terms of the holding over, the tenancy under this section must be deemed to be one from year to year terminable by six months' notice, or from month to month terminable by fifteen days' notice according to the purpose for which the property was leased—*Sailabala v. Tappassier*, A.I.R. 1952 Cal. 455. Where after the termination of an old lease a new lease for two years with enhancement of rent is created by an unregistered deed and the lessee continues in possession even after the expiry of two years a presumption of a monthly tenancy can be drawn—*Ebrahim Rawther v. Moideen Batcha Rawther*, 1964 Ker. L.T. 455.

554. Notice :—The object of the provision as to notice is to enable the tenant to gather up the fruits of his labour. A notice to quit is therefore a necessary prelude to the legal determination of a tenancy, and a

suit for ejectment brought without a notice is liable to be dismissed—*Rajendranath v. Bassidar Ruhman*, 2 Cal. 146; *Sheikh Sonaula v. Troylukho*, 2 C.W.N. 383; *Ganga Prasad v. Prem Kumar*, A.I.R. 1949 All. 173.

A landlord is entitled to eject a tenant after notice to quit, unless the tenant can prove that he has a right to remain on the land permanently and the onus is on the tenant to prove permanency of his tenancy—*Golam Hossein v. Abu Bakkar*, A.I.R. 1936 Cal. 351, 166 I.C. 811.

Notices under this section must be construed very strictly. Under such a construction of a notice it appeared that the landlords plaintiffs undertook either to give or tender to the tenant defendants the reasonable price of the materials of the structures of the tenant defendants before compelling the latter to give up possession, although according to the term of the lease the landlords plaintiffs were not in any way bound to do this: *held* that the clause in the notice with regard to payment of compensation was not a mere surplusage and in the event of non-compliance with the clause the plaintiffs were not entitled to evict the defendants—*Shambhu v. Kanai*, A.I.R. 1936 Cal. 581. But see *Ganga Prasad v. Prem Kumar*, supra, where it has been *held* that a notice should be liberally construed, and it should only be seen that the person served has understood what has been meant by the notice. A notice to quit, though not strictly accurate and consistent may still be good and effective in law. The test of its sufficiency would be what it would mean to the tenant who is presumably conversant with all the facts and circumstances of the holding. The notice should not be construed with a desire to find fault with it but to be construed *ut res magis valiat quam pereat*—*Utility Articles Manufacturing Co. v. Raja Bahadur Motilal Bombay Mills Ltd.*, A.I.R. 1943 Bom. 306, 45 Bom. L.R. 605. See also *Gaya Prasad v. Munni Lal*, A.I.R. 1952 Nag. 101. The reason given in the notice is not material for determining its sufficiency. The essential point is whether the person was asked to vacate the premises or not—*Nagendra v. Jotish*, A.I.R. 1952 Cal. 221. In a notice to quit it is not necessary to state any ground, and a suit for ejectment need not be on the same ground as stated in the notice—*Amarendra v. Bibhuti*, A.I.R. 1952 Cal. 773.

After a notice to quit has been given, a subsequent notice is of no effect, nor does it amount to a waiver of the first notice—*Basheshwar v. Delhi Improvement Trust*, A.I.R. 1953 Punj. 243 relying on *Loewenthal v. Vanhonte*, 1947 All. G.R. 116. Where the tenants have constructed a dwelling house and has been in occupation of the land for as long as 70 years paying a uniform annual rent, the tenancy cannot be terminated without serving a reasonable notice to quit—*Banamali v. Padmanabha*, A.I.R. 1951 Or. 262. What is a reasonable notice is largely a question of fact—*Faguniswari v. Dhum Lal*, A.I.R. 1951 Cal. 269.

The question of notice to quit, its requirements, or service is not affected by the Calcutta Rent Ordinance, 1946—*Amarendra v. Bibhuti*, A.I.R. 1952 Cal. 773. Notice under sec. 106 is the essential condition precedent to the filing of a suit for eviction on grounds mentioned in sec. 11 of the Bihar Buildings (Lease, Rent and Eviction) Control Act—*Adit Prasad v. Chhaganlal*, A.I.R. 1968 Pat. 26. A notice to quit can be issued on the previous written permission from the Rent Controller,

even when an appeal from that order is pending—*Phanibhusan v. Gulabchand*, A.I.R. 1951 Nag. 203, I.L.R. 1951 Nag. 401. A Rent Controller is not competent to split up a tenancy and give permission to the landlord to serve a notice to quit in respect of a portion of the tenancy—*Sakharampant v. Lothi*, A.I.R. 1953 Nag. 265, 1953 N.L.J. 235. In spite of a permission from the District Magistrate under sec. 3 of the U. P. (Temporary) Control of Rent and Eviction Act, 1947, a notice under the present section is necessary—*Ghasi Ram v. Choubey*, A.I.R. 1953 All. 218, 1952 A.L.J. 727.

When not necessary:—No notice is necessary if the lessee is a tenant by sufferance. Where a tenant-at-will has constructed expensive building on the site and the landlord has been keeping quiet for a long time and did not take any steps to stop such building being constructed, it is, however, equitable that the tenant should be compensated for the building before he is evicted—*Abdul Chafur v. Jet Mal*, A.I.R. 1942 Pesh. 74. See notes to sec. 116, under heading "Holding over". Where a tenant undertakes to give vacant possession whenever the landlord may desire him to do so the tenancy is a tenancy-at-will, for the termination of which no notice under sec. 106 is necessary—*Ramnarain v. Kishorelal*, A.I.R. 1964 Raj. 79; *Subramania Iyer v. Ammu*, A.I.R. 1964 Ker. 218.

Where the tenant, repudiated the title of the landlord and set up the title of a third party, the landlord could bring an ejectment suit without giving any previous notice to quit, since the tenant forfeited his tenancy by denying the landlord's title—*Anandamoyi v. Lakshmi Chandra*, 33 Cal. 339; *Haidri Begum v. Nathu*, 17 All. 45; *Ramayana Prasad v. Mt. C. Gulabokuer*, A.I.R. 1967 Pat. 35. But under clause (g) of section 111 as now amended, the lessor must give notice of his intention to determine the tenancy.

A licensee may also be ejected without notice—*Athakutti v. Govinda*, 16 Mad. 97.

A trespasser is not entitled to any notice. Thus, on failure to perform the service, a service-holder becomes a mere trespasser; and no notice to quit is necessary before ejectment—*Wazir Nonian v. Ram Prasad*, 59 I.C. 893 (Pat.).

A tenant holding over, after expiry of his lease, without his landlord's consent is a tenant on sufferance. No question of notice arises in his case—*Hasanali v. Dara Sah*, A.I.R. 1949 Nag. 282, I.L.R. 1949 Nag. 922; *Ramzan v. Ghani*, A.I.R. 1952 J. & K. 35.

Where the rent-note provided that in case of lessee's failure to pay the rent agreed, the lessor would be entitled to eject him, no question of notice arose—*Amar Singh v. Hoshia Singh*, A.I.R. 1952 All. 141. When a sub-tenant becomes a direct tenant by operation of law during the pendency of a suit for eviction against the tenant as well as the sub-tenant, the latter is not entitled to any notice, under sec. 106—*V. R. Verma v. Mohan Kumar Mukherjee*, A.I.R. 1962 Cal. 563 (S.B.).

Where a lease is for a fixed period, it is determined under section 111 (a) by the efflux of time limited by the lease, and notice must be presumed by implication as given when it was executed; therefore no notice

under sec. 106 is required for the termination of the lease—*Fazihuzza-man v. Anwar*, 1932 A.L.J. 126, A.I.R. 1932 All. 314, 139 I.C. 828; *Gokul Chand v. Shib Charan*, 9 A.L.J. 574. 13 I.C. 59; *Bishen Sarup v. Abdul Samad*, 1931 A.L.J. 666, A.I.R. 1931 All. 649 (650).

Where the tenant had expressly agreed to give up possession on a certain fixed date, he need not be given a formal notice to quit—*Dina Singh v. Jamal Singh*, 78 I.C. 446, A.I.R. 1925 Nag. 48. No notice is necessary where it is waived by the parties by a contract to the contrary; see 12 O.C. 279 and other cases cited under "Contract to the contrary" in Note 552, *supra*.

A sub-lessee is not entitled to a notice before ejectment after the surrender by the original lessee—*Shyam Lal v. Bachchu Lal*, 11 A.L.J. 981, 20 I.C. 11.

The position of a lessee holding under an unregistered deed, which is compulsorily registrable, is that of a mere tenant-at-will and a mere demand for possession is sufficient to determine the lease and no notice under this section is necessary. Where, therefore, a notice to the lessee does not fulfil the requirements of a valid notice, it amounts to demand for possession and the Court can grant a decree for ejectment—*Janki v. Kanhaiya*, A.I.R. 1936 Oudh 102 (105), 159 I.C. 316; *Gur Prasad v. Hansraj*, A.I.R. 1946 Oudh 144, 21 Luck. 292. If the local law provides that even after a decree for surrender the landlord cannot recover possession unless the tenant incurs forfeiture under the local law, the plaintiff can recover rent but not mesne profits—*Ouseph Thomman v. Lekhamikutti Amma Kunjikutti Amma*, A.I.R. 1956 Trav.-Co. 86.

Period of notice :—A lease from year to year is terminable with six months' notice. In a tenancy with an annual rent reserved, *i.e.*, in an annual tenancy, the tenant is entitled to six months' notice before he can be ejected—*Kishori Mohan v. Nund Kumar*, 24 Cal. 720 (723); *Ismail v. Jaigun*, 27 Cal. 570 (577). A lease of a homestead land is a lease from month to month terminable by '15 days' notice—*Debendra v. Syama Prosanna*, 11 C.W.N. 1124 (1126).

If the tenancy is one from month to month, and the tenant is entitled to 15 days' notice, a six months' notice requiring him to quit at the end of the year is not invalid. In fact it is more than sufficient—*Debendra v. Syama Prosanna*, 11 C.W.N. 1124 (1126). But where the tenancy is a yearly tenancy, it is terminable only by six months' notice, and any notice which falls short of this period is not sufficient—*Kishori Mohun v. Nund Kumar*, *supra*. A notice which gives less than 15 days' notice to a monthly tenant is invalid, and cannot determine the tenancy—*Farzand Ali v. Motilal*, 2 P.L.T. 282, 62 I.C. 421 (422).

Effect of a valid notice upon sub-tenants :—A valid notice to quit not only determines the right of the original demise, but any lease which the tenant might have made. A decree in ejectment passed against a lessee at the instance of a lessor is binding not only upon the lessee, but also upon his sub-tenants, provided they have no right independent of the right of their lessor. The sub-tenants are, therefore, liable to be evicted in execution of a decree under O. 21, r. 35, and it is not necessary

for the decree-holder to proceed under O. 21, r. 97, C. P. Code—*Shiekh Yusuf v. Jyotish*, A.I.R. 1932 Cal. 241, 35 C.W.N. 1132, 59 Cal. 739, 137 I.C. 139; see also *Ram Kissen v. Binraj*, 50 Cal. 419; *Green v. Herring*, (1905) 1 K.B. 152; *Minet v. Johnson*, 63 L.T. 507.

555. What is a valid notice :—Notice to quit, though not strictly accurate or consistent in the statements embodied in them, may still be good and effective in law. The test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they refer, but what they would mean to tenants presumably conversant with all those facts and circumstances. The notices are to be construed with a view to their validity and not with a desire to find faults in them which would render them defective. A notice need not be worded with the accuracy of a plea—*Harihar v. Ram Sashi*, 46 Cal. 458 (P.C.), 23 C.W.N. 77; See also *Ganga Prasad v. Prem Kumar*, A.I.R. 1949 All. 173; *Mrs. Cacasie v. Safdar Ali*, A.I.R. 1953 Cal. 585, 57 C.W.N. 567. But if a Dist. Board files a suit for eviction on the basis of a notice to quit served by the Government asking the tenant to deliver possession to the Dist. Board as the agent of the Government the suit is liable to be dismissed—*Dist. Board, Tippera v. Sharafat Ali*, A.I.R. 1941 Cal. 408. Where a notice was given to a lessee stating that he should vacate the lands on 13-5-27 and the notice was given on 9-11-27, the notice was valid; for it was sufficient if the person on whom the notice was served could understand what was really meant by the notice—*Tika Ram v. Dooji Maharaj*, A.I.R. 1934 All. 787, 152 I.C. 189. If a notice to quit calls upon the tenant to quit and prescribes the time for giving up possession, the notice is valid even though the particulars as regards tenancy are not accurately set out—*Alphanso Pints v. Thukru Hengsu*, A.I.R. 1955 Mad. 206. But where the notice ran thus : "If for any reason these fields have not been handed over to us before 31st March, 1950, you are to hand over possession thereof to us for our personal cultivation before the above mentioned date" the notice was held to be bad because the tenant was called upon to deliver possession not on 31.3.50 itself but even on any day before that date—*Devshankar Gangaram v. Bachubha Devsingh*, A.I.R. 1956 Bom. 113.

A notice to quit need not be worded with the accuracy of a plea. Where a monthly tenancy commenced from the 1st of each month, the notice was not invalid because the tenant was asked to vacate not by the end of the month, but by the 1st of the next month—*Gaya Prasad v. Munnilal* A.I.R. 1952 Nag. 101. See also *Ghasi Ram v. Charebey*, A.I.R. 1953 All. 218, 1952 A.L.J. 727.

Where a tenant gives notice to quit premises in the occupation of a sub-tenant entitled to protection under the Rent Act the tenant is not liable for rent in future on account of the termination of the tenancy nor is he liable for damages for use and occupation—*S. K. Bose v. Phanindra*, 62 C.W.N. 176.

The notice must designate the date on which the tenant is to vacate. A notice to quit "at the expiration of the current year to your tenancy, which shall expire after the end of one-half year from the service of the notice" (*Doe d. Digby v. Steel*, 3 Camp. 117) or simply a notice to quit "at the expiration of the present year's tenancy" (*Deo d. Gorst v. Timothy*,

2 Car. & K. 351) or a notice "at the expiration of the current year" (*Deo d. Baker v. Wombwell*, 2 Camp. 559) are valid notices. See also *Iatindra v. Malai*, A.I.R. 1953 Cal. 352, 88; C.L.J. 118; *Ismail v. Julekhabai*, A.I.R. 1944 Bom. 181, I.L.R. 1944 Bom. 361; *v. Sabitri v. Jalikha*, A.I.R. 1947 Cal. 244, 52 C.W.N. 13; *Bawa Singh v. Kundan Lal*, 1952 Punj. 422; *Ananta v. Osimuddin*, A.I.R. 1952 Ass. 132; *Mohan Lal v. Kunwar Sen*, A.I.R. 1953 All. 598, 1951 A.L.J. 702. But a notice to quit generally without referring to some distinct time would be invalid—*Goode v. Howells*, 4 M. & W. 199. By the notice the tenant was asked to vacate within the 30th April and deliver possession on 1st of May. The notice was held to be valid—*Niwaran v. Abinash*, 60 C.W.N. 308; *Hirjibhai v. Balarambhai*, A.I.R. 1956 Nag. 125; *Panchoo Singh v. Bala Sahai*, A.I.R. 1958 Raj. 306; *Riyasat Ali Khan v. Mirza Wahid Beg*, A.I.R. 1966 All. 165.

A notice to quit calling upon the tenants of a holding to quit a portion of it is absolutely bad and an action for ejectment can be defeated by tenants by proof that the contents of their holding are more than the part named—*Harihar v. Ramsashi*, 46 Cal. 458 (P.C.). *Bodardoza v. Azimuddin*, A.I.R. 1929 Cal. 651 (654), 57 Cal. 10, 33 C.W.N. 559, 120 I.C. 455—*Giridhari v. Purnendu*, 68 C.L.J. 481, A.I.R. 1939 Cal. 291, 182 I.C. 8. A notice to quit is not however bad for slightly wrong statements, e.g., where it includes some lands which it is found the defendant does not hold under the plaintiff—*Shama Churn v. Wooma Churn*, 25 Cal. 36; *Giridhari v. Purnendu*, supra. A notice stating that if the tenant thinks that the tenancy commenced on some other date he might vacate on the corresponding date is valid—*Bhagwan Sri Krishnaji M. V. Mandir v. Chuttan Lal*, A.I.R. 1963 All. 54. Where the landlord warns the tenant that if he fails to clear the arrears within a month of the receipt of the notice he will be liable to ejectment and in that event he must treat the notice as a legal notice and vacate within a month, there is a valid notice to quit—*Ram Swarup v. Brij Nandan Prasad*, A.I.R. 1963 All. 366. A notice to quit coupled with a demand for rent in arrears is valid—*Rajendra Nath v. Sm. Lalli Devi*, I.L.R. (1962) 2 All 120.

The giver of a notice is not bound to admit the person to whom it is given as a tenant. A notice is not bad because it is addressed to the tenant not as tenant but as a trespasser—*Ram Charan v. Hari Charan*, 7 C.L.J. 107; *Secy. of State v. Madhu Sudan*, 36 C.W.N. 918 (921). A notice expiring on the anniversary of the commencement of the tenancy is a valid notice—*Ram Palak v. Bilas Mahton*, A.I.R. 1952 Pat. 69. A notice terminating a non-agricultural sub-lease under this section is valid—*Abdul v. Jotoo*, A.I.R. 1950 Cal. 54, 54 C.W.N. 149.

But where a tenant has remained in occupation of the land for 70 years and has put up a dwelling house thereon and paid a uniform annual rent, the tenancy cannot be terminated without a reasonable notice whether the tenancy is agricultural or not. A notice not signed either by the lessor or his agent is of no value—*Banamali v. Padmanabha*, A.I.R. 1951 Or. 262. A notice given by brothers without joining their mother who has an interest in the property, is invalid—*Chhoti Dei v. Gangadhar*, A.I.R. 1953 Or. 245. A notice asking the lessee to vacate by the day following the date of the ending of the monthly tenancy is invalid—*Motilal v. Thandiram*, A.I.R. 1951 Aj. 52 (1). See also *Siddarama v.*

Kalappa, A.I.R. 1950 Mys. 63. A typed copy of the notice served on the tenant is invalid—*Hira Lal v. Dy. Comr.*, A.I.R. 1951 All. 483. Where a tenant under a year to year tenancy terminable by 6 months' notice on either side subleased a part of the premises to a man on 12th December, 1937 for 1 year 4 months from 31st December, 1937 to 30th April, 1939 and on 26th January, 1938 gave notice to the landlord to terminate the lease as on 15th May, 1938, it was held that the notice being dated less than 6 months before 15th May, 1938 was ineffectual—*Gooderham & Worts Ltd. v. Chandian Broadcasting Corpn.*, A.I.R. 1949 P.C. 90. Where in the notice there is no allegation as to when the tenancy commenced or what the month of the tenancy is, the notice is invalid—*Gulam Mohammood v. Ammani Ammal*, (1960) 2 Mad. L.T. 351.

Even if lessees are guilty of laches in not replying to the lessor's notice, that does not necessarily make the notice to quit valid if it was invalid otherwise—*Prodyot Kumar v. Maynuddin*, A.I.R. 1938 Cal. 724 (726). A notice to quit addressed to the managing partner of the tenant firm and acknowledged by the firm is a valid notice—*J. P. Sharma v. Rakhag Das Jai*, I.L.R. (1962) 12 Raj. 179.

Onus :—It is for the plaintiff in a suit for ejectment of a tenant upon notice to quit to prove the sufficiency of notice by proving the date of the commencement of the tenancy. In order to prove that the notice legally determined the lease, he must show that the notice served upon the tenant expired either with the end of the year or the month of the tenancy. In the absence of evidence to show when the year or the month of the tenancy commenced, the plaintiff's suit must fail—*Mozam Shaikh v. Annada Prasad*, 46 C.W.N. 366, A.I.R. 1942 Cal. 341, 75 C.L.J. 444. Where the notice to quit gives more than 15 days' time but there is some doubt as to the actual date of receipt the notice is to be regarded as good if the averment in the plaint that the cause of action arose on the date of the notice is not specifically denied in the written statement—*Sm. Bhagwati Devi v. Surendrajit Singh*, A.I.R. 1959 Pat. 257.

Notice stating enhanced rent :—It was held in an earlier case of the Allahabad High Court that a notice to quit must not be coupled as "if you do not quit within a month from this, I will sue you for rent at an enhanced rate" was held to be a conditional one and therefore not a valid notice to quit—*Bradley v. Atkinson*, 7 All. 899 (F.B.). But in England, it has been held that a notice otherwise sufficient is not rendered insufficient by its being accompanied with something else; and therefore, where the lessor gave the lessee notice in writing to quit upon a specified day and then went on to say, "and I hereby further give you a notice that should you retain possession of the premises after the day before mentioned, the annual rent of the premises now held by you be £150," it was held that the explicit first portion of the notice was not impaired or rendered nugatory by the alternative given by the second portion of continuing to hold the premises at an increased rent—*Ahearn v. Bellman*, 4 Ex. D. 201. And now the Allahabad High Court has laid down in a later case that a notice to quit with a condition superadded for enhancement of rent on failure to quit in accordance with the notice, is good enough to terminate the tenancy, and is not to be treated as an offer of a new tenancy at a higher rent; and the landlord is entitled to

a decree for ejectment. The notice does not amount to an offer to renew the tenancy at an enhanced rate of rent—*Shankar Lal v. Babu Ram*, 43 All. 330 (332) (following *Ahearn v. Bellman*, supra). See also *Sahir Hussain v. Sirajul Haq*, A.I.R. 1951 All. 853, 1951 A.L.J. 192. The Bombay High Court has also taken this later view in *Vaman v. Khanderao*, A.I.R. 1935 Bom. 247, 37 Bom. L.R. 376, 156 I.C. 1620. The Patna High Court holds that a notice of ejectment is quite distinct from a notice of enhancement; in the former case the lease is determined by the notice and thereafter the lessee becomes a trespasser. If in the notice an alternative term enhancing the rent from the date mentioned in it is proposed on which the defendant is required to vacate the premises, the continuance of the tenant to hold over implies an acceptance of the term proposed—*Farzand Ali v. Motilal*, 2 P.L.T. 282, 62 I.C. 421 (422). See also *Madan Mohan v. Ram Lal*, A.I.R. 1934 All. 115 (117), (1934) A.L.J. 421, 153 I.C. 432 where the same view has been taken. For a contrary view see *Md. Noor v. Ashiq Beg*, A.I.R. 1933 Oudh 465, 145 I.C. 647. Demand for arrears of rent and termination of the tenancy can be made by the same notice—*Mushtaq Husain v. Mahomed Saddiq*, 1967 All. L.J. 764. But a notice asking the tenant to pay rent by the end of a particular month and also to vacate on the expiry of the period of the notice, preceded by a number of similar notices, cannot be treated as a notice to terminate the tenancy—*Sunder Lal v. Ram Krishan*, A.I.R. 1960 All. 544. A notice to quit with a demand for enhanced rent if the tenant stays is not sufficient to terminate the tenancy because it amounts to an offer of a fresh tenancy—*Mohammad Ninave v. Neelacandan*, A.I.R. 1960 Ker. 216.

Where the landlord gave notice to a monthly tenant either to vacate the premises or to pay an enhanced rent, but the tenant vacated some months after time mentioned in the notice, he was liable to pay the enhanced rent—*Madan Mohan v. Ram Lal*, supra. Where a landlord gives notice to his tenant that he would be charged at an enhanced rent from a certain date and should vacate if he does not accept the enhancement and the tenant refuses to pay the enhanced rent and also refuses to vacate, he should be deemed to have accepted the enhanced rent. Of course, the Court has a discretion in the matter and where the enhanced rent is obviously penal, the Court would not grant it—*Parekh v. Anant*, A.I.R. Nag. 140, N.L.J. 118, 189 I.C. 895. The proposition that a notice to quit though admittedly invalid for the purposes of ejectment can nevertheless be good to support a decree for arrears of rent at the enhanced rate should not be applied for the period for which the notice was invalid—*Ibid.*

Where a landlord wrote to his tenant asking him to execute an agreement to pay increased rent and concluded by saying "otherwise I shall take steps to eject you and hence you consider this 15 days' notice expiring with the end of this month," it was held that this was a good notice to quit—*Ganga Das v. Ananda*, 13 C.W.N. 146, 2 I.C. 548; *Jugla v. Hur Narain*, 19 I.C. 758 (All.) distinguishing 7 All. 899 cited above. But where the first part of the notice asks the tenant to vacate but the second part shows an intention to continue the tenancy if the tenant pays enhance rent, the notice cannot terminate the tenancy—

Chidda Ram v. Naru Mal, A.I.R. 1965 All. 323. If the notice to quit gives option to the tenant either to vacate on the date mentioned or on a later date the notice is good—*Gurdit Singh v. Tata Iron & Steel Co. Ltd.*, A.I.R. 1965 Pat. 311. Notice terminating tenancy and demanding arrears of rent is not invalid—*Ahmad Ali, v. Jamal Uddin*, A.I.R. 1963 All. 581. A notice only demanding possession does not terminate the tenancy—*Ibid.*

Where the lessor's solicitors gave notice to quit in the following terms—"We give you notice that our client will require you to vacate and give up possession of the premises on the 29th February next, and that, should you fail to comply with the request, our client will take proceedings against you to eject you from the premises and he will charge you the sum of Rs. 350 per month as *damage* sustained by him during such period as you continue in possession after the 29th proximo," it was held that it was a good clear notice to quit and the addition of the second portion of the notice did not vitiate it—*Strager v. Price*, 12 C.W.N. 1059; *Bhagwan v. Savitri*, 78 I.C. 651, A.I.R. 1925 All. 199 (200).

Where a landlord gives notice to a monthly tenant to vacate the premises by a certain date, or in the alternative to pay enhanced rent from that date, and the notice is invalid for not giving clear 15 days' time, the tenancy is not determined and therefore the landlord cannot sue the tenant either for ejectment or for rent at the enhanced rate on the basis of the notice—*Farzand Ali v. Motilal*, (*supra*). A notice to quit need not specify the premises to be vacated—*Lakhanlal v. Udhoram*, 1960 M. P.L.T. (Notes) 161.

556. Notice according to Bengali calendar:—This section contemplates any kind of "monthly tenancy," *viz.*, according to English, Bengali, Sambat calendar and so forth, and may commence on any day of the month. Therefore, it is not correct to say that all tenancies from month to month under this section must be according to the English calendar in view of sec. 33 of the General Clauses Act—*Ahumad Ali v. Jyotsna Kumar*, A.I.R. 1952 Cal. 19 dissenting from the view of Rau, J. in *Calcutta Landing & Shipping Co. v. Victor Oil Co.*, 49 C.W.N. 76. A notice to quit written in Bengali was given on 20th December, 1948 asking the tenant to vacate 15 days after the notice within the month of Poush, that is, by the 1st of Magh. The tenancy was according to Bengali month: *Held* that the notice was not defective—*Ahumad Ali v. Jyotsna Kumar*, *supra*. See also *Haridas v. Sailendra*, A.I.R. 1953 Ass. 202; *Banarsilal v. Shri Bhagwan*, A.I.R. 1955 Raj. 167.

Where the tenancy is regulated and rent paid according to the Bengali year, a notice calculated according to the Bengali calendar is sufficient to terminate the tenancy—*Debendra v. Syama Prosanna*, 11 C.W.N. 1124 (1126); *Haridas v. Upendra*, 22 C.L.J. 75, 16 I.C. 937; *Ismail Khan v. Jaigun*, 27 Cal. 570 (577); *Raj Behari v. Kailash*, 22 C.L.J. 78, 30 I.C. 887; *Gobinda v. Dwarka Nath*, 19 C.W.N. 489 (492), 26 I.C. 962. Thus, if the year of the tenancy commences from 1st Baisakh and ends with the last day of Chait, a six months' notice served on the 31st Aswin (17th October) requiring the tenant to quit at the end of Chait (13th April) is valid, even though if calculated according to the corresponding days of the English calendar the notice falls short of six months by 4

days—*Debendra v. Syama Prosanna*, 11 C.W.N. 1124 (1126). In the case of a lease of a shoproom, a notice given on the 16th Baisakh calling upon the tenant to vacate on the 31st Baisakh (the last day of the month) is a valid notice—*Gobinda v. Dwarka*, supra, “within 30th Chaitra” means with the expiry of that date—*Mozam Shaikh v. Annada Prasad*, 46 C.W.N. 366, 75 C.L.J. 444.

557. “Expiring with the end of a year or month” :—It is not sufficient that the duration of the notice should be six months or 15 days, as the case may be; it is also required that the notice should expire with the end of the year or month. Thus, if the year of a tenancy is computed from the 1st Baisakh to the end of Chaitra, a notice given on the 26th Jaistha, calling upon the tenant to quit the land on the last day of Aghran is not valid (even though the duration of the notice is more than 6 months). It ought to have required the tenant to vacate on the end of Chaitra—*Hemangini v. Sri Gobinda*, 29 Cal. 203 (205, 206). So also, in the case of a monthly tenancy, the notice to quit must require the tenant to vacate at the *end* of the month, and *not before*. Thus, if the tenancy is regulated according to the English Calendar, the notice must require the tenant to vacate on the 31st January, or 28th February or 31st March and so on; and a notice asking the tenant to quit *before* the end of the month would be invalid, even though it gives 15 days’ time. So, a notice given on the 1st January requiring the tenant to quit on the 20th January (or even on the 20th February) is invalid though there is an interval of more than 15 days between the date of notice and the date of the required surrender. Thus, a notice was given on the 9th June that the lessee should vacate the premises after lapse of a month from that date; *held* that the notice was inoperative in law as it did not expire at the end of a month although it was of a longer duration than 15 days. Such a notice cannot terminate the tenancy—*Bijay Chandra v. Howrah-Amta Ry. Co.*, 38 C.L.J. 177, A.I.R. 1923 Cal. 524, 72 I.C. 98. If the tenancy commences from *any day in the middle* of the calendar month, (e.g., 10th or 12th or 15th), the month of the tenancy must be calculated as ending on the corresponding day of the next month. Thus, if a monthly tenancy is from the 6th of one month to the 5th of the next month, a notice given on the 30th June requiring the tenant to quit at the end of July is bad—*Bengal National Bank v. Janaki*, 54 Cal. 813, 31 C.W.N. 973, A.I.R. 1927 Cal. 725 (730); *Carrara Marble etc. v. Charu Chandra Guha*, A.I.R. 1957 Cal. 357. But where a house was taken on three years’ lease but no lease-deed was executed and the house was occupied in the middle of a month and the first amount of rent paid was for the period during which the house was occupied prior to the 1st of the following calendar month, the tenancy must be deemed to begin on the 1st of each calendar month—*Ramji Lal v. Secretary of State*; A.I.R. 1936 Oudh 306 (307), 162 I.C. 712. Alteration of the month of tenancy must be proved either by direct or by circumstantial evidence—*Carrara Marble v. Charu Chandra*, A.I.R. 1957 Cal. 357; *Mohonbai Lilawati v. Kishanlal and Mohonlal*, I.L.R. (1966) 16 Raj. 651.

If the tenancy is created according to the *Indian* Calendar, the notice must be given in accordance with that calendar. Thus, a house was let on a monthly tenancy, the month being calculated from the 27th of one month to the 26th of the next month of the *Hindi* calendar: Notice

was served on the 31st December 1915 (11th *Pous*) directing the tenant to vacate on the 31st January 1916 (12th *Magh*). *Held* that the notice was invalid. The notice in order to be valid ought to have directed the tenant to vacate on the 26th day of a month, the day on which every month expired according to the terms of the tenancy—*Sheoti Bibi v. Jagannath*, 18 A.L.J. 854, 57 I.C. 593. A notice to vacate on 31st July, tenancy commencing from 1st day of an English calendar month, is valid—*Tolaram v. Ayaldas*, A.I.R. 1965 Madh. Pra. 140; but see *Chhaganlal Maganlal v. Chhaganlal Mannalal*, 1961 Jab. L.J. 1175.

If a tenancy commences from the 14th *Pous*, the year of the tenancy must be calculated as commencing from 14th *Pous* and ending with the 13th *Pous* of the next year. A notice calling upon the tenant to quit in *Ashar* is bad; see *Kishori Mohun v. Nund Kumar*, 24 Cal. 720 (724). But if it appears that although the tenancy was created from the middle of a Bengali month (e.g., 19th *Chait*), still the *rent has all along been paid according to the ordinary Bengali year* calculated as commencing from 1st *Baisakh* and ending with 30th *Chait*, *held* that the year of the tenancy in this particular case must be calculated according to the ordinary Bengali year, and a six months' notice given on the 23rd *Aswin* requiring the tenant to quit on the *last day of Chait* is a valid notice—*Ismail v. Jaigun*, 27 Cal. 570 (577). When the tenant's entry takes place in the *middle* of a calendar month and rent is payable from the date of entry, *but the parties agree* that the rent should be payable at the *end* of the calendar month, the reasonable inference is that they intended that the monthly tenancy should coincide with the calendar month. In such cases, the fifteen days' notice to quit must be so given as to expire with the end of the calendar month, unless the intention of the parties appears to the contrary—*Arunachella v. Ramiah*, 30 Mad. 109 (111, 112). When the tenancy is according to the Hindi calendar, a notice to quit under sec. 106 must be given according to that calendar—*Sheobux Singh v. Paras Ram*, I.L. 9, (1959) 9 Raj. 1157.

A lessor served the lessees (yearly tenants) with a notice on the 28th September 1891 in the following terms: "Within two days from the receipt of this notice, meet us, increase the rent and give us a legal writing or in default on the 31st March 1892 I shall take full possession of the said land." *Held* that the lessees were by that notice given two days to make a fresh agreement with the landlord, failing which the notice to them to quit at the end of the year of the tenancy became unconditional and absolute. The notice was therefore a good and valid one to terminate the tenancy—*Kikabhai v. Kalu*, 22 Bom. 241.

If the notice is insufficient (on the ground that it requires the tenant to vacate *before* the end of the year of the tenancy), a suit based upon such notice must fail, and the Court cannot even pass a decree to the effect that the tenant must quit at the end of the year—*Hemangini v. Srigobinda*, 29 Cal. 203 (206), dissenting from *Ram Lal v. Dina Nath*, 23 Cal. 200.

A notice given on the 16th of a month requiring the tenant to vacate "within" the 31st (the last day of the month) is not invalid—*Gobinda v. Dwarka*, 19 C.W.N. 489 (492). Even a notice calling upon the tenant to quit "before" the expiry of the last day of the year is not bad—*Ismail*

Khan v. Jaigun, 27 Cal. 570 (578). But a notice requiring the tenant to quit on the last day *at noon* is bad, because the tenant is not bound to vacate before midnight—*Page v. More*, (1850) 15 Q.B. 684.

But a notice giving a *longer* time by a few hours is not bad. Thus, if the notice issued on the 15th September asked the tenant to quit on the forenoon of the 1st October, it was not bad by being too long by a few hours—*Gnanaprakasam v. Vaz*, 60 M.L.J. 293, A.I.R. 1931 Mad. 352 (355). Where the tenancy is for 11 months commencing on 20.4.49 and the tenant remains in occupation even after the term on payment of rent, a notice asking the tenant to quit on 21.1.54 is valid—*Vishnu Ganesh v. Laxminarayan*, A.I.R. 1959 Madh. Pra. 293. Where a tenancy commences on the 2nd day of a month, a notice determining the tenancy from the 1st day of the month is valid—*Madhav Rao v. Bhagwandas*, A.I.R. 1961 Madh. Pra. 138.

Where no date is fixed as to the commencement of a lease and the lease-money is payable by monthly rent, the lease is terminable by 15 days' notice expiring with the end of the month of the tenancy. In case of such a lease, a notice given on the 24th June calling on the lessee to vacate the premises by midnight of the 31st July following is a valid notice—*A. P. Bagchi v. Mrs. Morgan*, A.I.R. 1937 All. 36 (38), 166 I.C. 897. A lease reserving a yearly rent payable in the four usual quarterly instalments creates a tenancy from the commencement of the calendar year or month, as the case may be, in the absence of any indication in the lease that it was to commence from the date of the lease—*Udaytara v. Habibar Rahaman*, (1938) 42 C.W.N. 771. If the lessor who is in doubt as to the correct date of commencement of tenancy, gives a notice proposing three alternative dates and giving the lessee option to choose anyone, the notice is good—*Mohonalal v. Vijai Narain*, A.I.R. 1961 Raj. 136.

Where the tenancy was from month to month commencing on the 10th of every month and the lessor gave notice on the 13th June calling on the lessee to vacate the land "by" the 10th July, it was held that the word "by" did not exclude but included 10th, so the notice was valid—*Sheikh Nuroo v. Seth Meghraj*, A.I.R. 1937 Nag. 139 (140), I.L.R. (1937) Nag. 214, 170 I.C. 790; *Eastaugh v. Macpherson*, (1954) 3 All. E.R. 214.

Where the tenancy was from 10th of one month to 9th of the next month the landlord asked the tenant to vacate after 10.5.46. A second notice was given in these terms : "...I call upon you to definitely vacate ...by 10.10.47...you are further required to pay Rs. 1245 as arrears of rent upto 10.5.46 and Rs. 23,310 as damages till 10.10.47." The first notice was held to be invalid and the second notice was held to be a valid notice under sec. 111 (h)—*Ram Chandra v. Lala Dulichand*, A.I.R. 1958 All. 729. If the tenant is asked to vacate before the expiry of the last date of the month the notice is valid—*Mir Abdul Hanan v. Anil Ch. Dey*, I.L.R. (1961) Cut. 122; *Madhab Rao v. Bhagwan Das*, A.I.R. 1961 Madh. Pr. 138.

Fifteen days' notice :—The fifteen days' notice referred to in the section means 15 clear days. Thus, where the plaintiff served his notice on the defendants on the 16th Falgoon, and required them to quit the land on the 30th of the same month, so that the defendants had only

fourteen clear days, the notice to quit was held to be bad—*Subadini v. Durga Charan*, 28 Cal. 118, 4 C.W.N. 790. In other words, the day on which the notice is given is excluded from calculation. See sec. 110. But the day on which the notice is to *expire* is not to be excluded. And, therefore, a notice served on the 16th Baisakh calling on the tenant to quit on the 31st is a good notice, as it gives 15 clear days' time (the 31st Baisakh not being excluded from calculation)—*Gobinda v. Dwarka*, 19 C.W.N. 489 (493), 26 I.C. 962. The date on which the notice is received is included in computing the period of 15 days—*Mt. Natho v. Sital Prasad Sahu*, A.I.R. 1969 Pat. 310. In the case of a monthly tenancy according to the English calendar the notice asking the tenant to quit by the morning of 1.10.49 was held to be valid—*Bharat Sahu v. Gadadhar Ramanuj Das*, A.I.R. 1956 Orissa 128.

557A. Month or year of tenancy—Effect of sec. 110 :—If a tenancy under an agreement is said to commence from 1st June 1921 and to last for 4 years, the lease will commence (according to the first para of sec. 110) on 2nd June 1921 and expire (according to second para of sec. 110) on the midnight of 1st June 1925. Thereafter, the tenant holding over will hold from month to month, *i.e.*, from 2nd June to 1st July, and so on. Therefore, if on the 1st February 1928, the tenant gave notice of his intention to quit on the 1st March, the notice was valid and effective. The notice was operative till the midnight of the 1st March—*Benoy Krishna v. Salciccioni*, 60 Cal. 389 (P.C.), 37 C.W.N. 1, A.I.R. 1932 P.C. 279, 141 I.C. 514; *Durga Prasad v. Bhagwan Devi*, A.I.R. 1967 Punj. 404. See also *Susil v. Birendrajit*, A.I.R. 1934 Cal. 837, 38 C.W.N. 782, 153 I.C. 673. See in this connection *Venkataram v. Suryanarayana*, A.I.R. 1953 Or. 58. *Khumani v. Saktey Lal*, A.I.R. 1952 All. 579. Similarly, if a tenancy is created on the 1st December 1924 for a period of one month, "and thereafter unless and until the tenancy should be determined by a 15 days' notice expiring within the *calendar month*", it must be held that the first month of the tenancy commenced on the 2nd December 1924 (according to the provisions of sec. 110), and expired on the 1st January 1925, but thereafter it continued according to the *calendar month*, *i.e.*, January, February and so on. Therefore, if a notice is given on the 15th September requiring the tenant to vacate on the forenoon of the 1st October, the notice is not strictly speaking a correct notice; because it ought to have called upon the tenant to quit on the midnight of the 30th September, that being the time and date of expiry of the *calendar month*; but the Court excused the mistake on the ground that a notice need not be worded with the accuracy of a plea—*Gnanaprakasam v. Vaz*, 60 M.L.J. 293, A.I.R. 1931 Mad. 352 (353). "The validity of a notice to quit ought not to turn on the mere splitting of a straw. If hyper-criticisms are to be indulged in, a notice to quit at the first moment of the anniversary ought to be just as good as a notice to quit on the last moment of the day before." "The law upon notices to quit is highly technical, and I do not desire to add one more technicality to it"—thus observed Lindley, L.J., and Smith, L.J. in *Sidebotham v. Holland*, (1895) 1 Q.B. 378, in which the yearly tenancy ran from 19th May of one year to the 18th May of the next year, and the landlord gave a wrong notice requiring the tenant to quit on the 19th, instead of on the 18th May. Where a tenancy is in accordance with the Indian calendar, but the

tenant is asked to deposit rent under the Rent Control Act according to English calendar, the notice to quit must be given according to the Indian calendar—A.I.R. 1963 S.C. 120.

A periodical tenancy such as from month to month is not governed by sec. 110. Therefore the 1st day of the months need not be omitted from the period of notice to quit. In such a case the notice must expire with the end of a month of tenancy—*Chand Md. v. Murtazakhan*, A.I.R. 1950 Nag. 203, I.L.R. 1950 Nag. 437, dissenting from *Sheikh Nuroo v. Meghraj*, A.I.R. 1937 Nag. 139, I.L.R. 1937 Nag. 289; *Banchhanidhi v. Lachminarain*, A.I.R. 1950 Or. 1, I.L.R. 1949 Cut. 231; *Krishnaiah v. Lakshmana*, A.I.R. 1952 Mys. 139; *Ram v. Lalit*, A.I.R. 1947 Cal. 351; *Carrara Marble etc. v. Charu Chandra Guha*, A.I.R. 1957 Cal. 357. Where the tenancy has commenced on the first day of a month, the notice to quit must expire with the last day of a month—*Ganesi v. Jamuna*, A.I.R. 1945 Pat. 385, 24 Pat. 449. Where the tenancy commenced on the 13th of a calendar month the tenant could be asked to vacate only at the beginning of the 13th—*Ilahibux v. Munierkhan*, A.I.R. 1953 Nag. 219.

A characteristic of a periodical tenancy is that as each period begins, it is not a new tenancy but an accretion to the old tenancy. A provision that either side will give one clear months' notice does not affect the rule that the notice must expire with the expiration of the tenancy—*Utility Articles Manfg. & Co. v. R. B. M. Motilal Mills Ltd.*, A.I.R. 1943 Bom. 306, 45 Bom. L.R. 605.

A lease for 7 years commenced on 1st Baisakh 1318, but there was an express stipulation in the lease that the time limited by the lease was up to the end of 1324. The lessor served a notice on the lessee to vacate the land by the end of the month of Asar: held that the notice was valid. In view of the express agreement the lease lasted only up to the last day of 1324 and not up to the 1st Baisakh of 1325 under sec. 110. The term of the lease having expired on the last day of 1324, the monthly tenancy began from 1st Baisakh, 1325—*Deb Das v. Abdul Gani*, A.I.R. 1938 Cal. 358 (359), 42 C.W.N. 443, 67 C.L.J. 291.

558. Who can give notice :—The notice may be given by either the lessor himself or *his agent*. Thus, in the case of notice given by a landlord, it is sufficient if it is given at the instance of the landlord, and signed by his agent, and it is not necessary that it should be signed by the landlord himself—*Mohendra v. Biswanath*, 29 Cal. 231; *Gobinda v. Dwarka*, 19 C.W.N. 489 (493). *Gomez v. Ram Kumar*, A.I.R. 1934 Cal. 127, 149 I.C. 559, 58 C.L.J. 133. See also *Md. Nural Huda v. Kekabhoy*, A.I.R. 1953 Nag. 251. An agreement of tenancy provided as follows: "The tenancy may be determined by three months' notice. ...If determined by the council (landlords), shall be by a written notice signed by the valuer of the council..." The notice to quit by the landlords was signed, "J.E.J.T. valuer and agent of the...council (Landlords)". The valuer's name was written by his assistant. There was no indication that the assistant was acting on behalf of the valuer or with his authority. Held the notice was validly signed—*London County Council v. Vitamins Ltd.*, *London* (1955) 2 All. E.R. 229. A joint notice to quit by the land-

lord's transferees, owing distinct portions of the demised property, is sufficient to terminate the tenancy—*Shambhoo Dayal v. Chandra Kali Devi*, A.I.R. 1964 All. 350.

In the case of notices given on behalf of Government in respect of Crown lands, the Collector is competent to sign them and it is not necessary that the Secretary of State should sign—*Rakhal Chandra v. Secretary of State*, 10 C.W.N. 841 (844).

The recognized Secretary of a Corporation is competent to give or receive notice on behalf of the Corporation—*Deo d. Birmongham Canal Co. v. Bold*, 11 Q.B. 127.

A notice to quit certain premises belonging to a temple may be validly signed by the authorised agent of the manager of the temple and need not be signed by the manager himself—*Bhagwan v. Shiv Sabitri*, 78 I.C. 651, A.I.R. 1925 All. 199. Where notice to quit was given by the shebait on the footing as if the idols were the sole owners of the premises and it directed that the tenants should vacate the entire premises, while it was found that the idols had only an undivided share in the premises : *held* if the notice was sufficient with regard to the whole of the premises, it was sufficient with regard to a portion of it even if the property from which ejectment was sought might have been an undivided portion of the said premises—*Sashi Mohan v. Lakshmi-Narayanji*, A.I.R. 1937 Cal. 331.

In case of joint landlords one of them cannot give notice without the consent of others. The reason is, that if any one of them is to be at liberty to enhance rent or eject tenants at his own peculiar pleasure, there would be no safety for tenants, and it would be impossible for them to know how to regulate their conduct or whom to regard as their landlord—*Balaji v. Gopal*, 3 Bom. 23; *Kamarat Ali v. Hanuman*, 34 I.C. 56 (Cal.); *Abdul Hawid v. Bhanwaneswar*, A.I.R. 1953 Nag. 18.

A receiver being an officer of the Court cannot serve a notice to quit as he is not a representative or agent of the landlord. But where the Receiver issues the notice with the consent or at the instance of the lessor, he acts not as a receiver but as the agent of the lessor and therefore the notice is valid—*Vinod v. Vishnubhaji*, A.I.R. 1947 Lah. 338.

Where a tenancy is created by joint landlords, it can only be put an end to by all the lessors acting together. But there is an exception when one of the joint landlords is acting as manager of the estate with the consent of the others—*Krishna Bhima v. Laxmibai*, A.I.R. 1938 Bom. 316 (317-18), 40 Bom. L.R. 439; *Arun Chandra v. Panchu Modak*, A.I.R. 1957 Assam 70. Notice signed by the sons of the deceased landlord and not by their mother is valid—*Fatesh Chand v. Brij Bhusan*, A.I.R. 1957 All. 801. A notice to quit signed by one of the joint-owners on behalf of all is valid—*Misri Lal v. Ram Gopal*, 1966 All. L.J. 35.

Proper execution of *ammuktearnamas* giving authority to use in ejectment, confers also the power to issue notices, but it is not necessary that the authority should be in writing—*Badardoza v. Ajijoddin*, A.I.R. 1929 Cal. 651 (653), 57 Cal. 10, 33 C.W.N. 559, 120 I.C. 455.

A mortgagee in possession is entitled to determine the tenancy of an annual tenant without the consent of the mortgagor—*Barjorji v. Shripat*, A.I.R. 1927 Bom. 145 (148), 29 Bom. L.R. 215, 100 I.C. 1033. A notice to quit served by a Government officer without authority on a tenant under the Government is invalid—*Abdul Haque v. State of West Bengal*, 67 C.W.N. 1064.

559. Service of notice :—This section does not require that the notice should be delivered to the tenant personally by the landlord or his agent, or that it should be given direct to the tenant. Anyhow if the notice is delivered by some one to the tenant, the requirements of this section are complied with. If, therefore, notice is given in the first instance to the solicitor of the tenant, and is then conveyed by him through a relative or servant to the tenant, it is sufficient—*Bhojabhai v. Hayem Samuel*, 22 Bom. 754.

When two tenants hold premises in common, notice to quit to one of them is sufficient to determine the tenancy—*Woodfall's Landlord and Tenant*, 16th Edn., p. 379. Where, therefore, a notice to quit addressed to all the joint tenants who lived in commensality was handed over to one of them who signed an acknowledgement of it, held that the service was a good service—*Rojoni Bibi v. Hafizoonissa*, 4 C.W.N. 572; *Doe v. Watkins*, (1806) 7 East 531, 8 R. R. 670; *Vaman v. Khanderao*, A.I.R. 1935 Bom. 247, 156 I.C. 1620, 37 Bom. L.R. 376; *Bodardoza v. Ajijuddin*, A.I.R. 1929 Cal. 651 (654), 57 Cal. 10, 33 C.W.N. 559, 120 I.C. 455. In the case of joint tenants, if there is a tender or delivery of the notice to the head of the family, the service is sufficient. It is not necessary to deliver or tender the notice on each of the tenants personally—*Kedarnath v. Madhusudan*, 37 C.L.J. 478, 75 I.C. 105, A.I.R. 1923 Cal. 682. The procedure in case of joint tenants is that each is intended to be bound, and it has long ago been decided that service of a notice to quit upon one joint tenant is *prima facie* evidence that it has reached the other joint tenants—*Harihar v. Ramsashi*, 46 Cal. 458 (P.C.); *Mohanlal v. G. G. in Council*, A.I.R. 1945 Nag. 255. But the notice must be addressed to all the tenants. If a notice is addressed to one joint tenant, and served on him, another joint tenant is not bound by such notice—*Bejoy Chand v. Kali Prosanna*, 29 C.W.N. 620, A.I.R. 1925 Cal. 752 (754), 87 I.C. 708.

If a notice calling upon two joint tenants is sent to the address of one who refuses to accept, the tenancy is terminated—*Roshan v. Purshottam Lal*, A.I.R. 1965 All. 287; *Shri Nath v. Smt. Saraswati Devi Jayswal*, A.I.R. 1964 All. 52.

Under this section, the notice may be served on one of the family or servants of the tenant. If the notice has once been delivered to the addressee's relative or servant, it becomes immaterial whether the addressee actually receives it or not—*Doe de Neville v. Dunbar*, N. & M. 10; see also *Manzoor Ali v. Lal Devi*, A.I.R. 1951 All. 396; 1951 A.L.J. 154; *Ghulam Md. v. Lakshmibux*, A.I.R. 1951 Raj. 88. "When once you constitute your servant as your agent for that general purpose, service on that agent is service on you: he represents you for that purpose—he is your *alter ego*, and service upon him becomes an effective service upon yourself. Therefore the fact that the agent who received the notice

put it into the fire would liberate entirely the person who delivered the notice, but it would not liberate the receiver of the notice when once the agency was established; it would not avail him as a mode of escaping from the consequences of his having employed such an agent"—per Lord Hatherley, L.C. in *Tanham v. Nicholson*, 5 App. Cas. 561 (568, 569). But it should be noted that such service on the relative or servant must be made by delivery at *the residence* of the tenant. A service on a man's wife at a place other than his residence is not sufficient service—*Doe de Blair v. Street*, 2 A. & E. 328. If a Hindu taking a lease of shop in his personal capacity dies leaving several heirs a notice to quit served on one or more of the heirs is valid in law, provided the notice is intended to be a notice to all the heirs—*Mst. Ramubai v. Jiyaram Sharma*, A.I.R. 1964 Bom. 96. A notice to quit served on one of the joint tenants is sufficient and suit for ejectment against one of the tenants is also good—*Kunj Manji v. Trustee of the Port of Bombay*, A.I.R. 1963 S.C. 468. In the case of tenants-in-common, there is only unity of possession and not of title or interest; hence to determine such a tenancy notice must be issued to all the tenants—*V. Konnappan v. Kunniyil Manikkam*, A.I.R. 1968 Ker. 229.

The publication of notice in a newspaper does not amount to service of notice. Thus, where the landlord gave notice to vacate to the defendant, along with several other tenants, by means of an advertisement in a local newspaper, and it did not appear that the same form of notice was handed to the defendant or any member of his household, or that even a copy of the newspaper was sent to the defendant by hand or by post, it was held that to allow a mere advertisement in a newspaper to take the place of a notice to the tenant (or to the landlord) in terminating the tenancy was against reason and authority and that the persons to be affected must be addressed in a way which left no reasonable doubt as to his having knowledge of the notice—*Chandmal v. Bachraj*, 7 Bom. 474.

As a last resort, notice may be served by affixing it to a conspicuous part of the leased property. But before such service can be held to be valid, the Court will require strict proof to show that the service by tender or delivery as prescribed by this section was not practicable. A Civil Court peon went to serve a notice upon two tenants, one of whom was a pardanashin lady and the other a minor boy. Being told that the lady was indoors and that the boy had gone out to look after the cattle, the peon beat a drum, read the notice aloud and affixed a copy of the notice on the wall of the house. There were servants present, but no attempt was made to tender the notice to them or to find the boy and tender the notice to him. Held that the service of notice was not valid, inasmuch as the affixing of the notice to the wall was of no avail unless it was made out that tender or delivery was not practicable—*Biseswan v. Pitambar*, 51 I.C. 44 (Cal.). When the tenant is away from the premises and there is nobody else to receive notice, service by affixing the notice at the door is good service—*Satya Chorone v. Suresh Chandra*, 65 C.W.N. 1239.

Notice sent by post:—Service of notice may be made by a registered letter through the post office. Such service is not necessarily bad,

provided it is proved that the post-peon delivered the letter either personally to the party or to one of his family or to his servant—*Subadmi v. Durga Charan*, 28 Cal. 118; *Harihar v. Ramshashi*, 46 Cal. 458 (P.C.); *Bodardoza v. Ajijuddin*, A.I.R. 1929 Cal. 651 (653), 57 Cal. 10, 33 C.W.N. 559, 120 I.C. 455; *Saibalini Saha v. Snehalata Bose*, 65 C.W.N. 690. This is now expressly provided by the amendment made in the second para. When a notice by registered post comes back with the remark 'refused' the notice must be deemed to have been properly served without formal proof of refusal by the postman—*Saibalini v. Snehalata*, 65 C.W.N. 690; 71 C.W.N. 282. When an acknowledgment comes back signed by some person on behalf of the addressee, the service is good—*Radharani v. Angurbala*, 65 C.W.N. 1119.

Sending by post must mean sending by post to the tenant's proper address—*Prahladrai v. Commissioners for the Port of Calcutta*, A.I.R. 1938 P.C. 11, 43 C.W.N. 309 (P.C.). Where notice to quit though not properly addressed was accepted by the tenant and replied to the notice cannot be held to be invalid merely on the ground that it was not properly addressed—*Dwarka Prasad v. Central Talkies*, A.I.R. 1956 All. 187.

A notice sent by post must be addressed to the place of residence of the tenant. If addressed to the tenant at his *gadi* or place of business, the notice is not duly given—*Gobinda v. Dwarka*, 19 C.W.N. 489 (499).

It may be generally said that a notice is duly served if it is sent by registered letter, *though it is refused* by the tenant, and the bare fact of refusal to take and open the registered cover does not entitle the tenant to plead non-service of notice—*Jogendra v. Dwarka Nath*, 15 Cal. 681. Contra—*Vaman v. Khanderao*, A.I.R. 1935 Bom. 247, 37 Bom. L.R. 376, 156 I.C. 1020. If the letter containing the notice is properly addressed to the residence of the tenant, and is registered at the post office and left in the custody of the postal authorities, it must be presumed under sec. 114, Evidence Act, that the letter reached the tenant in the ordinary course, and the fact that the post office afterwards returned the letter as refused by the addressee does not destroy the presumption—*Girish v. Kishore*, 23 C.W.N. 319 (320), 54 I.C. 5. The tenant refusing the notice cannot afterwards plead ignorance of its contents, for he will be fixed with constructive notice—*Isma'il Khan v. Kali Krishna*, 6 C.W.N. 134 (137). If a notice is sent under certificate of posting at the address where the family of the tenant resides the notice is valid—*Sukumar v. Naresh Chandra*, A.I.R. 1968 Cal. 49. The presumption available for service under certificate of posting should not be given effect to when it is found that the notice by registered post and the notice served personally are both invalid—*M/s. Surajmull Ghanshyamdas v. Samadarshan Sur*, A.I.R. 1969 Cal. 109.

If a notice is sent by post, and is refused by the addressee, certain questions of evidence arise as to the date of sending the notice, the fact of return, and the date of tender or refusal. These are considered below:—

(1) If the notice is sent by post, it is first of all necessary to ascertain the date on which it was posted, and for that purpose it is necessary to rely on the date of the post mark, because the mere fact that a

notice is dated 16th of a month does not show that it must have been posted on that date—*Gobinda v. Dwarka*, 19 C.W.N. 489 (495), 26 I.C. 962. For instance, if the notice is dated 16th of a month calling upon the tenant to vacate on the 31st day of the month, but the notice is posted (as evidenced by the post mark) on the 17th, the notice is *prima facie* insufficient.

(2) If the notice sent by registered letter comes back to the sender through the Dead Letter Office, that fact does not justify the presumption that it has been *refused* by the tenant; for it may well be that it has been returned by the Post Office because the addressee has not been found; much less is there a presumption that the cover has been tendered to the addressee on a particular date—*Gobinda v. Dwarka*, 19 C.W.N. 489 (498).

(3) The date of the post mark of the post office of destination does not necessarily show that the letter was tendered to the addressee on the same date, especially if it is registered letter which is delivered by the post office only between specified working hours. Therefore, if a notice sent by registered post on the 16th of a month (calling upon the tenant to vacate on the 31st) reaches the post office of destination on the same day (16th) as evidenced by the post mark of that post office, that does not conclusively prove that the letter was tendered to the addressee on the 16th. And in the absence of such proof, the notice would be insufficient—*Gobinda v. Dwarka*, 19 C.W.N. 489 (495).

(4) If the letter comes back to the sender with an endorsement on the cover to the effect that the letter is returned as the addressee refused to receive it, and the endorsement is signed and dated by the peon, such endorsement is no evidence of the fact that the cover was tendered to the addressee on that date nor of the fact that it was refused by him on that date. These facts must be proved by calling the peon as a witness—*Gobinda v. Dwarka*, 19 C.W.N. 489 (496).

In view of the amendment in this section, sec. 114 of the Evidence Act and sec. 27, General Clauses Act, there is a presumption of law in favour of effective service where the notice is sent by registered post—*Bachcha Lal v. Lachman*, A.I.R. 1938 All. 388, (1938) A.L.J. 511. A lessor is not bound to prove service of notice if he sends the notice to the lessee by the registered post properly addressed. Where a firm is the lessor the identity of the partners need not be disclosed in the notice—*Saligram v. Abdul*, A.I.R. 1953 Ass. 206. Where a notice sent by registered post is returned with a postal endorsement "refused", the endorsement is admissible in evidence, even though the postman is not examined. Unless rebutted, it is sufficient notice under this section—*Bapayya v. Venkataratnam*, A.I.R. 1953 Mad. 884; *Nirmala v. Pravat*, 52 C.W.N. 659; *Sushil v. Ganesh*, 62 C.W.N. 193; *Saibalini v. Snehalata*, 65 C.W.N. 690; *Munni v. Pushpalata*, 71 C.W.N. 282. But see *Jankiram v. Damodhar*, A.I.R. 1956 Nag. 266; *Balgovind Rastogi v. Bhargava School Book Depot*, A.I.R. 1958 All. 369. It is submitted that for the purposes of this presumption, even sending the notice by ordinary post is sufficient, questions of correctly addressing the letter and posting it being questions of fact. Keeping a certificate of posting may be helpful.

If the defect in a notice is not pleaded at proper stage it is deemed to be waived—*Nathusingh v. Laxmanrao*, 1960 Jab. L.J. 549. New ground regarding defect in the notice to quit cannot be taken for the first time in second appeal—*Nathusingh v. Laxmanrao*, 1961 M.P.L.J. (Notes) 189.

107. A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

Leases how made.

All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

Where a lease of immoveable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee :

Provided that the “*State Government*” may,.....from time to time, by notification in the *Official Gazette*, direct that leases of immoveable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.

Amendment :—The third para has been added by sec. 55 of the T. P. Amendment Act (XX of 1929). See Note 568 below.

By the Government of India (Adaptation of Indian Laws) Order, 1937, which came into operation on 1st April, 1937, in the first line of the Proviso after the word “may”, the words “with the previous sanction of the Governor-General in Council” were omitted, the words “State Government” have been substituted for “local Government” by A.L.O. 1937 read with A.L.O. 1950 and the words “Official Gazette” have been substituted for “local official Gazette” by A.L.O. 1937.

The amended section deals with the mode of creation of a tenancy so exhaustively that a lease cannot be created in any other mode—*Mohan Lal v. Ganda Singh*, A.I.R. 1943 Lah. 127 (F.B.).

560. This section, like sections 54 and 59, must be read as supplemental to the Registration Act. (See sec. 4 and Notes thereunder). The effect of this section is to abolish optional registration in respect of leases mentioned in the second para of the section. Such leases may be effected by simple delivery of possession without any written instrument; but if they are in writing and no possession is delivered, they must be registered (*O’Leary v. Maung On Gaing*, 4 Bur. L.T. 197, 11 I.C. 863) unless there is any Government Notification sanctioning the creation of such leases by unregistered writing only. And so, an unregistered lease for a term of less than one year is invalid if possession is not delivered to the lessee—*Gulab Khan v. Lal Muhammad*, 96 I.C. 410, A.I.R. 1926 Oudh 609. A lease for a period less than one year if made in writing (and not by an oral agreement accompanied with delivery of possession) must be registered under

the 2nd para of this section, although it is not compulsorily registrable under sec. 17 of the Registration Act—*Rama Sahu v. Gowro Ratho*, 44 Mad. 55 (64) (F.B.). If such document is not registered, it will be inadmissible under the Transfer of Property Act for the purpose of proving the creation of a lease by its own force or for the enforcement of the terms of it, but it is valid under sec. 17 of the Registration Act, and is therefore admissible in evidence under sec. 49 of that Act for the collateral purpose of proving either an oral lease or for explaining the nature of the possession of the persons in occupation—*Ibid*; *Kedar Nath v. Dungar*, 32 P.L.R. 361, A.I.R. 1931 Lah. 501, 134 I.C. 289. See also the new proviso of sec. 49, Registration Act, cited under Note 289, *ante*, and in Appendix V.

The last para has been added by the Amendment Act VI of 1904, because of the Madras High Court decision in *Vairanandan v. Miyakan Rowther*, 21 Mad. 109 where it was held that leases falling under sec. 107 of the T. P. Act were compulsorily registrable notwithstanding the Government Notification issued under the proviso to sec. 17 (d) of the Registration Act.

560A. "Lease" :—This section is not governed by the definition of the term "lease" in the Registration Act, but by the definition given in sec. 105, *ante*—*Taj Din v. Abdul Rahim*, A.I.R. 1939 Lah. 423, 41 P.L.R. 498 relying on *Ram Krishna v. Jai Nandan*, 14 Pat. 672 (F.B.), 16 P.L.T. 451, A.I.R. 1935 Pat. 291.

Oral lease :—An oral lease being invalid under this section cannot be relied upon regarding the period of the tenancy—*Sengayyam v. Rasu*, A.I.R. 1952 Mad. 863.

The provisions of this Act were extended to Lahore in 1935, and thereafter an oral lease for a term exceeding one year could not be validly granted there—*Vinod v. Vishnubhai*, A.I.R. 1947 Lah. 388.

561. Agricultural lease :—Sec. 117 makes this Chapter inapplicable to leases for agricultural purposes. Consequently, the letting out of agricultural land need not be by a registered document; it may be by oral agreement or even by conduct of parties—*Alam Mulla v. Surendra*, A.I.R. 1923 Cal. 432 (433), 69 I.C. 57; *Giribala v. Dwarka*, 55 C.L.J. 312, A.I.R. 1932 Cal. 715; *Mohadeo v. Sheoram*, 90 I.C. 51, A.I.R. 1926 Nag. 9. Where, however, the lease relates to agricultural land, but is not a lease for agricultural purposes (e.g., where it is a lease granted to a rent-farmer or middleman) it is clearly governed by this Act, and can only be made under this section by a registered instrument—*Rash Behari v. Tiluckdhari*, 20 C.W.N. 485, 29 I.C. 797, 23 C.L.J. 111. Where the primary object of the lease is not agricultural, the lease must be treated as not an agricultural lease. Thus, where the lease was for 10 years in respect of a village and certain shops in a city and it was signed by the lessor but not by the lessee, it was held that the combination of the lease of shops in the city with a lease of zemindari rights rather than cultivation rights showed clearly that the lease was not for agricultural purposes. It, therefore, fell within the mischief of this section and was void *ab initio*—*Bithal Das v. Mt. Iqbalunnissa*, A.I.R. 1940 Oudh 425, 1940 O.W.N. 842, 190 I.C. 44. A lease for planting *casuarina* trees is a lease for an agricultural purpose, and does not therefore require a registered instrument for its creation—*Panadai Pathan v. Ramasami*, 45 Mad. 710, A.I.R. 1922 Mad. 351.

This section has no application to kabuliyat in respect of agricultural land. A tenancy in respect of such land can be created by an oral agreement, but if an instrument is executed then it must be registered under sec. 17 (1) (d) of the Registration Act, and if not registered, it becomes inadmissible under sec. 49 of that Act—*Ali Hossein v. Jonabali*, A.I.R. 1936 Cal. 770 (772), 62 C.L.J. 534; *Imamali v. Priyawati*, A.I.R. 1937 Nag. 289 (290-291), I.L.R. (1938) Nag. 31, 171 I.C. 553; *Sivasubramania v. Theerthapati*, A.I.R. 1933 Mad. 451, 64 M.L.J. 676, 144 I.C. 27. Thus, an amalnama or kabuliyat relating to growing straw requires registration—*Ali Hossein v. Jonabali*, supra. So a lease for three years for working out lac-bearing trees need not be in writing and registered, but if reduced to writing it must be registered—*Imamali v. Priyawati*, supra.

562. Agreement of lease—Possession—Part performance :—If there is an agreement of lease, and the tenant enters into possession in pursuance of that agreement, it is not in the power of the landlord to repudiate the agreement. "A party who has permitted another to perform acts on the faith of an agreement shall not insist that the agreement is bad and that he is entitled to treat those acts as if it had never existed. Between landlord and tenant, when the tenant is in possession at the date of the agreement, the admission into possession, having unequivocal reference to contract, has always been regarded as an act of *part performance*"—per Plumer, M.R. in *Morphett v. Jones*, (1818) 1 Sw. 172 (181) : 18 R.R. 48; *Maddison v. Alderson*, (1883) 8 App. Cas. 467 (479).

It was formerly held that as this section refers to leases, i.e., actual transfer of property, and not to an *agreement* to grant a lease, such an agreement, if made *orally* was valid; and if in pursuance of such agreement the intended lessee had taken *possession*, though the requisite document had not been executed, the position would be the same as if the document had been executed, provided that specific performance could be obtained between the same parties in the same Court and at the same time as the subsequent legal question fell to be determined—*Baranashi v. Papat Velji*, 25 C.W.N. 220, 63 I.C. 118 (124); *Chunilal v. Gopiram*, 45 C.L.J. 32, 100 I.C. 404, A.I.R. 1927 Cal. 275 (277). But then came the judgment of the Privy Council in *Ariff v. Jadunath*, 58 Cal. 1235, 35 C.W.N. 550, A.I.R. 1931 P.C. 79, 131 I.C. 762, which repudiated the doctrine of part performance, on the ground that in view of the provisions of sec. 107, the verbal agreement alone could not create a lease in favour of the so-called lessee, in the absence of a registered instrument, and that the English doctrine of part performance could not be invoked to override or nullify the statutory requirement of a registered document. The result is that in view of the authoritative decision of the Privy Council, the doctrine of part performance cannot be invoked in cases in which the new sec. 53A did not apply.

In cases which will be governed by the Amendment Act, the provisions of section 53A will come into play, but that section requires the agreement to be *in writing*; and if either party brings a suit for specific performance, the case will fall under the new sec. 27A, Specific Relief Act (added by the T. P. Amendment Supplementary Act XXI of 1929); but even under this Act there must be a document in *writing*, otherwise the lessee will not be allowed to rely on the doctrine of part performance.

In connection with this section it has been held that if there is a proposal in writing and it is also accepted in writing, the proposal and acceptance constitute a contract in writing. But if the proposal is in writing, but the acceptance is not in writing, the entire agreement not being in writing, it cannot be said that the contract of lease is "in writing"—*Gokul v. Md. Din*, A.I.R. 1938 Cal. 136 (138), 42 C.W.N. 97.

This section, i.e., sec. 27A, overrules the case of *Sanjib Chandra Sanyal v. Santosh Kumar Lahiri*, 49 Cal. 507, 26 C.W.N. 329, A.I.R. 1922 Cal. 436, 69 I.C. 877, in which it was held that if the lessee took possession under an *unregistered* agreement of lease, he could not sue for specific performance, because he could not prove the agreement, it being unregistered. Under the present law, it is sufficient for a suit for specific performance if the document containing the contract of lease is *in writing* signed by the parties, and the lessee has taken possession.

The doctrine of part performance requires that there must be a contract of tenancy between the parties. But where there is no evidence to show that there was any agreement at all between the parties, much less is there evidence to show that the agreement, if any, was in the nature of a tenancy, and it has not been shown that the alleged tenant had at any time paid rent in respect of the land, *held* that there could be no presumption of tenancy from the mere fact of possession being held by the alleged tenant—*Mati Lal v. Darjeeling Municipality*, 17 C.L.J. 167, 18 I.C. 844 (845).

Part performance cannot override registration:—The doctrine of part performance can be invoked only in a suit for specific performance, but it cannot override the provisions of this section or of sec. 17, Registration Act, as regards registration. Therefore, where a lease which ought to be registered has not been registered, the lessor cannot enforce the terms of the lease, by relying on the doctrine of part performance—*Baij Nath v. Kundan*, 1929 A.L.J. 1134, A.I.R. 1929 All. 831 (832), dissenting from *Jogendra v. Kurpal*, 49 Cal. 345. See the Report of the Special Committee cited under sec. 53A, *ante*.

The doctrine of *constructive possession* of the entire lands by proving possession of a part can be relied on in favour of a person who has the legal title vested in him in the leasehold. But a person in possession under an invalid lease being a mere trespasser cannot invoke the principle of constructive possession. His possession is limited to the lands actually in his physical possession—*Hari Prasad v. Abdul*, A.I.R. 1951 Pat. 160.

Where under a written agreement to lease yearly rent is reserved, a lease in pursuance of it can only be created by executing a registered deed. The fact that the proposed lessees were in possession does not mean that a valid lease was created. In such a case they are mere licensees—*Anand v. Taiyab*, A.I.R. 1943 All. 279. Where an agreement does not alter the terms of a lease, but merely dissolves a dispute regarding its construction, it does not however require registration—*Jagadish v. Md. Bukhtiyar*, A.I.R. 1953 Pat. 409.

Agreement to lease:—*Specific performance*:—"It is elementary", observe their Lordships of the Judicial Committee, "that specific perform-

ance of an agreement to grant a lease cannot be decreed unless that agreement, either expressly or impliedly to be granted, fixes the date from which the term is to run"—*Giribala v. Kalidas*, A.I.R. 1921 P.C. 71, 57 I.C. 626, following in *Khushi Ram v. Munshi Lal*, A.I.R. 1940 Lah. 225, 42 P.L.R. 194, 189 I.C. 418.

Where present demise:—Where possession has been given under an agreement to lease and from that date the parties act exactly as though the tenancy has been in force, the fact that the tenancy is to commence at a date subsequent to the agreement does not prevent there being a present demise and the contract contained in the writing requires registration—*Bechar Das v. Borough Municipality*, A.I.R. 1941 Bom. 346, 43 Bom. L.R. 603; see also *Hemanta Kumari v. Midnapur Zemindari Co.*, 46 I.A. 240, 47 Cal. 485; *Ramjoo v. Haridas*, 52 Cal. 695, A.I.R. 1925 Cal. 1087, 91 I.C. 320; *Sultanali v. Tayeb*, 32 Bom. L.R. 188, A.I.R. 1930 Bom. 210, 125 I.C. 188.

This section only lays down how a lease is to be made and not how an agreement to lease can be made—*Radhabai v. Nayadu*, A.I.R. 1951 Nag. 285, I.L.R. 1950 Nag. 799. A written agreement to lease not creating a present demise need not be signed both by the lessor and the lessee. Such a writing, where it is a term exceeding one year, would however require registration—*ibid.* Where before preparing the instrument of transfer the parties prepared a draft lease, the contract itself was reduced to writing and the document served as a protection under sec. 53A of this Act—*Ibid.*

As to meaning of the lease:—An agreement as to the meaning of a lease does not by itself amount to the creation of a new lease. Thus, where in the case of a dispute between the parties as to their respective rights under the lease, a compromise petition fixing the rate of rent and prohibiting the lessee from constructing pucca roofs without the lessor's permission was filed, it was held that it did not create a new lease—*Manik Chandra v. Gour Krishna*, A.I.R. 1941 Cal. 536.

563. Lease from year to year :—A lease is deemed to be from year to year when the lessor has at the end of the year no power to determine it—*Hand v. Hall*, 2 Ex. D. 318. A lease which under sec. 106 is "deemed" to be a lease from year to year is nonetheless a lease from year to year under sec. 107 and must be registered subject to the provisions of sec. 53A—*Sali Prasanna v. Md. Fazel*, A.I.R. 1952 Cal. 320. Sec. 107 does not apply to a lease from year to year under sec. 116—*Zahoor Ahmad Abdul Sattar v. State of U.P.*, A.I.R. 1965 All. 326. Where the lease is in fact for a manufacturing purpose even though there is no registered lease deed, it must be deemed to be a lease from year to year for the purpose of notice under sec. 106—*Steurat & Co. Ltd. v. C. Mackertich*, A.I.R. 1963 Cal. 198.

A *be-miadi patta* is a lease without a term or a lease not for a definite period, but one from year to year. Even though a *be-miadi patta* recites that the lessee and his heirs and successors should hold possession of the property, still the lease would not be construed as a permanent one—*Parshan v. Tulsi Kuer*, 2 P.L.J. 180 (182), 39 I.C. 658.

The words "this is to remain in force until another *patta* is granted" in a *patta* for one year, show an intention to create or regulate the terms of a tenancy beyond the year from year to year—*Venkatachellam v. Audian*, 3 Mad. 358.

A lease of a hut or house which fixes a monthly rent is a monthly lease; it is not a lease from year to year by reason of the fact that the rent is made payable annually—*Mangal Singh v. Atra*, 3 Lah. L.J. 222, 60 I.C. 226.

If there is a lease of immoveable property from year to year or for a term exceeding a year reserving a yearly rent, the fact that it is embodied in a decree, will not save it from the necessity of registration—*Ramsao v. Shrimant*, I.L.R. 1940 Bom. 480, A.I.R. 1940 Bom. 281, 42 Bom. L.R. 501.

564. Lease for a term of one year or exceeding one year :—A lease of house property for a definite period of one year only can be established by proof of an oral agreement accompanied by delivery of possession—*Md. Farooq v. Mt. Masjide Begam*, A.I.R. 1942 Oudh 408, (1942) O.W.N. 357, 200 I.C. 593. A lease for one year certain with an expression on the tenant's part of readiness to hold the land longer at the same rent, if the landlord should so desire it, does not create in the tenant any interest exceeding one year—*Apu Budgavda v. Narhari*, 3 Bom. 21. See also *Boyd v. Kreig*, 17 Cal. 548 and *Jagjivandas v. Narayan*, 8 Bom. 493. So also, a lease under which the lessor agrees to let his premises for a period of one year and also agrees "not to increase the rent nor to have the premises vacated for further two years if the said tenant wish to occupy it for that period" is not lease for a term exceeding one year and is not therefore compulsorily registrable—*Beni Menahim v. Pebologo*, 8 Bom. L.R. 580. The reason is that if in a document in which a term of one year is specifically prescribed, any subsequent words are used for the continuance of possession, they are to be considered to appertain to the future consent of the parties, and cannot in any way affect the actual term fixed—*Apu Budgavda v. Narhari*, 3 Bom. 21. All leases of immoveable property for more than a year must be in writing and registered—*Battersby v. DeCruz*, 63 Cal. 31; *Bashir v. Nederlandsche Handel*, A.I.R. 1937 Rang. 180, 171 I.C. 643. Where a building is leased out for an indefinite period for carrying on business at a rent to be settled on the basis of percentage of profits earned after fifteen months, the lease is one for a period exceeding one year, it is compulsorily registrable and it does not attract sec. 106 T. P. Act—*Delhi Motor Co. v. Basrurkar, U.A.*, A.I.R. 1968 S.C. 794.

A lease for so long as the lessee continues to pay the stipulated rent is a lease not limited to one year—*Sheo Gholam v. Budreenath*, 4 N.W.P. 36. Where the lease of a rice mill is executed for one month with a condition that if there is paddy unmilled at the expiry of the lease, a fixed monthly rent every month will be paid for 5 years, the lease is a lease for over one year and requires registration—*U Min Sin v. Ko Kye*, A.I.R. 1941 Rang. 117.

A lease of immoveable property for the life of the lessee is a lease for a term exceeding one year and must be registered—*Parsotam v. Nana*, 18 Bom. 109; *Wazir v. Ram Prasad*, 59 I.C. 893 (Pat.).

Though a Hindi Sambat year is more than one year calculated according to the English calendar, a lease for one Sambat year is not compulsorily registrable—*Moti Ram v. Seth Lakshmi Chand*, A.I.R. 1924 Nag. 216.

The transfer of the right to enjoy immoveable property in perpetuity made by the holder of an impartible zemindary to a junior member on terms that the latter will give up all claims for maintenance and will pay annually to the zemindar a sum of money does not amount to a lease so as to be without effect unless in writing registered. Such a transaction should be regarded as a family arrangement and is effective though oral—*Arumugham v. Subramaniam*, A.I.R. 1937 Mad. 882 (892) (F.B.), I.L.R. (1937) Mad. 638, 171 I.C. 444.

Where under an oral agreement for a lease of 3 years the lessee was given possession and rent was taken from him, only the formal execution of the deed was to be done later, it was held that the oral agreement amounted to a lease and required a registered document—*Mopurappa v. Ramaswami*, A.I.R. 1934 Mad. 760, 152 I.C. 538.

A verbal lease for more than a year is valid for one year, if it is accompanied by delivery of possession. Hence the tenant who continues to be in possession beyond one year is holding over and the landlord is entitled to claim rent under sec. 116—*Aziz v. Alauddin*, A.I.R. 1933 Pat. 485, 144 I.C. 788 ; *Anand v. Taiyab*, A.I.R. 1943 All. 279. But where a term of an oral agreement to lease of residential premises was that the tenant should occupy the premises at least for one year and thereafter the tenancy would terminate by one month's notice on either side, it was held that the lease was for a period exceeding one year. Such a lease could only be made by a registered instrument, and there was no valid lease for one year—*Ram v. Lalit*, A.I.R. 1947 Cal. 351. An agreement to lease though void for want of registration as a transfer of property may yet be valid, regarded as an agreement—*Chandulal v. Keshavlal*, A.I.R. 1936 Bom. 246 (249), 163 I.C. 579.

A permanent lease can only be created by a registered instrument. So, when the origin of the tenancy is known and the document by which it was created is ruled out for want of registration, oral evidence as to the terms of the tenancy is inadmissible, nor can attendant circumstances be looked into to find out what was its nature or incidents, and an estoppel against statute cannot be pleaded. But an equitable estoppel may arise where the tenant has spent money in raising permanent structure under the belief, though mistaken, that he had a permanent right—*Badal v. Debendra*, A.I.R. 1933 Cal. 612, 37 C.W.N. 473, 145 I.C. 892. Where a person was let into possession not as a donee but as a tenant, and the permanent tenancy which he set up has failed as being in contravention of this section, the status of that person originated as that of a yearly tenant. After the expiration of the first year of this tenancy he is merely holding over with the consent of the landlord until the landlord seeks to assess rent on the land, and if the person denies his right to do so, a suit by the landlord for ejectment within 12 years after the date of the denial is within time—*Naim Sahib v. Tata Iron & Steel Co.*, A.I.R. 1941 Pat. 244, 191 I.C. 686.

The right of fishing is an interest in immoveable property and there-

fore a lease thereof for any term exceeding one year can be created only by a registered instrument—*Thakur v. Jagdambika Pratap*, A.I.R. 1942 Oudh 93, (1941) O.W.N. 1065, 196 I.C. 694. Consequently, in the absence of a registered instrument, the lessor can succeed only on the basis of use and occupation—*Ibid*.

A document executed by the landlord or the tenant varying the terms of the tenancy as to the amount to be paid requires registration—*Parbati v. Bandeali*, A.I.R. 1936 Cal. 155, 40 C.W.N. 638, 162 I.C. 33, relying on *Lalit v. Gopali Chuk Coal Co.*, 39 Cal. 284 (F.B.). But see *contra*, *Ramsao v. Shrimant*, I.L.R. 1940 Bom. 480, A.I.R. 1940 Bom. 281, 42 Bom.L.R. 501.

564A. Lease contained in several documents :—Where a lease is created by more documents than one, the whole correspondence, or at any rate the letters containing the offer and the acceptance, must be registered—*Morgan v. Fernandez*, 30 M.L.J. 519, 33 I.C. 439, 3 L.W. 370.

So also a document which varies the amount of rent payable under an existing registered lease, requires registration—*Lalit Mohan v. Gopalichak Coal Co.*, 39 Cal. 284 (F.B.).

565. Failure to give possession :—The first para of this section lays down that certain leases (e.g., a lease reserving a yearly rent) can be made only by a registered instrument, and in such leases *delivery of possession is not necessary* for the vesting of the interest in the lessee. The lessee in spite of the fact that he has not obtained possession, holds the position of a lessee, and can maintain an action against the lessor for mesne profits as damages for keeping the lessee out of possession—*Razia Begum v. Md. Daud*, 6 Pat. 94, A.I.R. 1926 Pat. 508 (511), 96 I.C. 558. In England, however, livery of seisin is necessary to complete the title of the lessee, and he is not regarded as a tenant before actual entry; consequently, he cannot maintain any action of the nature referred to above. This doctrine of English common law ought not to be applied in India—*Razia Begum v. Md. Daud*, supra.

As to the lessor's duty to give possession to the lessee, see Note 573 under sec. 108.

566. Effect of non-registration :—Acts indicative of establishing the relationship of landlord and tenant can create a tenancy. These acts may be expressed, implied or gathered from conduct or circumstances of the parties—*Ram Rachhya v. Kamakhya*, A.I.R. 1922 Pat. 216 (224), 4 Pat. 139, 84 I.C. 586. If a person relying on an unregistered patta is admitted in possession, he is entitled to refer to the unregistered patta for the purpose of explaining that he was let into possession as a tenant—*Kuer Rai v. Baburam Kuer*, A.I.R. 1940 Pat. 498, 187 I.C. 583; see also *Janki Kuer v. Brij Bhikan*, 3 Pat. 349, 5 P.L.T. 541, A.I.R. 1924 Pat. 641. Persons who are in possession of property under unregistered lease-deeds are not trespassers but merely tenants-at-will—*Gaya Prasad v. Baijnath*, 14 All. 176; *Sheo Karan v. Parbhu Narain*, 31 All. 276; *Ram Chandra v. Syameshwari*, 42 C.L.J. 71, A.I.R. 1925 Cal. 1171 (1172); and the lessor is entitled to recover rent from them. Even if they are not liable to pay rent, they are still liable to pay compensation for use and occupation of

the land—*Ajam Saheb v. Meenatchi*, 35 Mad. 95 (F.B.); *Sheo Karan v. Parbhu Narain*, 31 All. 276 (F.B.); *Ramchandra v. Tama Ragho*, 36 Bom. 500. See also *Md. Farooq v. Mt. Masjidi Begam*, A.I.R. 1942 Oudh 408, (1942) O.W.N. 357, 200 I.C. 593. But a suit originally brought for rent will not be allowed at a late stage of the case (e.g., in second appeal) to be amended into one for use and occupation—*Surendra v. Bhai Lal*, 22 Cal. 752. In order that a plaintiff may get a decree for use and occupation on his failure to get a decree for rent, the claim must be specifically laid for rent and in the alternative for use and occupation—*O'Leary v. Maung On Gaing*, 4 Bur.L.T. 197, 11 I.C. 863.

An unregistered agreement of lease is a sufficient basis for a suit for specific performance. See Note 562, *ante*, and sec. 27A, Specific Relief Act cited therein. Every lease reduced to writing is not necessarily registrable, but assuming that it is so, it cannot be disallowed as evidence because "equity will support a transaction, though clothed imperfectly in legal forms, to which finality attaches, especially if it had been acted upon by the parties"—*Md. Mussa v. Aghore Kumar*, 42 Cal. 801, 42 I.A. 1, 28 I.C. 930; *Mt. Sajjo v. Basdeo*, A.I.R. 1937 Oudh 505, 171 I.C. 84.

A compromise decree creating a lease from year to year is compulsorily registrable; if not registered a monthly tenancy is created—*Konchada Sundara Narayana Subadi v. Sodai Bhima Gouda*, I.L.R. (1964) Cut. 229; *Md. Azizul Haque v. Debendra*, A.I.R. 1959 Assam 57. An unregistered Kirayanama for a term of three years on monthly rent for residential purpose being void and inadmissible in evidence the duration of the tenancy is to be ascertained in accordance with sec. 106 T. P. Act—*Adit Prasad v. Chhaganlal*, A.I.R. 1968 Pat. 26. But see *Ram Pratap v. National Petroleum*, 54 C.W.N. 58 where it has been held that no tenancy is created by an unregistered lease for five years though the person in possession is entitled to protection under sec. 53A T. P. Act and that the unregistered deed is admissible in proof of part performance. See also *Biswabani Pvt. Ltd. v. Santosh Kumar*, A.I.R. 1964 Cal. 235 in which *Ram Pratap's* case has been followed.

Where the lessees admit the lease but plead that the lease-deed is inadmissible in evidence for want of registration, the Court is fully entitled to go behind the lease and determine its validity—*U Min Sin v. Ko Kye*, A.I.R. 1941 Rang. 117. Where the lessees admit a lease, but only one of them pleads that the lease-deed is inadmissible for want of registration and the lease is found to be invalid, it is invalid against all the lessees—*Ibid.* But see *Baldeoprasad v. Dasrathilal*, A.I.R. 1955 Nag. 27 where it has been held that a lease from year to year or reserving annual rent cannot be proved except by a registered instrument; all other evidence is shut out including admission of the landlord—*Baldeoprasad v. Dasrathilal*, A.I.R. 1955 Nag. 27; *Sudhir Kumar v. Dharendra Nath*, A.I.R. 1957 Cal. 625.

The effect of this section and sec. 17 (d) of the Registration Act is, however, to exclude from evidence all unregistered leases which have been reduced to writing. A rent note purporting to grant lease for 11 months which is not registered is not admissible in evidence to prove the period for which the lease was granted and the rent due under it—*Mt. Nasiban v.*

Md. Sayed, A.I.R. 1936 Nag. 174 (175), 164 I.C. 557. Where the agreement or kabuliyat by which a tenancy was created is not registered and no patta in respect of the tenancy is produced, the kabuliyat is inadmissible for the purpose of proving that the tenancy is permanent—*Ram Lal v. Bibi Zohra*, A.I.R. 1939 Pat. 296, 182 I.C. 618.

Section 49, Registration Act, applies only to instruments which are required to be registered by sec. 17 of that Act, and is not applicable to instruments which have to be registered under the provisions of the T. P. Act. Hence an unregistered lease for less than one year which is required to be registered under sec. 107, T. P. Act, but not under sec. 17, Registration Act, is admissible in evidence to prove the nature of the possession under the instrument—*Rama v. Gauro*, 44 Mad. 55 (F.B.); *Ramkishore v. Ambika Prasad*, A.I.R. 1966 All. 515.

Section 15 of the T. P. (Second Amendment) Act 21 of 1929 refers only to questions of right, title, etc., which have already accrued and does not affect a question of admissibility in evidence. Consequently, the Proviso to sec. 49 of the Registration Act introduced by sec. 10 (3) and (4) of Act 21 of 1929 is retrospective in operation and applies even to documents executed prior to 1st April, 1930—*Swarnamayee v. Sarajubala*, 43 C.W.N. 956. Under the Proviso to sec. 49 of the Registration Act correspondence amounting to an unregistered agreement to lease can be looked at for the collateral purpose of determining whether an attachment of the leased property is legal—*Khimji v. Pioneer Fibre Co.*, A.I.R. 1941 Bom. 337, 43 Bom.L.R. 576.

As regards the evidentiary value of an unregistered document of lease, see the new proviso to section 49, Registration Act (cited in Note 271, *ante*). The document is inadmissible to prove the tenancy, but it is admissible in evidence to prove the nature of the possession held under the instrument—*Ram Sahu v. Gowro*, 44 Mad. 55 (F.B.). An unregistered document (lease-deed) though inadmissible for the purpose of affecting immoveable property, may yet be looked to, not in any way as creating a title or as showing a transaction that affected the property, but merely as containing a clear and exhaustive statement of the adverse possession set up by a person holding under the unregistered deed—*Thakore Fatte Singhji v. Bamanji*, 27 Bom. 515. In a suit for rent, or for damages for use and occupation, the unregistered document of lease may be admissible in evidence for determining the amount of rent or establishing the rate of rent agreed upon between the parties, but in a suit to *enforce the terms* of the lease, the unregistered document would not be admissible to prove those terms—*Baij Nath v. Kundan*, 1929 A.L.J. 1134, A.L.R. 1929 All. 831 (832). The amount of rent mentioned in the unregistered document cannot be looked at in order to establish the rent fixed; it might be looked at in order to ascertain what amount the landlord suing for arrears of rent was entitled to by way of damages for use and occupation—*Kidar Nath v. Dungar*, 32 P.L.R. 361, 134 I.C. 289, A.I.R. 1931 Lah. 501 (502).

Although a tenancy cannot be established by reason of the fact that the lease-deed is not registered, yet it can be established if the defendants admit that they are tenants and that they had paid rent—*Venkatagiri v. Raghava*, 9 Mad. 142; *Ramchandra v. Ragho*, 36 Bom. 500.

567. Absence of writing and registration—Presumption :—Under this section, lease from year to year, or for a term exceeding one year, or reserving a yearly rent must be made by a registered instrument. If however, a (non-agricultural) lease is neither put into writing nor registered but is only accompanied by delivery of possession, the presumption will arise that the lease is from month to month (for which no writing is required), even though the rent appears to have been payable annually in a lump sum—*Debendra v. Shyama*, 11 C.W.N. 1124 (1126); *Sarat Chandra v. Jadav Chandra*, 44 Cal. 214; *Mohendra v. Narendra*, 50 I.C. 918 (Cal.); *Bisweswar v. Pitambar*, 51 I.C. 44 (Cal.); *Sheikh Akloo v. Emanon*, 44 Cal. 403, 33 I.C. 899; *Raval & Co. v. Ramachandran* A.I.R. 1967 Mad. 57 (F.B.); *Sampat v. Idol Sri Chandra Prabhaji Bhagwan*, 1968 Raj. L.W. 412. Where a lease was granted for construction of a house with merely tiled or thatched roof, the rent was fixed monthly and it was stated that the lessee was free to give up the house and remove the materials thereof whenever he chose, it was held that the tenancy was either a tenancy-at-will or a tenancy from month to month and that being so, the *Kabuliyat* though unregistered, was admissible in evidence—*Ram Lal v. Bibi Zohra*, A.I.R. 1941 Pat. 228, 20 Pat. 115. So also, where a person takes a lease at a fixed yearly rent, without settling the period of lease, and there is no written instrument, the presumption will be that he becomes a tenant for one year only—*Gobinda v. Dwarka*, 19 C.W.N. 489 (491), 26 I.C. 962. So again, a verbal lease for more than one year accompanied by delivery of possession, will be presumed to be a lease for one year only and is valid for one year—*Mohamed Musa v. Joganund*, 20 I.C. 715 (Cal.). A lease of a dwelling house must be presumed to be held on a monthly term where there is no written and registered contract to show that the lease was an annual one—*Shankar Ram v. Tulshi*, 2 P.L.T. 178, 61 I.C. 976; *Arunachella v. Ramiah*, 30 Mad. 109 (112). If the parties enter into an agreement for a lease for 15 years, and a document is executed but not registered, the effect is that the lease must be regarded as a lease for one year only, as a lease for a term exceeding one year can be made only by a registered instrument—*Matilal v. Darjeeling Municipality*, 17 C.L.J. 167, 18 I.C. 844 (845). See also *Alauddin v. Aziz*, A.I.R. 1934 Pat. 369, 148 I.C. 684. But this is no longer good law; see *Ram Kumar v. Jagadish*, A.I.R. 1952 S.C. 23.

In the absence of a written lease creating a tenancy, the nature of the tenancy must be determined from the surrounding circumstances and in particular from the course of dealings by the parties—*Dwarka v. Parbati*, A.I.R. 1942 Cal. 486, 46 C.W.N. 770. Section 107 does not control sec. 106—*Krishna Das v. Bidhan Chandra*, A.I.R. 1959 Cal. 181.

568. Third para, *Kabuliyat* :—The third para which has been newly added lays down that both the *patta* and the *kabuliyat* must be executed by the lessor and the lessee respectively; in the absence of a *patta*, a mere *kabuliyat* executed by the lessee is of no avail. Prior to this amendment there was difference of opinion on this point, which will be evident from the under-noted cases.

It was held by the Allahabad High Court as well as Oudh and Nagpur Courts that where the plaintiff agreed to give the defendant a lease of the land for five years, and the defendant executed a registered *kabuliyat* to

the effect, but *no patta* was written or registered, *held* that the transaction did not amount to a lease; in the absence of a deed of lease executed by the lessor, a *kabuliyat* executed by the lessee, even though registered and accepted by the lessor, was *not equivalent to a lease* for the purpose of this Act—*Kedar Nath v. Shankar Lal*, 46 All. 303 (309), 78 I.C. 934, A.I.R. 1924 All. 514; *Sheo Karan v. Maharaja Parbhu Narain*, 31 All. 276 (F.B.); *Raj Kuar v. Nabi Buksh*, 9 O.C. 396; *Nand Lal v. Hanuman*, 26 All. 368; *Kashi Gir v. Jogendranath*, 27 All. 136; *Ahmed Khan v. Sadasheo*, 80 I.C. 736, A.I.R. 1925 Nag. 121 (122); *Safdar Ali v. Ambika*, A.I.R. 1930 All. 678 (681), (1930) A.L.J. 1385, 130 I.C. 8; *A. P. Bagchi v. Mrs. Morgan*, A.I.R. 1937 All. 36 (38), 166 I.C. 897; *Md. Hasan v. Buddhu*, A.I.R. 1938 All. 32, 172 I.C. 973. Where there was an unregistered *patta* as well as a registered *kabuliyat*, *held* that the *patta* being unregistered was ineffective to constitute a lease, and that the *kabuliyat* alone, though registered, did not create a lease—*Sikandar v. Bahadur*, 27 All. 462. The Rangoon High Court, following the Allahabad view likewise *held* that since according to the definition given in section 105, a lease was a transfer of a right to enjoy property, a *kabuliyat* executed by the lessee could not be termed a lease, because it *did not transfer* any right in the property; it was merely an agreement to cultivate and pay rent—*U Tha Nyo v. Mg. Kyaw Tha*, 3 Rang. 379, 90 I.C. 693, A.I.R. 1925 Rang. 273, 4 Bur. L.J. 99; *Mg. Ba v. Htoon*, 5 Rang. 95, 102 I.C. 105, A.I.R. 1927 Rang. 169. The same view has been taken by the Patna High Court—*Ramkrishna v. Jainandan*, A.I.R. 1935 Pat. 291 (F.B.), 14 Pat. 672, 157 I.C. 98. A *Kabuliyat* cannot form the basis for a claim for rent—*Jagannath v. Amarendra Nath*, A.I.R. 1957 Cal. 479. But the landlord is entitled to recover compensation for use and occupation—*Ramnarain Passi v. Sukhi Tewary*, A.I.R. 1957 Pat. 24. A *patta* executed by the landlord was sufficient for the purpose of creating a lease before the amendment of 1929—*Bastacolla Colliery Co. Ltd. v. Bandhu Beldar*, A.I.R. 1960 Pat. 344 (F.B.). A lease for an indefinite period on payment of yearly rent cannot be created by a unilateral registered *Kabuliyat*. On acceptance of rent by the landlord the executant becomes a periodic tenant under sec. 106—*Chandra Nath Mukherjee v. Chulai Pashi*, A.I.R. 1960 Cal. 40; *Jagannath Mahaprabhu v. Saunti Lenka*, I.L.R. (1959) Cut. 296. A forfeiture clause in a *Kabuliyat* is admissible in evidence—*Chandra Nath Mukherjee v. Chulai Pashi*, A.I.R. 1960 Cal. 40.

But the Calcutta High Court *held* in *Raimoni v. Mathoora*, 39 Cal. 1016, 16 C.W.N. 606, 14 I.C. 540, and *Dinanath v. Janakinath*, 55 Cal. 435, A.I.R. 1928 Cal. 393 (396), that a *kabuliyat* executed by the lessee constituted a valid lease, though no formal *patta* was executed by the lessor; and the same view was taken by the Madras High Court in *Syed Ajam v. Ananthanarayan*, 35 Mad. 95 (F.B.), 8 I.C. 668 (over-ruling *Turof Sahib v. Esuf Sahib*; 30 Mad. 322). The Bombay High Court was of opinion that a *kabuliyat* or rent note executed by the lessee *did not operate as a transfer* of an interest in the property to the lessee and could not therefore operate as a lease; but if the lessee obtained possession, such possession would then be attributable to the document (*kabuliyat*) he had signed, which had been registered and accepted by the lessor, so that in equity he would be entitled to retain his possession against the lessor seeking to eject him—*Ram Singh v. Bai Dyanba*, 27 Bom. L.R. 626, A.I.R. 1925 Bom. 512, 88 I.C. 648.

The Calcutta and Madras (Full Bench) rulings are now rendered obsolete by this new third para of sec. 107.

Such a document is, however, admissible against the executant himself and would entitle the owner to eject the person in occupation—*Md. Hasan v. Buddhu*, supra. Although a patta is not a title-deed, it is a document of title to which great weight is generally given both by the possessor and by the Government. The latter cannot say that the pattadar is not entitled to the land nor the tress granted under the patta, nor can the pattadar say that he is not holding from the Government—*Secretary of State v. Hussain Sahib*, A.I.R. 1940 Mad. 783, (1940) 2 M.L.J. 13, 1940 M.W.N. 573, 191 I.C. 631. Though a Kabuliyat cannot operate as a valid lease, it can be used for explaining the plaint—*Jagannath v. Amarendra Nath*, A.I.R. 1957 Cal. 479.

The right to collect the fees of slaughter-houses and fish bazars is immoveable property. The letting of such right would, therefore, fall within the definition of "lease" and would require to be executed by both the lessor and lessee—*Md. Rowther v. Tinnevely Municipal Council*, A.I.R. 1938 Mad. 746 (747), 48 M.L.W. 74.

The amendment of this section requiring documents of lease to be in a bilateral form applies to contracts entered into before 1st April, 1930, so that if such an agreement is to be specifically performed afterwards, it must be performed by a document in the bilateral form and not by two separate documents—*Swarnamayee v. Sarajubala*, 43 C.W.N. 956.

A lease has to be signed both by the lessor and the lessee. Consequently a rent note (kabuliyat) signed only by the intending lessee is not a lease under the Act and would not require registration under this section. It may be a lease under the Registration Act according to the definition in sec. 2 (7) of that Act. But if it is neither from year to year nor for any term exceeding one year nor reserving a yearly rent, it does not require registration under sec. 17 (1) (d) of the Registration Act—*Tulsiram v. Govinda*, A.I.R. 1940 Nag. 143 (144), 1940 N.L.J. 110, 189 I.C. 753. Where a *sarkhat* has been executed by the tenant alone, it does not constitute a lease. There is nothing in this section which would make the registration of such a *sarkhat* compulsory or exclude it from evidence. The *sarkhat* is admissible as showing the terms of the contract previously entered into by the parties. A suit for ejectment and rent can be based upon it, although it does not create a lease—*Md. Farooq v. Mt. Masjidi Begam*, A.I.R. 1942 Oudh 408, (1942) O.W.N. 357, 200 I.C. 593.

A lease from year to year or for a term exceeding one year not executed in the manner specified in the third para of this section is invalid and the invalidity cannot be cured by construing it as a lease for one year made by oral agreement accompanied by delivery of possession and thereafter to be a case of holding over under sec. 116—*Hari Prasad v. Abdul*, A.I.R. 1951 Pat. 160. See also *Sant Bux v. Ali Raza*, A.I.R. 1946 Oudh 129, 21 Luck. 194. A Kabuliyat alone cannot create a lease—*Shiv Dutt v. Ghasita*, A.I.R. 1953 All. 499. Where the landlord accepts the Kabuliyat and receives rent as provided therein, the lessee cannot be denied the status of the tenant—*Asa Ram v. Mst. Ram Kali*, A.I.R. 1958 S.C. 183. Payment and acceptance of rent can create a tenancy—*Tulum*

Dhari Rai v. Devi Rai, A.I.R. 1965 Pat. 279. A deed of *Bharapatra* by which the executant states that he is a tenant at a particular rent for a period of 3 years is not however a lease and is not covered by the third para so as to be excluded from evidence—*Birendra v. Sukumar*, A.I.R. 1952 Cal. 352. A rent-deed executed by the tenant, if not registered, can be relied upon to establish the relation existing between the parties—*Mohan Lal v. Gauda Singh*, A.I.R. 1943 Lah. 127 (F.B.). A lease for more than one year cannot be created by a unilateral *Kabuliyat* even though it be registered one and even though it be accepted by the landlord orally or by writing unregistered—*Dip Narain Singh v. Kanai Lal Goswami*, 64 C.W.N. 293. A *Kabuliyat* is not a lease within sec. 105—*Ibid.* Where the lessee remained in possession for 12 years under a *Kabuliyat*, the lessee acquired the title which the agreement, if accompanied by a registered lease would have conferred upon him—*Ibid.*

Where the lessor alone executed a *patta* and the lessee alone executed a *Kabuliyat*, no valid lease is created—*Budhan v. Ramanugrah*, A.I.R. 1947 Pat. 78, 13 B.R. 332. Terms of contract embodied in a *Kabuliyat* cannot be proved either by the *Kabuliyat* or by any other evidence—*Hiralal Rewani v. Bastacolla Colliery Co. Ltd.*, A.I.R. 1957 Pat. 331. If a person executes a registered *Kabuliyat* purporting to take a settlement of some land for 10 years for building purposes and pays rent only for the first two years, he is neither a tenant for ten years nor for one year but he is a tenant from month to month—*Ram Kumar v. Jagdish Chandra*, A.I.R. 1952 S.C. 23. If a *Kabuliyat* for three years is unregistered, a monthly tenancy is created—*Lalchand v. Radha Ballabh*, A.I.R. 1959 Raj. 240.

569. Delivery of possession :—Under this section a lease for less than one year must be made either by a registered instrument or by an oral agreement to be completed by delivery of possession. So where in a suit for recovery of rent on the basis of certain unregistered rent notes (leases for less than one year) no oral agreement was relied upon, nor was the suit for recovery of compensation for use and occupation, the suit was dismissed in view of the provisions of secs. 105 and 107—*Md. Malan v. Dayal Singh*, A.I.R. 1939 Lah. 162, 41 P.L.R. 178. It has been held under sec. 54 that a sale of immoveable property of value less than Rs. 100, which is already in the possession of the purchaser, need not be effected by any further delivery of possession, nor by registration. See Note 292 "Delivery of Possession" under sec. 54. The same principle will hold good in case of leases also. Therefore, a lease not being a lease from year to year, etc., does not require any further delivery of possession or registration where possession has already been delivered to the lessee under a prior valid lease. See *Hari Chand v. Hammond*, A.I.R. 1934 Pesh. 81, 148 I.C. 548. The correctness of this well-recognised principle has, however, been doubted in *Fakira v. Leakut*, 18 C.W.N. 858, 23 I.C. 318; see also *Mt. Malan v. Dayal Singh*, supra.

When a registered deed purporting to create a lease in favour of the plaintiff is not signed by both the parties and the plaintiff fails to obtain delivery of possession on account of the land being in the possession of a trespasser the plaintiff's suit for possession is bound to fail even if the landlord had accepted rent—*Orient Paper Mills v. Sitaram Agarwala*, A.I.R. 1957 Orissa 276. But when the lease is for agricultural purpose

the executant of the Kabuliyat not signed by the landlord can sue the trespasser even if he subsequent to the lease intended to build a house on the demised land—*Dassain Nonia v. Ramdeo Prasad*, A.I.R. 1957 Pat. 692.

The mere execution of a rent-note unaccompanied by transfer of possession does not transfer interest in the property—*Ramsing v. Bai Dyanba*, A.I.R. 1925 Bom. 512, 27 Bom.L.R. 626, 88 I.C. 648. But where an oral lease accompanied by possession has been established, the deed of rent can be used as a corroborative piece of evidence to support the terms of the lease—*Taz Din v. Abdul Rahim*, A.I.R. 1939 Lah. 423 (425), 41 P.L.R. 498. An oral lease for more than one year accompanied by delivery of possession is valid for the first year and thereafter the lessee continuing in possession with the assent of the lessor becomes a tenant by holding over—*Laxminarayan v. A.D.C. Akola*, 1958 Nag. L.J. (Notes) 22.

Delivery of constructive possession is quite sufficient for the purposes of this section—*Mohan Lal v. Gauda Singh*, A.I.R. 1943 Lah. 127 (F.B.); *Parameswar Lal Agarwalla v. Dalu Ram Jalan*, A.I.R. 1957 Assam 188.

570. Leases by Government :—Leases granted by Government are outside the operation of the Transfer of Property Act. See the Crown Grants Act (printed in the Appendix). But although the Crown Grants Act exempts such leases from the operation of the Transfer of Property Act, it does not exempt them from the operation of the Registration Act; and the question whether a particular lease granted by Government does or does not require registration, is to be decided with reference to sec. 90 of the Registration Act. See *Munshi Lal v. Notified Area*, 36 All. 176, 12 A.L.J. 219, 22 I.C. 933; *Secretary of State v. Nistarini*, 6 Pat. 446, A.I.R. 1927 Pat. 319 (321, 322), 104 I.C. 209; *Kallingal Moosa v. Secretary of State*, 43 Mad. 6, 53 I.C. 345.

It is not necessary under the Crown Grants Act that the grant should be evidenced by a writing signed by or on behalf of the Crown. All that is required is that in point of fact the transaction has the effect of a grant by or by the authority of the Crown. So a lease executed by the lessee alone and accepted and acted upon by the Government operates as a grant by the Crown. Hence para 3 of sec. 107 of the present Act does not apply to the lease—*Manindra v. Amiya*, A.I.R. 1951 Cal. 361, 55 C.W.N. 171. A license given by Government to prospect minerals in land is not required to be registered, as it is in the nature of a Crown grant—*Rangaswami v. Nimbaker*, A.I.R. 1946 Mad. 180, (1945) 2 M.L.J. 400. See also *Ramnarayan v. State of M. P.*, A.I.R. 1962 Madh. Pra. 93 (F.B.).

108. In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following or such of them as are applicable to the property leased :—

Rights and liabilities of lessor and lessee.

(A) *Rights and Liabilities of the Lessor.*

(a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended

use, of which the former is and the latter is not aware and which the latter could not with ordinary care discover :

(*b*) the lessor is bound on the lessee's request to put him in possession of the property :

(*c*) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contract binding on the lessee, he may hold the property during the time limited by the lease without interruption.

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(*B*) *Rights and Liabilities of the Lessee.*

(*d*) If during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease :

(*e*) if by fire, tempest or flood, or violence of an army or of a mob or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void :

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision :

(*f*) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor :

(*g*) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor :

(*h*) the lessee may even after the determination of the lease remove, at any time whilst he is in possession of the property leased, but not afterwards all things which he has attached to the earth ; provided he leaves the property in the state in which he received it :

(*i*) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representa-

tive is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them :

(j) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease :

nothing in this clause shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee :

(k) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest :

(l) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf :

(m) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition, and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left :

(n) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor :

(o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own ; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell or sell timber, pull down or damage buildings

belonging to the lessor, or work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto :

(*p*) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes :

(*q*) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.

Amendment :—Clauses (h) and (o) have been amended by sec. 56 of T. P. Amendment Act (XX of 1929). See Notes 579 and 585 below.

571. Scope :—This section applies only in the absence of a *contract to the contrary*—*Megh Lal v. Raj Kumar*, 34 Cal. 358 (371). The provisions of this section are also subject to local usage—*Kanai v. Rasik*, 19 C.W.N. 361. Where the exact nature and terms of the tenancy are obscure, they must be gathered from the conduct of the parties and the apparent use which has been made of the land ever since the grant—*Joti Prasad v. Har Prasad*, A.I.R. 1932 All. 473, (1932) A.L.J. 567, 139 I.C. 346.

A lease for a term cannot be avoided by the lessee for breach of a covenant by the lessor—*Govindaswami v. Palaniappa*, A.I.R. 1925 Mad. 833, 48 M.L.J. 397, 87 I.C. 10.

The breach of any of the obligations imposed by this section does not entitle the lessor to determine a lease governed by the Rent Control Order; the lessor can merely claim damages and injunction—*Pandit v. Narsinghdas*, A.I.R. 1950 Nag. 870.

Agricultural leases :—Though this section is not applicable to agricultural leases (see sec. 117), yet the principles of this section ought to be followed in the case of such leases, as embodying the rules of justice, equity and good conscience—*Srinivas v. Ranga Swami*, 1 L.W. 858, 25 I.C. 812; *Narayan v. Krishna Rao*, 14 N.L.R. 188, 43 I.C. 970; *Penu-metsa v. Gopiseti*, 40 I.C. 590.

572. Clause (a)—Material defects :—Compare notes under sec. 55, cl. (a). A defect in the lessor's *title* cannot be said to be a material defect in the *property* within the meaning of this clause—*Syed Mukhtar v. Rani Sunder*, 17 C.W.N. 960 (963), 19 I.C. 815.

The landlord must inform his tenant of all latent defects in the property. If the furniture of the tenant of a thatched bungalow is destroyed by a fire caused by a defect in the chimney not disclosed to the tenant the landlord is liable for the loss sustained by the tenant—*Radha Krishna v. O'Faherty*, 3 B.L.R. (A.C.) 277.

The landlord is bound to disclose the defects which exist at the time of granting the lease; it is not necessary that he should apprise the tenant of any subsequent deterioration of the demised property rendering it unfit for occupation—*Sarson v. Roberts*, (1895) 2 Q.B. 395 (399).

572A. Covenant of title :—The lessor's obligations to disclose def-

ects is limited to "any material defect in the property with reference to its intended use." These words have reference only to the nature and condition of the property to be demised. No obligation as to *production of documents* or giving *answers to questions* (requisitions) is mentioned in this section. And the lessee cannot call upon the lessor to produce satisfactory evidence of his title, before completion of the lease. The lessee may, however, repudiate a lease by proving that the title is bad. And this he can do, not necessarily by establishing that the lessor has no good right to convey, but by showing that the interest which would be conveyed to him (lessee) would be nugatory, precarious or incomplete—*Jyoti Prosad v. H. V. Low & Co.*, 57 Cal. 1189, 34 C.W.N. 347 (351, 354, 355), A.I.R. 1930 Cal. 561, 128 I.C. 321.

The lessee suing to get possession must prove both title of his lessor and his own title under the lease—*Bithal Dass v. Mt. Iqbalunnissa*, A.I.R. 1940 Oudh 425, 1940 O.W.N. 842, 190 I.C. 444. One of the joint lessors or lessees cannot enforce the covenant of a lease—*Jadunandan v. Mt. Maho*, A.I.R. 1939 Pat. 428, 185 I.C. 284.

Where a lessor covenants to indemnify the lessee against all persons, this is but a covenant to indemnify against lawful title—*Keshab v. Sher Singh*, A.I.R. 1937 Lah. 930, 171 I.C. 114; see also *Indu Bhusan v. Mozzam Ali*, A.I.R. 1929 Cal. 272 and *Ayyanna v. Gangayya*, A.I.R. 1933 Mad. 465, 144 I.C. 16.

573. Clause (b)—Delivery of possession:—Compare section 55, clause (1) (f). This clause lays down that the lessor is bound, on the lessee's request, to put him in possession of the property; hence non-delivery of possession is a good answer to a suit for rent—*Meenakshi v. Chidambaram*, 23 M.L.J. 119, 15 I.C. 711 (714); *Ganda Sing v. Secretary of State*, A.I.R. 1934 Pesh. 101, 152 I.C. 231. If the lessee obtains possession of only a *portion* of the property leased, he is liable to pay rent only for the portion of which he has obtained possession—*Abdul Karim v. Upper India Bank*, 19 P.R. 1918, 40 I.C. 684 (685); *Surendra v. Bhudar*, A.I.R. 1938 Cal. 690 (691), 67 C.L.J. 136. Where the lessor fails to give the lessee possession of the whole leasehold, it is open to the lessee to repudiate the entire contract. But if he remains in possession of a portion of the property, he must pay a reasonable sum for use and occupation—*Hanumantha v. Doraiswami*, A.I.R. 1928 Mad. 380 (381), 54 M.L.J. 354, 109 I.C. 465. If the tenant is not given occupation of the whole of the land demised, the landlord has no right to the entire rent and unless he has a right or some equity to an apportionment he can recover nothing on the contract—*Abhoy v. Hem*, A.I.R. 1929 Cal. 568, 33 C.W.N. 715; *Sajjad v. Trailakhya*, A.I.R. 1928 Cal. 479, 55 Cal. 464, 31 C.W.N. 472. But the doctrine has no application where the rent is so much per acre or bigha—*Katyanai v. Uday*, A.I.R. 1925 P.C. 97 (99), 52 I.A. 160, 52 Cal. 417, 30 C.W.N. 1, 88 I.C. 110. It has however been recently held by the Privy Council that in Bengal the doctrine of suspension of rent should not be applied to cases where the lessor fails to give possession to the lessee of part of the tenure demised, for relief by specific performance, by damages, by abatement of rent is not unobtainable in the Courts—*Ram Lal v. Dhirendra*, A.I.R. 1943 P.C. 24, on appeal from *Dhirendra v. Ram Lal*, *infra*. *Katyanai v. Uday*, 52

I.A. 160 does not lay down that if the rent is a lump sum rent, then in all cases of failure to give possession of any part, there can be a suspension of rent—*ibid.* Where there is no dispossession, but an original failure of making over possession of a small portion of the demised land, and the tenant has paid the full rent for a long period there should be abatement but no suspension of rent—*Dhirendra v. Ramlal*, (1938) 42 C.W.N. 1030; *Manohar Lal Seal v. M/s. Bengal*, A.I.R. 1958 Pat. 457.

If the land is already in the possession of a third person to the knowledge both of the lessor and the lessee, it would be the duty of the lessor to make it possible for the lessee to take possession by removing the third person from the possession thereof. But where the lessee knows the land and there is no obstruction to his going upon the land the lessor is not required to put the lessee in possession unless the latter requests him to do so; and if the lessee neither requests the lessor to put him in possession nor himself chooses to take possession, he cannot resist a suit for rent on the ground of not getting possession—*Narayanaswami v. Yerramilli*, 33 Mad. 499 (501). If the leased land is in the occupation of a third person, *viz.*, a previous lessee, the present lessee is entitled to bring a suit for possession not only against the lessor but also against that third person; in fact the suit should be brought against both—*Bishen Sarup v. Abdul*, 1931 A.L.J. 666, A.I.R. 1931 All. 649 (651); *Md. Fazehzzaman v. Anwar Husain*, A.I.R. 1932 All. 314, (1932) A.L.J. 126, 139 I.C. 828. The mere fact that the lessor in the course of the suit entered into a compromise with the former lessee whose lease had expired, does not disentitle the latter lessee from obtaining his decree against the former lessee—*Ibid.* In spite of the lease the landlord can also maintain a suit to eject a trespasser for the purpose of putting his lessee in possession. He is not bound to implead his tenant in such a suit—*Damodar v. Lachimi*, A.I.R. 1928 Pat. 354 (355), 7 Pat. 496, 110 I.C. 642.

Where the property leased is in the occupation of raiyats, delivery of possession may be sufficiently given by the giving of a notice to the tenants requiring them to attorn and pay rent to the lessee—*Natesan v. Vengu Nachiar*, 33 Mad. 102 (110); *Zemindar of Vizianagram v. Behara*, 25 Mad. 587 (592); but the mere execution and delivery of the lease-deed would not in such cases amount to delivery of possession—*Zemindar of Vizianagram v. Behara*, 25 Mad. 587 (591). It should also be noted that a notice to the raiyats to pay rents to the lessee would amount to delivery of possession only where the lessor himself has possession to give, and not where he is himself out of possession—*Natesa v. Vengu*, *supra*; *Abdul Karim v. Upper India Bank*, 19 P.R. 1918, 40 I.C. 684 (685).

If the tenant denies that he has ever got possession of the subjects let, the identity of which is not disputed, the landlord cannot claim rent without proving not only that the tenant is in possession but that such possession is referable to the lease. Where, however, the tenant has already paid rent the onus is on the tenant to prove that certain subjects, of which he did not get possession are within the subjects let—*Jogesh Chandra v. Emdad*, 59 Cal. 1012 (P.C.), 36 C.W.N. 221 (229), A.I.R. 1932 P.C. 28, 136 I.C. 398.

Where the lessor has failed to put the lessee in possession, the lessee can sue the lessor either for the profits of the immoveable property wrongfully received by the lessor for the lessee's use, or for damages for breach of contract—*Zemindar of Vizianagram v. Behara*, 25 Mad. 587 (595); see also *Razia Begum v. Md. Daud*, 6 Pat. 94, A.I.R. 1926 Pat. 508 (511), 96 I.C. 588, cited in Note 565 under sec. 107; *Purna Nand Puri v. Kamala Sinha*, A.I.R. 1965 Pat. 39. Stipulations to the effect that the lessee shall not be competent to raise any objections on the ground of drought, inundation, dispossession, etc., of any kind and that he shall not claim any *dags*, etc., which may have been included in the lease but which are owned and possessed by anybody else, do not in any way take away from the lessee the ordinary rights of being put in possession and in default claiming a rescission of the contract—*Ahamad v. Jamini*, A.I.R. 1930 Cal. 385 (386), 57 Cal. 114, 125 I.C. 607. This section does not mean that the parties can agree that the lessee shall have no right of possession. If they do so, then the transaction would not be a lease at all. Therefore, the transfer of a mere right to the usufruct of a property without the right to possess the land will not be a lease—*Governor-General v. Indar Mani*, A.I.R. 1950 E.P. 296, 52 P.L.R. 107.

574. Clause (c)—Covenant for quiet enjoyment :—Under this clause the so-called covenant for quiet enjoyment is deemed to be a part of the contract and to be read into the contract; whereas under section 55, it is not a part of the contract, but merely a statutory obligation—*Ramparikha v. Mt. Ramjhari*, A.I.R. 1937 Pat. 44 (47), 15 Pat. 753, 166 I.C. 599. The present section, read with secs. 18 and 25 of the Specific Relief Act reveals that the question of a transferor's title is as material in a lease as in a sale, although when the lessee sues for recovering his premium from the lessor, the burden of proving the lessor's defective title lies on the lessee—*Vinayake Rao v. Bhundu*, A.I.R. 1942 Nag. 103 (105), I.L.R. 1942 Nag. 349, 202 I.C. 9. Where the lessor has no title to the land and a stranger does not allow the lessee to have possession of the leased property, the lessee is entitled to a refund of the premium paid to the lessor—*Ibid.*

Though this section is not in force in the Punjab, yet the principle relating to covenant for quiet enjoyment is of universal application. Where a lessor covenants to indemnify the lessee against all persons, this is but a covenant to indemnify against lawful title—*Keshav v. Sher Singh*, A.I.R. 1937 Lah. 930; see also *Ayyanna v. Gangayya*, A.I.R. 1933 Mad. 465, 144 I.C. 16; *Vaskuri v. Vedangi*, A.I.R. 1933 Mad. 465, 144 I.C. 16, where the principle was applied in the case of a contract by a Receiver. The covenant for quiet enjoyment contemplated by this clause extends only to the disturbance of the lessee's possession by the lessor or by persons claiming under him or by his landlord, but not to disturbance by a trespasser—*Srinivasa v. Rangaswami*, 1 L.W. 858, 25 I.C. 812; *Syed Mukhtar v. Rani Sundar*, 17 C.W.N. 960; *Udai v. Katyani*, 49 Cal. 948, 35 C.L.J. 292; *Douzelle v. Girdharee*, 23 W.R. 121; *Dharam Narain v. Labh Singh*, 60 I.C. 477 (Lah.); *Surendra v. Bhudar*, A.I.R. 1938 Cal. 690 (691), 67 C.L.J. 136; *Vaskuri v. Vedangi*, A.I.R. 1933 Mad. 465, 144 I.C. 16. The implied covenant protects the lessee against all disturbances by the lessor whether lawful or not; but as against other

persons, it protects the lessee only against *lawful* disturbances—*Naurang v. A. J. Meik*, 50 Cal. 68 (74), 36 C.L.J. 28; *Banka Behari v. Madan Mohan*, 26 C.W.N. 143; *Indu Bhushan v. Chowdhury Moazam*, 33 C.W.N. 106 (111); *Wolton v. Hele*, (1670) 2 Wms. Saund. 177, 178 (b). The law has been thus stated by Woodfall, *Landlord and Tenant*, 16th Ed., p. 713: "The lessee is to enjoy the lease against the *lawful* entry, eviction or interruption of any man, but not against the *tortious* entries, evictions or interruptions, and the reason for the law is solid and clear, because against the tortious acts the lessee has his proper remedy against the wrong-doers." Therefore, where the lessee is disturbed in his possession by the wrongful acts trespassers and there was nothing to show that the trespassers were instigated by the lessor, the lessee is not entitled to suspend the payment of rent, and if he suspends the payment, the landlord is entitled to cancel the lease and evict the lessee—*Vithilinga v. Vithilinga*, 15 Mad. 111 (121) ; *British India Corpn. v. Secy. of State*, A.I.R. 1945 All. 425, I.L.R. 1945 All. 412. As to the basis of damages recoverable by the lessee from the trespasser see *Kanchanlal v. Hariprasad*, A.I.R. 1951 Nag. 379, I.L.R. 1951 Nag. 516. Where a third person dispossesses both lessor and the lessee by purchase in execution sale by title paramount, and the lessee thereafter attorns to the third person by payment of rent, the lessor's title becomes extinguished and there occurs a surrender of the lease by operation of law. Consequently the lessor cannot claim rent from the lessee after the eviction—*Hanumanthaiya v. Thavakal San*, A.I.R. 1950 Mys. 9.

Where the sub-lessee of a theatre is prevented by the original lessor from using the theatre on the ground that he had served a notice on the lessee determining the lease and the sub-lessee is compelled to take a fresh lease from the proprietor on payment of an additional sum, there is a breach of covenant for quiet enjoyment which entitles the sub-lessee to bring a suit for damages against the original lessee—*Gajadhar v. Rambhau*, A.I.R. 1938 Nag. 439.

The words "without interruption" in this clause are not qualified in any way, and have been understood to mean what is known in England as a covenant for quiet enjoyment in a *unqualified form*. In other words, the lessee is protected against interruption by whomsoever it is occasioned, *i.e.*, interruption caused by the lessor or by persons who claim under the lessor, or by persons claiming by *right paramount* to the lessor—*Tayawa v. Gurshidappa*, 25 Bom. 269 (273); *Narayan v. Gokuldas*, A.I.R. 1947 Nag. 48, I.L.R. 1946 Nag. 568. The grant of a tenancy of the surface land does not preclude the landlord from exercising his right to drain his premises by underground drain through the demised land—*Bothra Bros. Ltd. v. Sm. Pramila Bala Dutt*, A.I.R. 1959 Cal. 309. Against the covenant to pay rent, eviction by the title paramount is a good defence and to constitute it three conditions must be fulfilled: the eviction must have been from something actually forming part of the premises demised; the party evicting must have a good title; and the tenant must have quitted against his will. To constitute eviction forcible expulsion is not necessary—*Jogendra v. Mahesh*, A.I.R. 1929 Cal. 22 (25), 55 Cal. 1013, 32 C.W.N. 559, 112 I.C. 172. The lessor is bound to protect the possession of the lessee against persons claiming under para-

mount title. Therefore, where the lessor knowing that he had no title gave a lease, but in consequence of his want of title failed to secure possession to the lessee or failed to secure him undisturbed possession, the lessee being ejected by the true owner of the land, *held* that the lessor failed to carry out the obligation imposed by this clause and was not entitled to recover rent—*Motilal v. Yar Mahammad*, 47 All. 63, A.I.R. 1925 All. 275, 85 I.C. 756. *Tayawa v. Gurshidappa*, *supra*. If a tenant has been evicted against his will or forced to attorn to a person holding title paramount, he would be freed from his liability—*Narayanaswami v. Lakshmi Narasimha*, A.I.R. 1939 Mad. 220 (222, 223), 1939 M.W.N. 98, 48 M.L.W. 759, relying on *Bilas v. Desraj*, 42 I.A. 202., 37 All. 557. But if the person claiming title has no registered deed on which his title rests, the tenant is liable to pay rent to his lessor—*Narayanaswami v. Lakshmi Narasimha*, *supra*, at p. 224. Where a tenant is dispossessed in execution of a decree by a person having paramount title, the landlord cannot obviously claim any rent without restoring possession, since every lease conveys a covenant for quiet enjoyment. But the landlord is entitled to recover the rent for the period prior to the dispossession by virtue of sec. 116 of the Evidence Act—*Parkash Kuar v. Giam Chand*, A.I.R. 1940 Lah. 341, 191 I.C. 555. But the mere institution of a suit for possession by a person having a title paramount in law does not amount to such eviction—*Amrita Lal v. Uttam Lal*, I.L.R. (1938) 2 Cal. 559, A.I.R. 1939 Cal. 216, 181 I.C. 529. A considerable portion of land was given by A in lease, but out of it 61 acres belonged to another owner B who dispossessed the tenant. Later on A brought a rent suit against C, B's wife, who had acquired the tenure as purchaser at an execution sale of a decree against the tenant. Seeing that she had not obtained possession of the land included in the tenure, C claimed an abatement in the rent: *held* that C was entitled to the abatement—*Jatindra v. Uday*, A.I.R. 1931 P.C. 104 (105, 107), 58 Cal. 1281, 58 I.A. 141, 35 C.W.N. 583, 131 I.C. 309. As to the meaning and instance of "eviction by title paramount" see *Narayan v. Gokuldas*, A.I.R. 1947 Nag. 48, I.L.R. 1946 Nag. 568. Where a lessee is evicted from his tenancy by a person having a title paramount to his lessor, he can recover from the latter the consideration of the lease and also the pecuniary loss he has suffered, that is, the cost of defending the suit for ejectment and any sum recovered against him as costs or as mesne profits—*ibid*. But the paramount title of a third party does not necessarily connote want of title of the lessor. And the lessee cannot claim abatement of rent by reason of being deprived of a portion of the lands owing to the Government having a paramount title thereto, unless he can establish his lessor's *defect of title* to that portion of the lands. Thus, where the Government made a survey of certain khas mahal lands adjoining the lands occupied by the lessee, and fixed the boundaries in such a way as to lessen the amount of the lessee's lands, he cannot claim an abatement of rent from his lessor, because it cannot be said that the lessee has been evicted from a portion of the lands by reason of any defect of title in his lessor—*Indu Bhusan v. Chowdhury Moazam*, 33 C.W.N. 106 (109), 117 I.C. 838, A.I.R. 1929 Cal. 272. "Eviction by title paramount means an eviction due to the fact that the lessor had no title to grant the term, and the paramount title is the title paramount to the lessor which destroys the effect of the

grant and with it the corresponding liability for payment of rent"—per Lord Buckmaster in *Malthey v. Curling*, [1922] A.C. 130.

The lessor is bound to protect the lessee against all disturbances caused by persons *claiming under him* (the lessor). This means that he is responsible for disturbances committed by a person claiming under him the right to do the act complained of, *i.e.*, the lessor becomes bound by any act of interruption caused by a person whom he has expressly or impliedly *authorised* to do the act. The lessor cannot be made responsible for all interruptions by any person claiming title through him, whether assignee or under-tenant, however wilful or negligent the interruption. This would be beyond reasons; there must be some limit to the lessor's liability. Therefore, where A and B were the lessees of C to work adjoining mines, and A could not properly work the mine owing to the wrongful act of B, and claimed a reduction of rent, *held* that C could not be held liable for the wrongful act of B, as his act was unauthorised, and consequently A was not entitled to a reduction of rent. He had a remedy against B in tort—*Naurang v. A. J. Meik*, 50 Cal. 68, 36 C.L.J. 28, A.I.R. 1923 Cal. 41.

When the lessee is evicted by an Act of the Legislature (*e.g.*, when under the Epidemic Diseases Act it becomes unlawful for him to occupy the premises any longer in the manner contemplated by the lease) there is no breach of the lessor's covenant for quiet enjoyment, and the lessee cannot sue the lessor on the covenant. He will be liable to pay the rent for the whole period—*Merwanji v. Syed Sardar Ali Khan*, 23 Bom. 510. So, also, if the lessee is ejected by Government acting under the provisions of the Land Acquisition Act, the lessee cannot sue the lessor for disturbance of possession—*Minto v. Kaleechurn*, 8 W.R. 527.

It should be noted that although this clause is worded in a conditional form ("*if* the latter pays the rent", etc.), it should not be construed to mean that the actual prior payment of the rent is a condition precedent to the lessee's right to quiet possession and enjoyment. It would be hardly reasonable to interpret this clause to mean that the failure to pay any instalment of rent would deprive a lessee of the right to continue in enjoyment of the leased property—*Meenakshi v. Chidambaram*, 23 M.L.J. 119, 15 I.C. 711 (713, 714). See in this connection *Abdul v. China*, A.I.R. 1951 Ass. 62. If a property jointly owned by the father and his minor son is let out to a tenant by the father alone and the minor son brings a suit for partition asking for recovery of possession of the demised property and the tenant compromises the suit with the minor son on payment of a certain sum, the tenant can recover the said sum in a separate suit from the father for breach of covenant for quiet possession.—*Jabbar Sahib v. R. Renu*, (1964) 2 Mad. L.J. 142. A refusal by the landlord to give consent to electric installation amounts to a breach of the covenant for quiet enjoyment, and the court can grant mandatory injunction—*Dr. Daryaosingh v. Dr. Pramilaibai*, A.I.R. 1959 Madh. Pra. 191.

574A. Dispossession by landlord :—When the land of the tenant is in actual possession of a trespasser, and a third party is granted a settle-

ment by the landlord and the third party dispossesses the trespasser, the ouster amounts to dispossession of the tenant—*Abdul v. Hamed*, A.I.R. 1933 Cal. 898, 38 C.W.N. 61. If there is an interruption to the tenant's enjoyment of the property, his obligation to pay the rent ceases. And the tenant enjoys this immunity from the payment of rent until the landlord again permits him to have quiet enjoyment—*Meenakshi v. Chidambaram*, 23 M.L.J. 119, 15 I.C. 711 (714); *Dhunput v. Mahomed Kazim*, 24 Cal. 296; *Jyoti Prasad v. Seldon*, 19 Pat. 433, A.I.R. 1940 Pat. 516 (523-524), 192 I.C. 17. Substantial interference, short of actual dispossession, by the landlord with the quiet possession of the tenant entitles the tenant to claim suspension or abatement—*B. Ahmed Marocair v. Muthuvalliappa Chettiar*, A.I.R. 1961 Mad. 28. Where the land is sub-let by the tenant and the landlord starts collecting rent from the subtenants the tenant can claim total suspension even if the lessor fails to collect the entire rent from the subtenants—*Ibid.* If the landlord keeps logs of wood in one room of the house let out to the great inconvenience of the tenant the entire rent can be suspended until the mischief is removed—*Jatindra v. Raimohan*, A.I.R. 1961 Assam 52. The doctrine of suspension of rent has no application in India if the landlord fails to give possession of a part of the demised premises—*Surendra Nath v. Stephen Court*, 63 C.W.N. 922. There will be suspension of rent in cases where the landlord has by his action dispossessed or where the lessee has not, owing to his action, been able to take possession of a part of the holding—*Joyram v. Bishnu Charan*, A.I.R. 1925 Cal. 805, 85 I.C. 781. If the tenant is evicted from a *portion* of the property, the tenant is entitled to rescind the lease; but if instead of throwing up the lease, he elects to retain possession of the remaining portion, he cannot refuse to pay rent for that portion; he is bound to pay the rent for the portion retained, and is entitled to sue for damages in respect of the portion of which he has been deprived—*Meenakshi v. Chidambaram*, 23 M.L.J. 119, 15 I.C. 711 (716, 718). In other words, the tenant is not entitled to claim total suspension of rent, but can claim only a proportionate abatement of the rent in respect of the portion from which he has been evicted. It should be noted that this rule of proportionate abatement of rent applies only where the rent is fixed at a *certain rate per bigha*; but where the rent is fixed in a *lump sum for the whole land* leased, treated as an indivisible subject, the tenant is discharged from the payment of the whole rent if he is evicted from any portion of the land—*Katyani v. Uday Kumar*, 52 Cal. 417 (P.C.), 30 C.W.N. 1, 88 I.C. 410, A.I.R. 1925 P.C. 97; *Dhirendra v. Bhabatarini*, A.I.R. 1929 Cal. 395 (396), 33 C.W.N. 367, 119 I.C. 297; *Deoki Kaur v. Shiva Prasad*, A.I.R. 1939 Pat. 356, 1939 P.W.N. 263, 22 P.L.T. 378. But see *Ram Lal v. Dhirendra Nath*, 47 C.W.N. 489 (P.C.) where it has been laid down that "as a matter of broad general principle, the law of India no longer proceeds upon the notion that where a contract is for an entire sum, there is a necessity of reason which prevents a party from recovering anything where his full obligations under a special contract have not been discharged". Where the lessee does not deny that he actually possesses the land which is depicted in the plan attached to the lease deed, nor is there any doubt that the land is within the boundaries, if there is a question between boundaries and area, the former should prevail—*Keshabji v. Piramall*,

42 C.W.N. 405, 67 C.L.J. 521, A.I.R. 1939 Cal. 129; see also *Bara Kalim v. Rajendra Nath*, A.I.R. 1920 Cal. 865, 64 I.C. 751 and *Gossain Das v. Mrittunjoy*, 18 C.L.J. 541. In later decisions it has, however, been held that if a landlord dispossesses a tenant from a portion of the tenure, he is not entitled to recover any rent from the tenant unless he restores the portion to him, and it makes no difference that at some time the tenant is found to be in possession of some more lands, but not the entire tenure—*Krishna v. Surendra*, A.I.R. 1932 Cal. 385, 36 C.W.N. 72, 137 I.C. 696; *Hajira Bibi v. Abrar Hussain*, A.I.R. 1964 All. 343. The mere obtaining of a decree by the tenant for possession is not sufficient to defeat a tenant's right to suspension of the entire rent for eviction from a portion of the demised premises. That right continues until effective steps are taken by the landlord to restore possession of the land—*Reshee Case v. Satish*, A.I.R. 1931 Cal. 397 (400), 35 C.W.N. 46, 132 I.C. 81. The eviction whether from part or whole entails a suspension of the entire rent while the eviction lasts whether the tenant remains in possession of the residue or not. Perhaps, the sound course is to determine what is equitable in the particular case and that might range from the apportionment of rent per bigha where the dispossession is trivial or slight in a rapidly rising gradient to entire suspension where the interference with the enjoyment of the tenancy is considerable—*Dalip v. Suraj*, A.I.R. 1935 Pat. 38 (39), 14 Pat. 323, 153 I.C. 298. Tenants would not be entitled to a suspension of rent simply because of a mistake of the landlord in including certain portion of the land in a previous decree not comprising the subject-matter of that suit, and consequently having it sold, as the tenant could have corrected the mistake in a subsequent suit—*Biseswar v. Kali Charan*, A.I.R. 1926 Cal. 908 (910), 44 C.L.J. 27, 94 I.C. 418. Where a tenant claims suspension of rent owing to an encroachment of a few inches on the leased premises by the erection of a platform, the question was, did the landlord do something of a grave and permanent character with the intention of permanently depriving the plaintiff of a portion of the subject-matter of the demise—*Nishi Kanta v. Ezra*, A.I.R. 1936 Cal. 135 (138), 166 I.C. 299. In a rent suit for the applicability of the doctrine of suspension of rent on account of dispossession from a portion of the tenancy in respect of which a lump rental is payable, it must be shown that the landlord has deliberately set out to dispossess the tenant—*Sukhraj v. Dip Narain*, A.I.R. 1942 Pat. 266, 8 B.R. 153, 197 I.C. 160; *Hakim Saxdot Bahadur v. Tej Prakash Singh*, A.I.R. 1962 Punj. 385. Consequently, where by mistake a small portion of the tenancy has gone out of possession of the tenant, because it was inserted by mistake in a kabuliyat executed by the landlord in favour of a third person, the plea of suspension of rent cannot prevail—*Ibid.* If the landlord fails to give possession of one out of three bed rooms of demised premises, the tenant cannot suspend rent, but must pay proportionate rent—*Surendra Nath v. Stephen Court Ltd.*, A.I.R. 1966 S.C. 1361.

The landlord cannot sue for possession during the continuance of a tenancy even if there is a trespasser on the land. His rights in that respect do not accrue until the tenancy is determined. Until then, all he can do is to sue in respect of injuries to his reversionary interest, but not for possession. The adverse possession of the trespasser would not

run against the landlord during the currency of the tenancy—*Punjaram v. Ramu*, I.L.R. 1940 Nag. 348 (F.B.), A.I.R. 1940 Nag. 49, 1940 N.L.J. 121 relying on *Katyayani v. Uday*, 52 I.A. 160, 52 Cal. 417, A.I.R. 1925 P.C. 97. A tenant cannot recover the premium paid on the ground of disturbance by a trespasser—*Dr. Prabhu Narain v. Kamla Prasad*, A.I.R. 1964 Pat. 59.

575. Clause (d)—Accessions :—The true presumption, it was held, as to encroachments made by a tenant during his tenancy upon the adjoining lands of his landlord was that the lands so encroached upon were added to the tenure and formed part thereof for the benefit of the tenant so long as the original holding continued, and afterwards for the benefit of his landlord; and the tenant could not be ejected from them while the tenure lasted—*Gooroodas v. Issur Chunder*, 22 W.R. 246; *Chapsibhai Dhamjibhai v. Pursottam Matilal*, I.L.R. (1965) Bom. 27. But see *Naddiyar Chand v. Meajan*, *infra*. The Zemindar was not entitled to disassociate the accretions from the original grant and to turn the tenant out of the accreted lands, so long as the original holding continued—*Bhagabat v. Durga Bejai*, 16 W.R. 96. Nor is the tenant entitled to claim such accessions as his own property. The rule is that all increments made by the lessee upon land adjoining to or in the neighbourhood of his holding are presumed to have been made for the benefit of his landlord, and if the tenant has acquired a title against a third person by adverse possession, he has acquired it for his landlord and not for himself—*Naddiyar Chand v. Meajan*, 10 Cal. 820.

Since the accretions become a part and parcel of the original tenure, the landlord cannot treat the accreted lands as a separate tenure altogether in order to claim compensation for use and occupation of such lands; but he is, of course, entitled to an additional rent which must be fixed after investigation into the value of the increment due to the accretion—*Assanullah v. Mohini Mohan*, 26 Cal. 739.

The rule in this clause does not apply where the tenant encroaches upon the *land of his landlord*. In such a case it is in the option of the landlord either to treat him as a trespasser (and thus to eject him out of the encroached lands) or to treat him as a tenant in respect of those lands. The tenant has no right to compel the landlord to treat him as tenant; "It would seem strange, if, as a matter of law, a tenant were allowed, without the landlord's permission, to appropriate any land which adjoins his own tenure, and then when the landlord complained of the trespass and required him to give the land up, he were allowed to take advantage of his own wrong and to insist upon retaining possession of it until the expiration of his tenure"—*Naddiyar Chand v. Meajan*, 10 Cal. 820. But once the landlord has accepted him as a tenant for some time in respect of the encroached lands, he cannot afterwards turn back and treat the tenant as a trespasser—*Khondar Abdul Hamid v. Mohini Kant*, 4 C.W.N. 508.

On the above principle, a tenant of land, even having a permanent right of tenancy on the land, cannot acquire an easement by prescription upon other lands of his lessor. For, a tenant is always a tenant and never an owner of the land. He always derives his rights from the

lessor, and as the latter cannot have the right of enjoyment of an easement as of right against himself, so neither can his tenant against him—*Mani Chander v. Baikanta*, 29 Cal. 363; *Udit Singh v. Kashi Ram*, 14 All. 185; *Jeenab Ali v. Allabuddin*, 1 C.W.N. 151.

576. Clause (e)—Destruction of property:—This clause does not apply where the parties have specifically agreed that inspite of land being lost by diluvion or damage being caused by flooding, the lessee would be liable to pay the whole rent—*Surpat v. Sheo Prasad*, A.I.R. 1945 Pat. 300, 24 Pat. 197. A let out to B a thatched shed at a monthly rent. During the tenancy, the shed was burnt by fire. Thereafter B raised another structure on the land inspite of A's protest: *held* (1) this section in terms did not apply, as B neither elected to walk out; nor to suspend payment of rent; (2) that the doctrine of frustration applied to leases and A could claim that the lease had come to an end by destruction by fire; and (3) that under the tenancy B had no right to raise the structure of his own treating the lease as the lease of the land only—*Kshitish v. Shiba Rani*, A.I.R. 1950 Cal. 441. Sec. 108 (e) cannot be invoked in the case of agricultural leases—*Gurdarshan Singh v. Bishan Singh*, A.I.R. 1963 Punj 49 (F.B.). Where the property leased is not destroyed or substantially or permanently unfit, the lessee cannot avoid the lease on the ground that he does not or is unable to use the land for purposes for which it was let out to him, because the doctrine of frustration applies to an executory contract but not to a completed conveyance—*Raja Dhruv Deb Chand v. Raja Harmohinder Singh*, A.I.R. 1968 S.C. 1024.

This clause applies where the house is rendered substantially and permanently unfit for the purpose for which it was leased. The mere fact that the house is damaged to some extent and is in need of immediate repair does not entitle the lessee to avoid the lease. Thus, where a house was damaged by earthquake and an engineer who examined the house certified that the house was not in imminent danger but that it required immediate repairs in some portions, *held* that the building had not been rendered substantially and permanently unfit for occupation within the meaning of this section—*Donaghey v. Weatherdon*, 7 I.C. 201. In the case of a lease of coffee plants in the coffee garden it appeared that the whole of the plants had been absolutely destroyed by fire and the lessee consequently abandoned the garden before the period; the lessee was held not liable for the rent reserved under the lease—*Kanhayan v. Mayan*, 17 Mad. 98. This clause does not in terms apply to agricultural leases. It requires that any material part of the property owing to any of the specified causes should have been wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let. Thus, where some of the trees in the land perished or decayed in the ordinary course of nature, this clause did not apply—*Kandoth v. Cheriqaulanthol*, A.I.R. 1936 Mad. 664 (665), 71 M.L.J. 552, 165 I.C. 855.

A lessee is not liable for a damage caused to the leased property by fire while the property was in the lessee's occupation, unless negligence of the lessee is proved. The burden of proof is on the lessor to establish negligence of the lessee. But in certain circumstances and on proof of certain facts a presumption of negligence may be raised against the lessee—*Deputy Lal v. Reoti Prasad*, A.I.R. 1941 All. 327, 1941 A.L.J. 861.

Where a portion of the property demised is inundated by sea water and is rendered unfit for cultivation, the tenant is, in an action for rent, entitled to proportionate abatement. The principle underlying this clause is not applicable to such a case—*Subramania v. Kattambath*, 43 Mad. 132, 53 I.C. 397. The right of a tenant at the general law to claim an abatement of rent by reason of a portion of the land having been washed away by the action of a river cannot be disputed. The onus is upon the tenant to prove the extent of the diluvion and the corresponding abatement which he may claim—*Arun v. Bhagaban*, A.I.R. 1931 Cal. 537 (543) (F.B.), 59 Cal. 155, 35 C.W.N. 1011, 133 I.C. 577; *Krista Das v. Abdul*, 25 C.W.N. 328; *Vishnu v. Kunnungal*, A.I.R. 1962 Ker. 239. Defendants took a certain property on lease for 3 years on a fixed annual rent. In the second year the crop was completely destroyed by floods and it was not possible to raise a second crop. *Held*: the defendants lessees were not liable to pay any rent during that year—*P. Valiapally v. C. Thomman*, A.I.R. 1956 Trav.-Co. 59.

Where a shed demised by the cantonment authorities was blown off and the tenant carried on his business on another premises an express agreement was necessary to enable the cantonment authorities to realize rent of the premises which had been destroyed—*Benarsi v. Cantonment Authority*, A.I.R. 1933 Lah. 517 (519). But a lessee of salt pans could not be excused from repairing or working them as agreed, on the ground of strike of workmen, when the strike was not unforeseen—*Hari Laxman v. Secretary of State*, A.I.R. 1928 Bom. 61 (62), 52 Bom. 142, 103 I.C. 19.

If the rent of the whole period of the lease had been paid in advance, but before the expiry of the period the leased property is destroyed by fire, the lessee is entitled to a refund of a proportionate part of the rent paid in advance, under sec. 65 of the Contract Act—*Dhuramsey v. Ahmedbhai*, 23 Bom. 15.

Upon the destruction of the leased premises the lessee is entitled to treat the lease as void by giving a notice to the landlord; and as soon as he avoids the lease, he must vacate the building and give vacant possession of it to the landlord. He is not entitled to retain possession of the premises till such time as it suits him, and then make the destruction of the premises by fire, the ground for putting an end to the lease so far as the remainder of the term is concerned—*Bruel & Co. v. Haji Siddick*, 12 Bom. L.R. 474, 6 I.C. 909. Unless he has given vacant possession of the house to the landlord, he cannot be said to have exercised his option of avoiding the lease. Where, therefore, a tenant who rented a godown gave notice to his landlord that he (the tenant) had exercised his option to terminate the tenancy upon the destruction of the godown, but it was found that several bags of sugar belonging to him were still lying in the godown, *held* that the tenant must be taken to have been in occupation either under his original tenancy or under a similar one resulting from his holding over, and was therefore liable for rent—*Siddick Haji v. Bruel & Co.*, 35 Bom. 333, 8 I.C. 1049; *Munnu-swamy v. Muniramiah*, A.I.R. 1965 Andh. Pr. 167. If the tenant does not invoke the doctrine of frustration the lease shall continue for the benefit of both the parties. Therefore in case of partial destruction of the leased property the tenant cannot claim reduction of rent, nor can

he claim suspension in the case of complete destruction—*Dr. Kundan Lal v. Shamshad Ahmad*, A.I.R. 1966 All. 225; *Jiwanlal & Co. v. Manot & Co.*, 64 C.W.N. 932. Even if a house is destroyed wholly, the lease is not terminated unless the lessee so chooses—*Jiwanlal v. Manot & Co.*, 64 C.W.N. 932.

Proviso to clause (e) :—The lessee is not entitled to the benefit of clause (e) if the property is destroyed through the wrongful act of his own. Thus, the lessee of certain premises stored cotton bales therein. The watchman in charge of the bales left a lighted kerosene oil lamp near the bales and went away to have his meals. The lamp burst, the cotton bales caught fire and considerable damage was caused to the leased premises by the fire. *Held* that the lessee was liable for the damage caused—*Girdaridoss v. Ponna Pillai*, 39 M.L.J. 233, 59 I.C. 252. But where the lessee of a building stored alcohol in it, and through some unknown cause fire broke out and the building was burnt to ashes, and it appeared that the lessee's watchman was absent when the fire broke out, *held* that there was no negligence on the part of the lessee—*East Indian Distilleries Ltd. v. Mathias*, 51 Mad. 994, 55 M.L.J. 663, 114 I.C. 234, A.I.R. 1928 Mad. 1140 (1141, 1142).

577. Clause (f)—Repairs :—None of the clauses of this section entitles the lessee to call upon the lessor to repair the property. Unless there is an express contract to that effect, the lessor is not necessarily bound to make any repairs whatever—*Bijoy v. Howrah Amata Light Ry.*, 38 C.L.J. 177, A.I.R. 1923 Cal. 514; *Steuart & Co. Ltd. v. C. Macker-tich*, A.I.R. 1963 Cal. 198. This Act imposes no obligation on the landlord to repair. On the contrary, a qualified obligation in that respect lies on the tenant under clause (m)—*Lakhmichand v. Ratanbai*, 51 Bom. 274, A.I.R. 1927 Bom. 115 (118). In the absence of a contract to do repairs or of an obligation imposed by statute, there is no obligation on the part of the landlord to put the premises in a habitable condition—*Chappell v. Gregory*, (1864) 34 Beav. 529; or to do any repairs whatever upon them—*Gott v. Gandy*, (1853) 2 E. & B. 845, even though by the neglecting to do so they become uninhabitable—*Arden v. Pullen*, (1840) 10 M. & W. 321. The lessee in exercise of his right to repair cannot replace the tiled roof by a roof made of cement slabs—*Smt. Gyan-wati Naithani v. Udai Raj*, A.I.R. 1964 All. 417.

Even if the lessor was under an obligation to effect repairs and fails to comply with the request of the lessee, the latter is not entitled to terminate the tenancy. He can execute the repairs himself after giving reasonable notice to the lessor and recover the amount expended by him by deducting it from the rent of otherwise—*Bijay v. Howrah Amata Light Ry.*, 38 C.L.J. 177, 72 I.C. 98, A.I.R. 1923 Cal. 524.

The tenant is entitled to deduct from the rent the expenses of necessary repairs done by him, even though there is a covenant in the lease to pay rent without deduction—*Graham v. Colonial Government*, 12 C.L.J. 351, 6 I.C. 131. See in this connection *Abdul v. China*, A.I.R. 1951 Ass. 62 and *Augustine v. Chandi*, A.I.R. 1953 Tr.-Coch. 462. Where the landlord fails to carry out the repairs which the Rent Act requires him to do, the tenant is not entitled to suspension or abatement of rent—*N. M. Industries Ltd. v. Birendra Nath*, A.I.R. 1957 Cal. 232.

The tenant can deduct from the rent the expenses of only those repairs which the landlord was bound to execute, and it is for the tenant to establish that the landlord was bound to execute them. It is not enough to show that the landlord had executed similar repairs in previous years—*Bolton v. Donald*, 3 A.L.J. 134.

Upon a breach of covenant to repair by the lessor the lessee's remedy is only deduction from rent, or damages or re-imbursement of money spent in repairs. There is no question of specific performance—*Bansi v. Krishna*, A.I.R. 1951 Pat. 508. The claim must however be put forward in the pleadings—*ibid*. Where the Rent Act imposes a duty on the landlord to repair, the tenant cannot invoke the remedy provided by sec. 108 (f) T. P. Act—*Behari v. Kunjar Lal*, A.I.R. 1963 All. 439.

578. Clause (g)—Payment by lessee for lessor :—A putnidar making certain revenue payments due by his defaulting superior landlord is entitled to recover the same from the latter, even though a separate account had been opened for such payments—*Smith v. Dinonath*, 12 Cal. 213. Where the lessee pays the land revenue payable by the lessor, the lessee can recover it from the lessor—*Faiyazunnissa v. Bajrang*, A.I.R. 1927 Oudh 609, 104 I.C. 358. In a suit for rent the tenant can ask for the deduction of water-tax and the property tax paid by him—*Acharya, T. K. S. v. Satyamma*, S. (1966) 1 An. L.T. 11.

Where the lessee is threatened with disturbance or eviction by the act of a prior mortgagee, for payment of which debt the lessor has made himself liable, that threat amounts to a breach of covenant for his enjoyment. If a sum is paid by the lessee to avoid eviction and disturbance, it must in reason be one which the lessor is bound to make good, and hence the lessee is entitled to recover the same from the lessor—*Iswara v. Ramappa*, A.I.R. 1934 Mad. 658 (661), 152 I.C. 201.

In the case of a sub-lease of property which is subject to a maintenance charge and the sub-lease contains a covenant for quiet enjoyment, on the sub-lessor failing to pay the amount of the maintenance the sub-lessee is entitled to pay the same in order to secure quiet enjoyment and to recover it from the sub-lessor—*Nanjappa v. Rangaswami*, A.I.R. 1940 Mad. 410, (1940) 1 M.L.J. 200, 1940 M.W.N. 266.

The lessee can make only those payments on behalf of the lessor which the latter was bound by law to pay. Thus, where in execution of a decree against the lessor his interest in the property was put to sale, and the lessee deposited money under sec. 310A, C. P. Code, 1882 (now O. XXI, r. 89 of the Code of 1908) to set aside the sale, and brought a suit against his lessor to recover the money, *held* that the money paid by the lessee under sec. 310A was not money which the lessor was bound by law to pay, and that therefore such payment did not afford any ground to sue the lessor for its recovery—*Bipin Behari v. Kalidas*, 6 C.W.N. 336.

Where the tenant pays Corporation rates due by the owner on receipt of a demand notice from the Corporation under sec. 246, Calcutta Municipal Act, 1951 the amount so paid can be adjusted against rent if there is an understanding between the parties for such adjustment—*Nashiban Bibi v. Parul Bala Dutta*, 62 C.W.N. 778.

579. Clause (h)—Removal of trees, fixtures :—The old clause ran thus: "The lessee may remove at any time during the continuance of the lease, all things, etc." That is, this clause only allowed the tenant to remove "*during* the continuance of the lease," all things which he might have attached to the land, and nothing was said as to the rights of the parties in respect of such things *after* the determination of the lease, if they had not already been removed by the tenant. The question arose whether the tenant forfeited all his rights in such things if he had not so removed them; and it was held that according to local usage, the option was with the lessor either to take the building on paying compensation, or if he was unwilling to pay compensation, to allow the tenant to remove the building—*Ismaj Kani v. Nazarali*, 27 Mad. 211 (217); *Angammal v. Aslami Sahib*, 38 Mad. 710 (735); *Kanai Lal v. Rassik Lal*, 19 C.W.N. 361, 23 I.C. 762. Where the terms of the lease did not provide for payment of compensation to the tenant, the Court had a discretion, in a proper case, to allow *reasonable time* to the tenant after the expiry of the tenancy to remove his superstructure from the land—*Raja Avergal v. Noor Mohomed*, 66 I.C. 48, A.I.R. 1922 Mad. 349; *Angummal v. Aslami Sahib*, 38 Mad. 710 (736); *Govinda v. Charusila*, 60 Cal. 1042, 37 C.W.N. 791 (795), A.I.R. 1933 Cal. 875. Where after the termination of the tenancy, the tenant took no steps for 2 years to remove his structures, and after 2 years brought a suit to remove the structures or to recover compensation, his claim must be disallowed—*Govinda v. Charusila*, supra.

The present clause, as now amended, allows the tenant to remove the fixtures even *after* the determination of the lease, *so long as he is in possession*, but not afterwards.

The amended clause has introduced no new principle but has only extended the period within which the tenant could remove, beyond the 'continuance of the lease' to any further time during which he is in possession of the property leased. The old clause (h) limited the tenant's right to remove as a right to be exercised during the term, but it failed to notice that cases of hardship might arise where a tenancy was suddenly determined, *e.g.*, by a mortgagee's sale or by Land Acquisition proceedings. These difficulties have been removed in the amended clause by an extension of the period—*Govinda v. Charusila*, 60 Cal. 1042, 37 C.W.N. 791 (796). If the tenant once quits possession, the fixtures become the property of the lessor—*Khimjee v. Pioneer Fibre Co.*, 43 Bom. L.R. 576, A.I.R. 1941 Bom. 337 (338). But see *India Electric Works Ltd. v. B. S. Mantosh*, A.I.R. 1956 Cal. 148, wherein it has been laid down that clause (h) "is not a clause of forfeiture and it is not declared therein that after the expiry of the term of the lease or after the lessee has ceased to be in possession his title to the fixtures will be forfeited."

According to the maxim "*Quincquid plantatur solo solo cedit*" in England the buildings etc. created upon or affixed to the soil by a lessee, in the absence of a contract to the contrary, cannot be removed by the lessee at the termination of the lease and become the property of the lessor. But in India the position is governed by cl. (h) of this section under which the buildings *etc.* upon termination of the lease can be removed by the lessee, unless there is a contract to the contrary—*Bally-*

gunge Bank v. Comr. of Income-tax, A.I.R. 1947 Cal. 159, 50 C.W.N. 598. But see *contra Jungreja v. Umrao Singh*, A.I.R. 1950 M.B. 39. The effect of this clause is that the lessee is the owner of the buildings etc. put up by him on the lessor's land—*Laxmipat v. Larsen*, A.I.R. 1951 Bom. 205, 52 Bom. L.R. 688. Equitable principles cannot override the operation of this clause. Even where the lessor has granted or contracted to grant permanent rights, and on the faith thereof the lessee has created the structures, he is not entitled to compensation for them notwithstanding this clause—*Darbari Lal v. Raneegang Coal Assn.*, A.I.R. 1944 Pat. 30, 22 Pat. 552. See also *Chhedi v. Mahipal*, A.I.R. 1951 Pat. 600. A lease of certain brick-fields provided for forfeiture of the materials remaining on the land on expiration of the lease. After its expiration the lessor allowed certain items as a matter of grace to be removed by the lessee: held that there was no waiver on the part of the lessor of the condition of forfeiture—*Karnani Industrial Bank v. Province of Bengal*, A.I.R. 1949 Cal. 47, 53 C.W.N. 195.

This section is subject to a contract to the contrary; and so where the terms of the lease provided that "on determination of the tenancy the erections raised on the premises would belong to the lessor, unless the lessee removed them on the determination of the lease or within 2 months thereafter, upon payment of all rent due and performance of all conditions"; and the lease was determined for non-payment of rent, whereupon the lessee agreed to the lessor's entering into possession, held that the fixtures would pass to the lessor—*Cook & Co. v. Phillips*, 34 C.W.N. 786 (788), 130 I.C. 222, A.I.R. 1931 Cal. 133; *Indian Electric Works Ltd. v. B. S. Mantosh*, A.I.R. 1956 Cal. 148.

Apart from estoppel or contract, the tenant has no right to demand compensation for buildings left by him on the premises when he quits them. In the absence of evidence of an express consent on the part of the landlord to the erection of the superstructure by the tenant, the mere fact that the landlord knew of the construction of the building would not lead to the presumption that there was any undertaking by the landlord to pay for the house if the tenant did not remove it—*Angammal v. Aslami Sahib*, 38 Mad. 710. (735). Where the lessee for a term is permitted to build structures consistent with the lease and there is no contract or usage against his removing the structures the lessor cannot be compelled to take the structure on payment of compensation—*Chandi Charan v. Ashutosh*, 40 C.W.N. 52.

Where the lessees lost their right by a decree in a mortgage suit not having given them an opportunity to remove the building, they were allowed to remove them unless the lessor chose to take them on payment of compensation—*Kanai v. Rasik*, 19 C.W.N. 361. A sub-lessee is entitled to the benefit of cl. (h) and can remove a structure made by him—*Mana Devi v. Malki Ram*, A.I.R. 1961 All. 84.

If after the tenant has erected buildings on the land, the lease turns out to be invalid, the tenant is only entitled to have the superstructure removed by him, and not to any compensation—*Govindasami v. Ethirajammal*, (1916) 1 M.W.N. 180, 34 I.C. 1. A tenant cannot claim compensation for improvements, but he is entitled to remove the materials—*Smt. Chapala Devi v. Rakhal Chandra Sen*, A.I.R. 1964 Pat. 363. If

the landlord appropriates the materials of any super-structure the tenant can recover the value thereof—*Sundareswar Devasthanam v. Marimuthu*, A.I.R. 1963 Mad. 369. If any structure is built with the consent of the lessor the lessor cannot claim compensation for the structure so built on the determination of the lease, his only right being to remove the structure—*B. Mohammad Hayath Saheb v. Radhakrishna Bhatta*, (1968) 1 Mys. L.J. 63.

This clause should be read with the clause (o), and the meaning of the two clauses read together is that the lessee is entitled to remove those trees and buildings which he himself has attached to the earth, and that he is prohibited from removing the trees and buildings which he has not himself attached to the earth and which stood on the land at the time of lease—*Vasudeva v. Valia*, 24 Mad. 47 (53); *Gangamma v. Bhomakka*, 33 Mad. 253; *Kedar Nath v. Govinda*, 32 C.W.N. 366 (371), 108 I.C. 242. As regards trees planted by the *mulgeni* tenant himself since the grant of the lease, the tenant has every right to cut them whether they are timber trees or otherwise—*Ganesh v. Hanmant*, A.I.R. 1952 Bom. 100, 53 Bom. L.R. 800. The lessee is not entitled to fell or sell timber trees but he can make use of non-timber trees and utilise its usufruct as a person of ordinary precedence—*ibid*. As regards the spontaneous growth after the lease was granted, the lessee cannot cut timber trees, but he can cut the non-timber trees and put them to any other use as he pleases—*ibid*.

The principle underlying sec. 108 can be invoked in the case of agricultural leases in the absence of special custom to the contrary. Consequently in the case of a perpetual lease of land for agricultural purposes, the lessee is, in the absence of special custom to the contrary not entitled to claim timber of trees which has spontaneously grown on the land—*Gur Prasad v. Mehdi Husain*, A.I.R. 1942 Oudh 460 (462), (1942) O.W.N. 435, 201 I.C. 728. See also *Ganesh v. Hanmant*, *supra*. Where no underproprietary rights have been conferred upon the lessee, he cannot claim ownership of such trees as mentioned above—*Ibid*.

'Attached to the earth':—For the meaning of this term, see Note 20 under sec. 3 and Note 78 under sec. 8.

A tenant who has planted trees on the land has the right of cutting down and making use of them—*Sitabai v. Shambhu*, 38 Bom. 716. A lessee may remove trees which he has himself planted and buildings which he has himself erected, provided he leaves the property in the state in which he received it—*Vasudeva v. Valia*, 24 Mad. 47 (53) (F.B.). See in this connection *Velu v. Lakshmi*, A.I.R. 1953 Tr.Coch. 584. A trespasser is not entitled to any compensation for the trees planted by him—*Rev. Father K. C. Alexander v. State of Kerala*, A.I.R. 1966 Ker. 72.

A trade fixture, i.e., a fixture put up for business can be removed by the tenant—*Chaturbhuj v. Bennett*, 29 Bom. 323, (335). If a Municipal Board fails to remove night-soil deposited on land taken on lease even after delivery of possession to the lessee, its right to the night-soil is not lost—*Municipal Board, Meerut v. Bir Singh*, A.I.R. 1965 All. 527.

579A. Clause (i)—Growing crops:—Compare the last para of sec. 51, and see Notes 8 and 78, *ante*. Where the effect of an award and the

decree passed thereon in a suit for possession of land was that if X did not deposit the money payable to Y before certain date, Y was entitled to remain in possession and he raised crops on the land: *held* that Y was entitled to the benefit of this clause and X was not entitled to insist that Y should make over possession of the crops to X along with the land or pay the value of the crops—*Gangamma v. Mahabala*, A.I.R. 1937 Mad. 879 (882), 46 M.L.W. 676.

580. Clause (j)—Transfer by lessee of his interest :—This clause is *not retrospective*, and does not apply to tenancies created *before* the passing of this Act—*Madhav Chandra v. Bijoy Chand*, 4 C.W.N. 574; *Hari Nath v. Raj Chandra*, 2 C.W.N. 122; *Umakanta v. Kashiram*, 23 I.C. 246 (Cal.); *Mohendra v. Krishna Kumari*, 46 I.C. 656 (Cal.). Thus, a permanent tenancy created before the passing of this Act for the purposes of habitation cannot be transferred (even though no buildings have been erected on the land for the purpose of habitation), if the document creating the tenancy does not confer upon the lessee the right to transfer and there is no evidence of a local custom in favour of such transfer—*Safar Ali v. Abdul Rashid*, 39 C.L.J. 585, A.I.R. 1924 Cal. 1012; *Bansi Singh v. Chakradhar*, A.I.R. 1938 Pat. 569 (572), 17 Pat. 358, 19 P.L.T. 731. So also, a tenancy of homestead land from year to year which was in existence before the passing of this Act and which was not transferable except by custom, is not governed by this Act, and this clause does not make it transferable absolutely or by way of sub-lease—*Ananda Mohan v. Govinda*, 20 C.W.N. 322, 33 I.C. 565 (567); *Ramcharan v. Hari Charan*, 7 C.L.J. 107; *Umakanta v. Kashiram*, 23 I.C. 246 (Cal.); *Madhusudan v. Kamini*, 32 Cal. 1023; *Sarada Kanta v. Nobin Chandra*, 54 Cal. 333, 31 C.W.N. 231 (234), A.I.R. 1927 Cal. 39; *Hanuman Prasad v. Deo Charan*, 7 C.L.J. 309; see also *Kamala v. Nibaran*, A.I.R. 1932 Cal. 431 (432-33), 36 C.W.N. 149, 138 I.C. 72. But see *Md. Sharif v. Waqf Banam-i-Khuda*, A.I.R. 1947 All. 49 where it has been held that this section has only declared the law as previously administered. A lease-hold interest was transferable even before the Act, as there was no rule of law imposing restriction upon such alienation. So a permanent lease created before the passing of the Act can be transferred by the lessee. If the lease of homestead land is created *after* this Act, the interest of the lessee is transferable under this clause—*Mohendra v. Krishna Kumari*, 46 I.C. 656 (Cal.). A non-agricultural tenancy created *after* the passing of this Act is transferable, unless any custom or contract is established to the contrary—*Kishori Lal v. Kamini*, 37 Cal. 377 (383). A tenancy from month to month is assignable,—*Ram Barai Singh v. Tirtha Pada Misra*, A.I.R. 1957 Cal. 173.

In the Punjab the rule contained in the clause is followed. Thus, where the question as to whether a particular right of tenancy is transferable or not, the presumption under the general law as laid down in this clause is that in the absence of contract or local usage to the contrary, the right is alienable. Where, therefore, the landlord alleges that the tenancy is by custom not alienable, the onus is on him—*Rahmatullah v. Atta Mohammad*, A.I.R. 1937 Lah. 360 (362), 173 I.C. 198. There is no presumption that a right of residence on a city site is inalienable such as arises in the case of villages or small towns where the residential

sites belong to the agriculturists—*Ibid.* Sub-lessee from a statutory tenant acquires no right of tenancy—*Anand Nivas v. Anandji*, A.I.R. 1965 S.C. 414. Where a tenant forms a partnership in a shop let out to him obliging himself to work for the firm only, there is no sub-letting, even though rent is to be paid out of the partnership fund—*Sivanandan v. Tribuendadas Vendravan*, 81 Mad. L. W. 478.

Where the land in dispute or part of it is covered by a *kothi*, the presumption is that it was let for building purposes and the lessee of such land has a right of transfer. Where the land is merely appurtenant to it as part of the compound of the *kothi* and was let as such, the lessee possesses a right of transfer of the nature described in this clause—*Joti Prasad v. Har Prasad*, A.I.R. 1932 All. 473, (1932) A.L.J. 567, 139 I.C. 346.

In spite of the rule contained in this clause as to the alienability of leases, it is open to the parties to covenant against such alienation and a sub-lease given in contravention of such covenant is invalid as between the original lessor and lessee, though it is valid as between the original lessee and the sub-lessee—*Abdulla v. Mahammad*, 26 Mad. 156; and the landlord will be entitled to bring a suit for damages—*Sital Prasad v. Dildar Ali*, 1 P.L.J. 1, 33 I.C. 408. A covenant not to sub-let premises is not broken by the subletting of part only of the premises—*Esdaille v. Lewis*, (1956) 2 All. E.R. 357. Where a tenant is forbidden under the terms of the lease to sublet the premises, a sub-tenant in possession cannot contend that the premises are lawfully sub-let for the purpose of claiming the benefit of sec. 11 (3) of the West Bengal Premises Rent Control Act—*Haripada v. Sailesh*, A.I.R. 1952 Cal. 141. Where one of the conditions of the tenancy was that the tenant must carry on business on the premises let, then the application of cl. (j) is excluded—*Md. Safi v. Union of India*, A.I.R. 1953 Cal. 729. In the case of a lease containing a covenant against sub-letting without the landlord's consent: (1) There can be at law a sub-lease without the previous consent of the lessor. The sub-lease is not invalid, but it is liable to be affected by the forfeiture of the head lease, unless consent has been unreasonably withheld. (2) Upon the sub-lessee taking possession on the expectation of the lessor recognizing the sub-tenancy, the lessee becomes responsible to the sub-lessee on a covenant for quiet enjoyment. (3) On the other hand, the transaction is to be regarded as an agreement to grant a lease with the landlord's prior written consent and the lessee may protect himself against possible claims of damages by making the contract subject to the landlord's consent. (4) Where the lessee does not apply for the landlord's consent at the time fixed or after a reasonable time (fixing the same by due notice), the sub-lessee is entitled to rescind. If the sub-lessee repudiates before that time, the lessee is entitled to relief—*Battersby v. De Cruze*, (1936) 63 Cal. 31. An absolute demise by sub-lease for the unexpired residue of the term operates not as an assignment of the term, but only as a sub-lease, and is not a breach of covenant against assignment—*Hansraj v. Bejoy Lal*, A.I.R. 1930 P.C. 59, 57 Cal. 1176, 57 I.A. 110, 34 C.W.N. 342, 122 I.C. 20. See in this connection *Lodna Colliery Co. v. Bepin*, 55 I.C. 113, 1 P.L.T. 84.

Where the grantee of a lease transfers the whole of his term to the

sub-grantee on terms similar to the original lease, such transfer operates by way of sub-demise and not of assignment—*Ram Kinkar v. Satya Charan*, 66 I.A. 50, (1939) 1 Cal. 283, 43 C.W.N. 281, A.I.R. 1939 P.C. 14; *Nanjappa v. Rangaswami*, A.I.R. 1940 Mad. 410, (1940) 1 M.L.J. 200, 1940 M.W.N. 266; see also *Hansraj v. Bejoy Lal*, 57 I.A. 110, 57 Cal. 1176, A.I.R. 1930 P.C. 59. The distinction between a sub-lease and an assignment is that in a sub-lease the whole or any part of the lessee's interest can be transferred, while in an assignment the whole of the interest in the property must be transferred. Even if the whole of the lessee's interest is subdemised, the sub-lease does not operate as an assignment. So there is no privity of contract or privity of estate between the sub-lessee and the superior landlord—*Abba Ali v. Mulraj*, A.I.R. 1947 Sind 163, I.L.R. 1946 Kar. 454. A transferee of a specific portion of a holding is not liable for the entire rent, but only to that portion of the rent which could be apportioned to the area in his exclusive possession—*Madhabilata v. Butto Kristo*, A.I.R. 1911 Pat. 129, 10 B.R. 652; and the apportionment may be effected in accordance with the principle laid down in the latter part of sec. 109 *post*—*ibid*. Even where the lessor's consent is required for the assignment of a lease by the lessee and he assigns it without such consent, the assignment is valid and operative, and the only right that the lessor has is to sue the lessee for damages for breach of the contract—*Treasurer v. Tyabji*, A.I.R. 1948 Bom. 349, 50 Bom. L.R. 240. In such a case the obligations of the lease will continue and the assignee will also be liable for them—*ibid*. The words "such consent, however, not to be unreasonably withheld in the case of respectable or responsible person" in a lease do not amount to a separate and independent covenant by the lessor that he would not refuse consent except upon reasonable grounds. These words relieve the lessee from the burden of the covenant if the lessor unreasonably withholds his consent in the case of a proposed assignment to a respectable or responsible person—*Kamala Ranjan v. Baijnath*, A.I.R. 1951 S.C. 1, 1951 S.C.J. 13; *Shankar Prasad Goenka v. State of Madhya Pradesh*, A.I.R. 1965 Madh. Pra. 153.

The distinction between an *assignment* and *relinquishment* is clear. The consent of the lessor to an assignment is not necessary in the absence of a contract or local usage to the contrary. But in the case of relinquishment, it can only be in favour of the lessor by mutual agreement between them—*W. H. King v. Republic of India*, A.I.R. 1952 S.C. 156.

A lessee cannot make an underlease for a longer term than his own lease. If an underlease mentions no term, it cannot be construed to have effect beyond the interest of the grantor—*Harish Chunder v. Sree Kali*, 22 W.R. 274. During the subsistence of tenancy the tenant A brought B on the land as a sub-tenant. After the expiry of lease of A, B continued possessing the property exclusively. A sold her interest to C. B never paid rent to C nor was recognized as tenant by him: *held*, as soon as the interest of A came to an end, the interest of B as sub-tenant also came to an end and B could not subsequently rank as tenant of C. Hence C could not sue B in ejectment as tenant after service of a notice to quit—*Biraja Sundari v. Mahamaya*, A.I.R. 1941 Cal. 599. When the original lease has not been determined, the lessor cannot treat the sub-lessee, holding under a valid sub-lease, as if he was his tenant and not

the tenant of his sub-lessor, and sue him directly for rent—*Ganges Manfg. Co. v. Radharani*, A.I.R. 1945 Cal. 89, 49 C.W.N. 63. As purchaser in the lessee's interest at an execution sale, the lessor would no doubt be entitled to realise rent direct from the sub-lessee, but the rent would be the rent which the sub-lessee was liable to pay under the sub-lease—*ibid.* It is elementary that as between the lessor and the sub-lessee there is neither privity of contract nor privity of estate and the sub-lessee would not be bound by the covenants of the principal lease—*Jagadish v. Md. Bukhtiyar*, A.I.R. 1953 Pat. 409; covenants of the principal lease—*Jagadish v. Md. Bukhtiyar*, A.I.R. 1953 Pat. 409; *Baban v. Champabai*, A.I.R. 1949 Nag. 336, I.L.R. 1949 Nag. 432. Permission granted by the tenant to others to use the premises does not amount to sub-letting—*Petroleum Workers Union v. A. Mohamed & Co.* A.I.R. 1967 Mad. 33.

A decree for ejectment of the lessee obtained by the lessor can be executed against the sub-lessee as he is bound by the decree within the meaning of Or. 21, r. 35 (1), C.P. Code—*Yusuf v. Jyotish*, 59 Cal. 739. See also *Ramkissen v. Brijaraj*, 50 Cal. 419. But see contra *Ezra v. Gubbay*, 47 Cal. 907. If the sub-lease is a permanent one the decree for ejectment against the lessee does not bind the sub-lessee unless he is made a party to the suit—*Sukumar v. Nagendrabala*, 71 C.L.J. 209, A.I.R. 1940 Cal. 393, 190 I.C. 622. A valid notice to quit not only determines the original demise, but any sub-lease which the tenant might have made, provided the sub-tenant has no right independent of the right of his lessor. Such a sub-tenant is not a necessary party to a suit for ejectment brought by the superior landlord—*Yusuf v. Jyotish*, *supra*. A lessee by a voluntary surrender of his lease cannot however prejudice the right of his underlessee—*Ibid.*

This clause provides that the liability of the lessee shall not cease by reason only of the transfer. Therefore, a lessee does not cease to be liable to pay rent to his landlord even after he (lessee) has transferred his interest in the property leased—*Bhola Nath v. Durga Prosad*, 12 C.W.N. 724; *Manmatha v. Balai*, 70 I.C. 111, A.I.R. 1924 Cal. 359; *Manmatha v. Nalinaksha*, A.I.R. 1925 Cal. 423; *Ardeskar v. K. D. Bros.*, A.I.R. 1925 Bom. 330, 27 Bom. L.R. 553, 88 I.C. 79, and it is no answer to a suit for rent brought by the landlord against the lessee, that the transferee from the lessee is willing to pay the rent—*Akrurmani v. Madhab Chandra*, 47 I.C. 800 (Cal.). A mere assignment of a lease does not release the lessee from his liability under the personal covenant. There must be actual substitution of the assignee as the person liable on the personal covenant. Thus, a judgment against the assignee for the rent due which remains unsatisfied is no bar to a subsequent claim against the lessee for the amount unpaid, the causes of action being different—*Municipal Corporation of Bombay v. Vasantlal*, I.L.R. (1938) Bom. 471, A.I.R. 1938 Bom. 360, 40 Bom. L.R. 497. There is no consistency whatever between the liability of the original lessee on his covenant and that of the assignee by reason of privity of estate, though the several liabilities are in respect of the same subject-matter—*Ibid.* Where there is a direct covenant by the lessee to pay to the lessor the rent; mere acceptance of rent from an assignee of the lessee by the lessor will not relieve the lessee from his personal covenant. The English rule of *reddendum* does not apply to such cases—*Abdul v. Phiroz*, A.I.R. 1936 Bom. 88 (89), 60 Bom. 394, 161

I.C. 57. Where the lease provides that the lessee is not competent to transfer his ijara right, that such transfer, if made, shall not bind the lessor and that if by operation of law such transfer becomes binding on the lessor even then the lessee shall remain bound to pay the rent so long as the transferee shall not furnish security to be fixed by the lessor for the payment of rent, the lessor is not bound to fix the security for the due payment of rent by the transferee whenever the lessee chooses to transfer his right and the lessee's personal liability to pay rent shall continue even after transfer—*Satyaniranjan v. Sarjubala*, 33 C.W.N. 865 (871); affirmed 33 C.W.N. at p. 872 (P.C.). The lessee's liability (e.g., to pay rent) does not cease even though he gives notice of the transfer to the landlord, unless the lessor consents to it—*Sashi Bhushan v. Tara Lal*, 22 Cal. 494 (500); *Satyaniranjan v. Sarajubala*, 33 C.W.N. 865 (870); affirmed 33 C.W.N. at p. 872 (P.C.); *Devidas Bhatta v. Ratnakar Rao*, (1965) 1 Mys. L.J. 731.

But when, after a tenant has transferred his interest to another the landlord *accepts rent from the transferee*, the presumption is that the latter is accepted by the landlord as his tenant—*Nabakumari v. Behari Lal*, 34 Cal. 902 (P.C.). The lessee shall cease to be liable if the lessor accepts rent from the assignee and thereby creates *privity of contract* between himself (lessor) and the assignee—*Theethalan v. Eralpad*, 40 Mad. 1111 (1113). But see *Abdul v. Phiroj*, *supra*. A lessor cannot recover rent from one only of the heirs of the deceased original lessee when he admits an assignment of the lease to a third party though unrecognized, and does not prove that such assignee is not in possession but the defendant is—*Lakshminarayan v. Giriya Sankar*, (1938) 42 C.W.N. 1088.

The assignee also is liable to the original lessor in respect of all covenants running with the land, which include a covenant to pay rent. The assignee is therefore directly liable to the lessor for the payment of rent. The doctrine applies even where the title of the assignee is derived under a Court-sale—*Viravadrappa v. Basangowda*, I.L.R. 1940 Bom. 328, 42 Bom. L.R. 279, A.I.R. 1940 Bom. 154. The assignee of the lessee, however, is not liable for interest on the arrears of rent—*Ibid*. The lessor may at the same time sue the lessee on the express covenant and the assignee upon the privity of estate, though he can have execution against one only—*Kunhamian v. Anjelu*, 17 Mad. 296; *Mammatha v. Nalinaksha*, A.I.R. 1926 Cal. 324, 79 I.C. 557; *Govinda v. Md. Hosain*, A.I.R. 1925 Sind 296, 87 I.C. 802. Covenant to pay ground rent and taxes is a covenant which runs with the land—*Ardeskar v. K. D. Bros.*, A.I.R. 1925 Bom. 330 (331), 27 Bom. L.R. 553, 88 I.C. 79. An express covenant in restraint of alienation is a covenant running with the land. It binds not only the lessee but also his assignees and auction-purchasers of the land—*Dayal Singh v. Pramatha*, A.I.R. 1936 Pat. 493 (494), 15 Pat. 673, 164 I.C. 811. Covenants that touch and concern the thing demised, and not collateral thereto, run with the land and bind the assignees. Thus, a covenant by the lessee of a mine not to work the mine in a certain direction and to have a barrier between the mine leased to him and another mine, is a covenant which runs with the land—*Lodna Colliery Co. v. Bipin*, 55 I.C. 113, 1 P.L.T. 84. An assignee by way of sub-demise is bound by a restrictive covenant (a covenant against the

working of a coal mine in a certain way) of the head lease, if he has notice, either actual or constructive, of the covenant—*Mati Lal v. Ishwar Radha Madhav Jew*, 41 C.W.N. 203. In the case of a lease granted without express authority to extract minerals if the lessee and sub-lessee join to extract coal from under the land, they are joint tortfeasors. If there is a *bona fide belief* in them in their right to extract the coal that would go only to mitigate the measure of damages—*Mangobinda v. Brahma Niranjana*, A.I.R. 1938 Pat. 326 (327), 174 I.C. 130. A covenant to pay a part of the price if the lessee assigns his interest can be enforced only against the assignor, and not against the assignee unless the latter in his turn assigns—*Lala Madho Prasad v. Raja Jaleshpuri Pratap*, A.I.R. 1960 All. 513 (F.B.).

A mining lease is not mere sale of the land or minerals, but also partakes the character of a lease—*Jyoti Prasad v. Seldon*, 19 Pat. 433, A.I.R. 1940 Pat. 516, 192 I.C. 17; see also *Falakrishna v. Jagannath*, 59 Cal. 1814, 36 C.W.N. 709, A.I.R. 1932 Cal. 775. In the case of assignment of a share of such leased premises the lessor is entitled to sue the assignees for the whole rent. The assignees are liable jointly and severally with the lessee—*Jyoti Prasad v. Seldon*, supra.

Privy of estate :—When the liability of a tenant to pay rent is founded on privity of estate, the liability ceases as soon as the interest is transferred to some other person. But so far as the original lessee is concerned, his liability does not cease with mere assignment; his liability can only cease after the assignee is accepted as tenant by the lessor either expressly or impliedly—*Saradindu v. Kunja Kamini*, A.I.R. 1942 Cal. 514, 46 C.W.N. 798. See also *Krishna v. Narayana*, A.I.R. 1949 Mad. 618, (1949) 1 M.L.J. 191 and *Dwijendra v. Promode*, A.I.R. 1951 Cal. 251, 54 C.W.N. 673. Both the assignor and the assignee can be sued for ejectment—*Pandit Kishan Lal v. Ganpat Ram Khosla*, A.I.R. 1961 S.C. 1554.

It has been held by the Lahore High Court that there being no privity of contract between the original lessor and a sub-lessee, the former is not entitled to claim rent from the latter, his remedy being only against the lessee with whom he made the contract—*Jetha Nand v. Udho Das*, A.I.R. 1931 Lah. 614, 131 I.C. 121. But the liability of the assignee of a lease to pay rent to the landlord arises by reason of the *privity of estate* and this privity of estate is created by the *transfer* to him and not by his obtaining *possession*. Similarly, when the assignee in turn assigns over, his privity of estate ceases and consequently his liability also ceases in respect of breaches of covenant committed after he has assigned over—*Saldanha v. Subraya*, 30 Mad. 410; *Mehra Godadhar*, 37 Cal. 683.

By Indian, as by English, law an assignee of a lease is liable by privity of estate for all the burdens of the lease—burdens which are imposed upon him by the mere assignment, whether he enters into possession or not—*Ram Kinkar v. Satya Charan*, A.I.R. 1939 P.C. 14, 43 C.W.N. 281. Therefore a lessor can hold the assignees from the lessee, liable for royalty even though they may not have obtained actual possession under the assignment—*Jyoti Prasad v. Seldon*, supra. On the other hand, since the privity of estate is created by *transfer* and not by *possession*

sion, it follows that mere possession of a leasehold property will not render a man liable for rent, if the lease has not been assigned to him—*Ananda v. Abdullah*, 41 Cal. 148 (155). Moreover, the liability of the assignee for rent arises from the date of the assignment and not from the date of his taking possession—*Saldanha v. Subraya*, 30 Mad. 410; *Bengal National Bank v. Janaki*, 54 Cal. 813, 31 C.W.N. 973, A.I.R. 1927 Cal. 725 (730), 104 I.C. 484.

These principles relating to the privity of estate between the lessor and the lessee's assignee does not apply except when the whole of the lessee's interest is assigned over. No privity of estate arises when a subsidiary interest is carved out of the lessee's interest, as where the lessee mortgages or sublets his leasehold interest—*Sukhdeo v. Rameshwar*, A.I.R. 1939 Pat. 522, 185 I.C. 557. There is no privity of estate between a lessor and the mortgagee from the lessee—*Thethalan v. Earlpad Raja*, 40 Mad. 1111 (1112, 1114), 40 I.C. 841. Since in the case of a mortgage a legal interest remains in the mortgagor, the interest taken by the mortgagee of leasehold interests is not an absolute interest and is not such as to render him liable for the burdens of the lease by reason of privity of estate or contract between him and the lessor. Nor can privity of estate result from his entry into possession—*Jagadamba Loan Co. v. Shiba Prasad*, A.I.R. 1941 P.C. 36. In this case their Lordships held that no question arose of novation by reason of the mortgagees having paid rent to the lessor. Their Lordships were of opinion that although in *Ram Kinkar v. Satya Charan*, (supra) the mortgagees had not entered into possession of the properties mortgaged, the principle of that decision was equally inconsistent with privity of contract as with privity of estate as a ground of claim against the mortgagee of leaseholds in such a case as the case under consideration—*Jagadamba Loan Co. v. Shiba Prasad*, supra, at p. 38. Similarly, a sub-lease differs from an absolute assignment of a lease in that it creates no privity of estate between the sub-tenant and the landlord. The landlord has to deal with his lessee and not with the sub-tenants of the latter—*Timmappa v. Rama*, 21 Bom. 311 (313). Under the Indian law as embodied in the T.P. Act, even the English mortgage of a lease does not amount to a transfer of the whole and an absolute interest and does not create a privity of estate between the lessor and the mortgagee, so as to make the latter liable on the ground for the burdens of a lease—*Ram Kinkar v. Satya Charan*, A.I.R. 1939 P.C. 14.

A mortgagee of a lease who has foreclosed is liable for rent to the lessor, because in such a case the entire interests of the lessee and the mortgagee have become by operation of law merged in the person of the latter—*Macnaghten v. Bheekaree*, 2 C.L.R. 323. If the lessee mortgages the demised land in violation of the term of the lease and the landlord obtains a decree for eviction on the ground of forfeiture, the mortgagee not being an assignee cannot say that the notice under cl. (g), sec. 111 is bad or that there has been no violation of the condition of the lease—*Kshiroda Sundari v. Bhupendra*, A.I.R. 1961 Assam 70.

It is only when the person in possession is a pure trespasser and there is no privity between him and the tenant, that the Court will grant a decree for possession to the landlord. In other cases where the

person in possession holds under a transfer by the tenant, possession will not be decreed unless abandonment by the tenant is proved—*Nandanlal v. Shree Hanumanji*, A.I.R. 1940 Nag. 46, (1939) N.L.J. 551.

581. Clause (k) :—Compare cl. (5) (a) of sec. 55. The distinction between sec. 55 and the present section is that while under the earlier section the non-disclosure amounts to fraud on the part of the purchaser and entitles the vendor to rescind the contract of sale, a non-disclosure under this clause has no such serious effect but only entitles the lessor to sue for compensation.

582. Clause (l)—Payment of rent :—The tenant's liability to pay rent commences from the date he is put into possession and not from the date when the landlord merely signs the lease—*Shama Prasad v. Taki*, 5 C.W.N. 816; and the tenant is not bound to pay rent for the portion of the property of which he has not obtained possession—*Siba Kumari v. Bipprodas*, 12 C.W.N. 767. Where a lump rent was fixed for the whole land and the lessor dispossessed the lessee in a highhanded manner from a portion of the land he is not entitled to claim any rent till he again puts the tenant in possession of the portion dispossessed. The mere fact that the area dispossessed is a small one is not of an overriding importance—*Nilkantha v. Kshitish* A.I.R. 1951 Cal. 338. A lessee is not entitled to claim remission for loss suffered due to cyclones—*Alanduraiappan v. T. S. A. Hamid*, A.I.R. 1963 Mad. 94. Where a mortgagor executes a rent-note in favour of the mortgagee in respect of the mortgaged property the mortgagee is competent to sue for arrears of rent, except where the mortgage-deed specifically provides that on failure to pay rent a suit for the entire money can be filed—*Kushal Raj v. Mst. Mooli Bai*, I.L.R. (1963) 13 Raj. 980. If a tenant gives notice to the landlord purporting to surrender the unexpired period of the lease but the landlord refuses to accept the surrender, the tenant does not cease to be liable for the rent—*Thiagarajaswami v. Kamalappa Thevar*, A.I.R. 1962 Mad. 439. A tenant denying the title of the landlord but willing to pay rent under protest commits default in payment of rent when the landlord does not accept rent offered under protest—*Bhagwandas v. Surajmal*, A.I.R. 1961 Madh. Pr. 237.

This clause makes it obligatory on the tenant to pay or tender the rent at the proper time and place. There is nothing in this section to require the lessor to make a demand—*Allibhoy v. Gordhandas*, 23 S.L.R. 29, A.I.R. 1929 Sind. 13, 111 I.C. 530; *Nasiruddin v. Umerji Adam & Co.*, A.I.R. 1941 Bom. 286 (287), 43 Bom. L.R. 546. The place of payment of the rent is a matter of contract, and, in the absence of express provisions, is to be implied from custom; and if there is no custom, it is normally the duty of the debtor to seek out his creditor—*In the matter of Maung Pyu*, A.I.R. 1940 Rang. 84 (88) S.B., 1940 R.L.R. 325, 188 I.C. 422. The tenant is not bound to make a useless tender when he knows for certain that the tender would be refused—*S. K. Shaw v. Brij Raj*, A.I.R. 1949 Pat. 475, 30 P.L.T. 183.

In India rent does not accrue from day to day, but according to kists—*Ram v. Harihar*, A.I.R. 1937 Pat. 237, 16 Pat. 184, 168 I.C. 502.

Where there is no assignment by the lessor and the lessee pays the

rent in advance which the lessor accepts, he will be bound to appropriate the advance towards the rent as it accrues due—*Krishnaswamy v. Mohanlal*, A.I.R. 1949 Mad. 535, I.L.R. 1949 Mad. 657.

In the absence of a stipulation in the lease it cannot be forfeited for non-payment of rent—*Harsur v. Samat*, A.I.R. 1953 Sau. 94. A tenant can claim abatement of rent on the ground of diluvion of a portion of the land demised, even if there is no provision for this in the Tenancy Act—*Medini Kumar v. P. C. Mallik*, A.I.R. 1948 Pat. 322. In such a case the onus is on the tenant to show how much has been diluviated—*ibid.* A tenant cannot claim assessment of fair rent where the tenancy is governed by the present Act. Abatement of rent cannot be claimed, if there is no deprivation of the tenant from a part of the premises by reason of non-repairs by the landlord—*Bansi v. Krishna*, A.I.R. 1951 Pat. 508, 30 P.L.T. 231.

Where the lessor has no title to the property and the lessee is ejected by the true owner, the lessee is not bound to pay any rent to the lessor—*Moti Lal v. Yar Mahammad*, A.I.R. 1925 All. 275, 47 All. 63, 85 I.C. 756. But a sub-tenant who remains in possession even after the passing of a decree for eviction against the head lessee is bound to pay rent to the head lessee for the period during which he remains in possession after the decree—*National Jewellery Works v. Diana Printing Works*, 63 C.W.N. 192. In order to sustain the defence to a rent suit, founded upon eviction by title paramount, two things must be proved by the defendant, namely, (i) that he has been evicted by a third person, and (ii) the third person had a paramount title, superior to the title of his lessor. Though physical expulsion is not necessary, the mere assertion by the third person that he has better title to the knowledge of the lessor and the lessee, is not a defence to a rent suit instituted by the lessor against the lessee, even if this assertion be a true assertion. It is essential that the person asserting such title should take possession or should be taken in the eye of law to have taken possession of the demised premises. The mere institution of a suit for possession by a person having title paramount in law does not amount to such eviction—*Amritalal v. Uttamlal*, A.I.R. 1939 Cal. 216 (218), I.L.R. (1938) 2 Cal. 559, per R. C. Mitter and Edgley, JJ.

Where a landlord has at the beginning of the tenancy a title or possession, the tenant cannot deny his landlord's right to let the property to him, although the plea that the tenancy has ceased or that his liability to pay rent either wholly or partially has come to an end, is available to him on the ground that he has been evicted against his will or forced to attorn to a person holding title paramount. In that case he would be freed from his liability to pay rent—*Seeram v. Kethavarapu*, A.I.R. 1939 Mad. 220, 48 M.L.W. 959.

As to the tenant's right to suspend payment of rent in case of obstruction to his possession or deprivation of the whole or portion of the land, see Note 574, *ante*.

This Act gives no authority to a landlord to enhance the rent of his tenant during the term of the lease, whether it be in perpetuity or for a definite term—*Satish Chander v. Rai Jatindra*, 7 C.L.J. 284.

Where the lease discloses a joint demise, no one of the lessors with or without the consent of his co-lessors can sue for an aliquot part of the whole; the suit must be for the whole of the interest demised, else it fails—*Baraboni Coal Concern v. Gopinath Jiu*, A.I.R. 1934 P.C. 58 (59), 61 Cal. 313, 61 I.A. 35, 38 C.W.N. 325, 147 I.C. 884. An *inter se* partition of the mokarrari interest amongst the mokarraridars does not affect their liability, *qua* the lessor, for payment of the whole rent, as several tenants of a tenancy constitute in law but a single tenant. Such is the case also in a *lakhiraj* holding subject to a mokarrari interest—*Badri Narain v. Rameshwar*, A.I.R. 1951 S.C. 186, 1951 S.C.J. 252, 30 Pat. 664. See also *Krishna v. Narayana*, A.I.R. 1949 Mad. 618, (1949) M.L.J. 191. A co-sharer can file a suit for the entire rent by impleading the other co-sharers as defendants. But a suit for a proportionate part of the rent is not maintainable in the absence of a contract to that effect between the tenant and the co-sharer landlords—*Vijai Kumar Tandon v. Ganga Devi Rathor*, 1969 All. L.J. 403.

A stipulation that if a tenant does not pay rent on the due date interest shall be charged on the arrear, is enforceable—*Bhyrub v. Meer Ameerooddeen*, 17 W.R. 173; and the mere omission to claim interest for some time cannot amount to a waiver of the landlord's right to claim interest at the stipulated rate—*Shyama Charan v. Heran Mollah*, 26 Cal. 160; *Jahoory v. Bullab*, 5 Cal. 102. Moreover, the Court has no power to reduce the stipulated rate of interest payable upon non-payment of rent in due time—*Sayed Shahid Hussain v. Jagmohan*, 2 P.L.T. 276, A.I.R. 1921 Pat. 301.

Where the plaintiff prays for rent in his one third share making the co-sharers proforma defendant the suit is not maintainable because the contract for payment of rent cannot be split up at the will of a co-sharer—*Dhaneswar v. Subodh Kumar*, A.I.R. 1967 Cal. 334. If the tenant purchase the interest of one of the landlords, others can get only a decree for joint possession and proportionate rent in a suit for eviction and for rent in arrears—*Hari Pratap v. Ramgopal*, A.I.R. 1961 Raj. 18.

Concurrent lease:—When a lessor executes two concurrent leases of the same property, that is to say, two leases in which the term of the second commences before the term of the first has expired, the second lessee is to be taken as the assignee of the lessor's interest during the concurrent portion of the terms, and the lessor after the execution of the second lease can recover rent only from the second and not from the first lessee—*Ram Anant v. Shanker*, 30 All. 369. A concurrent lease operates as a grant of the reversion upon the existing term and would entitle the concurrent lessee to recover the rent from the earlier lessee. Where, therefore, the lessor grants a usufructuary mortgage of the property when both the leases had some time to run, the mortgagee's right to recover rent would be only to proceed against the concurrent lessee and not against the original lessee—*Periaswami v. Periaswami*, A.I.R. 1951 Mad. 718, (1951) 1 M.L.J. 165. If the lessor is authorised by the lessee to collect rent from the sub-tenants in satisfaction of his claim for rent from the lessee, the authority cannot be subsequently withdrawn because the lessor becomes the agent of the lessee coupled with interest—*B. Ahmed Maracair v. Mulhuvalliappa Chettiar*, A.I.R. 1961 Mad. 28.

If the lessor realises only a part of the rent from the sub-lessees and the claim against the latter becomes barred by limitation he cannot realise the balance from the lessee—*Ibid.*

583. Clause (m) :—The provisions of the Act can not be applied by analogy to patni taluqs and a patnidar is competent to use or lease out land for manufacture of bricks—*Surendra v. Bijoy*, A.I.R. 1925 Cal. 962 (964), 52 Cal. 655, 30 C.W.N. 233, 41 C.L.J. 527.

The use of electric energy for lighting or other domestic purposes is so reasonable and prevalent that to bring electricity in the premises for such purposes is to use the land or premises in a natural and not in unnatural way—*Dhanal Soorma v. Rangoon Indian Electric Telegraph Association*, A.I.R. 1935 Rang. 401 (403), 13 Rang. 369, 160 I.C. 245.

Omission by a tenant of land to put manure would only lead to lesser return of crop. There can be no detriment to the land itself—*Pokar v. Lakshman*, A.I.R. 1951 Raj. 120.

In a suit for ejectment by a tenant against his sub-tenant on the ground of expiration of the sub-tenancy, the sub-tenant cannot plead that the tenant's title to the land has been terminated by a notice from his landlord and that he has got a fresh lease direct from the landlord. The sub-tenant is bound to restore possession to the plaintiff under this clause—*Sorthia v. Karamshi*, A.I.R. 1952 Kutch 19.

Repairs by lessee :—This clause lays down that on the termination of the lease the lessee is bound to restore the property in as good condition as it was in when he was put in possession. But this does not mean that if a tenant has taken a house which is out of repairs, he should put it in repairs when the lease comes to an end; but he is bound to maintain and restore the property in the condition in which it was when it was leased out to him. If the building when demised was an old one, and there was a covenant to repair, it is not necessary that the old building be delivered up in a renewed form—*Lister v. Lime*, (1893) 2 Q.B. 212. Where the lessee terminates the tenancy by notice to the lessor and offers possession, but the latter refuses the offer on the ground that the premises were not in a state of proper repair, the lessor cannot challenge the notice or termination of the lease, but must sue for damages for wilful negligence of the tenant—*Raman v. Kunhi*, A.I.R. 1953 Mad. 996.

The implied obligation of a tenant from year to year is to keep the premises wind and water tight—*Anworth v. Johnson*, (1832) 5 C. & P. 239; *Leach v. Thomas*, (1835) 7 C. & P. 327; *Wedd v. Porter*, [1916] 2 K.B. 91 (100); and to make fair and tenantable repairs—*Cheltham v. Hampson* (1791) 3 T.R. 313. *Gregory v. Mighell*, (1811) 18 Bes. 328 (331); as by putting fences in order, or replacing windows or doors that are broken during his occupation or cleansing drains and sewers—*Russell v. Shenton*, (1842) 3 Q.B. 449. Where a godown, when it was let, was in a fit and proper condition and the landlord had contracted only to make minor repairs, he was not liable for damages caused by the collapse of one of its walls to the neighbouring wall of the plaintiff's godown; but the assignee of the unexpired portion of the lessee's lease was liable

as tenant to make good the damage sustained by the plaintiff—*Bai Monghibai v. Lakhmidas*, 19 Bom. L.R. 887, 43 I.C. 273.

This clause which directs the lessee to restore the property in the same condition in which it was let, subject to the change caused by reasonable wear and tear or by any irresistible force, has no application where the parties have fixed their own terms—and made their own bargain. Thus, where the lessee covenanted to keep the premises “wind and water tight and in habitable condition” and the premises were subsequently damaged by an earthquake, *held* that as the parties had made their own terms as to the condition in which the lessee was to keep the house and in which it was to be delivered up at the end of the term, the lessee was bound by his contract to make good the damage, irrespective of whether or not the damage was caused by earthquake or any other irresistible force—*Heckle v. Tellery*, 4 C.W.N. 521. But in such a case the lessee is not liable to do all and every repair that is necessary by reason of the earthquake, but only to make the damage to the extent of making the premises “wind and water tight and in habitable condition”—*Ibid.* All that the lessee is bound to do is to put the premises in such repair as having regard to the age, character and locality of the house, would make it reasonably fit for the occupation of a tenant of the class who would be likely to take it—*Proudfoot v. Hart*, 25 Q.B.D. 42, cited in the above case. When there is a covenant in a lease to leave the premises in repair at the end of the term, and such covenant is broken, the lessee must pay what the lessor proves to be a reasonable and proper amount for putting the premises into the state of repair in which they ought to be left—*Sarafali v. Subraya*, 20 Bom. 439 following *Joymer v. Weeks*, [1891] 2 Q.B. 31 (43).

The general rule of law with respect to covenants to repair is that where the covenant to repair is in general terms to keep the premises in repair, the covenant will attach to *new buildings* which are subsequently erected upon the demised premises during the currency of the term. On the other hand, where the covenant to repair refers to certain specified property that is demised, such as the “said building” or the “said houses,” then unless the additional buildings in fact become part of the specific buildings which the tenant covenanted to repair, the covenant will extend to such new and separate erections. Whether or not a covenant to repair extends to any particular property depends upon the terms of the covenant and the facts proved in the case under consideration—*Debendra v. Cohen*, 54 Cal. 485, A.I.R. 1927 Cal. 908 (910), 106 I.C. 477. If the new buildings are so constructed that they cannot be treated as separate buildings but are in fact and in truth made part of the original buildings, the covenant to repair would extend to such new erections—*Debendra v. Cohen*, *supra*; *Cohen v. Debendra*, 32 C.W.N. 154 (157, 158), 107 I.C. 86, A.I.R. 1928 Cal. 89. “A general covenant to repair includes not merely buildings existing when the demise is made, but all those which may be erected during the term”—*Field v. Curnick*, [1926] 2 K.B. 374; *Cornish v. Cleife*, (1864) 3 H. & C. 446; *Foa’s Landlord and Tenant*, 6th Edn. p. 228. The mere fact that an agreement between the landlord and tenant embodied in a rent note imposes an obligation on the tenant to do plastering and repairs of the pre-

mises, does not, however, impose on the tenant an obligation to re-build a house which falls down or is re-constructed in obedience to a dilapidation notice—*Abdul Razak v. Seth Nandlal*, A.I.R. 1938 Nag. 506 (511-12), (1938) N.L.J. 317.

Destruction by fire:—A lease of a building for the purpose of storing alcohol and other spirits for a distillery contained a covenant that "the lessees on the expiry of the period of lease should restore the building at their own cost to the condition in which they took the same, and that in case the lessees fail to remove the additions and alterations made by them and to restore the building to its original and habitable condition at their own cost, the cost thereof shall be paid by the lessees to the lessor." The building having been subsequently accidentally burnt down by fire, the lessor sued the lessee for damages for reinstatement of the building. *Held* that the covenant merely intended that any structural alterations made by the lessees for the purposes of their business should be restored on the expiration of the lease so as to make the building suitable for occupation as a dwelling house; that the covenant did not refer to the complete destruction of the building and its complete reinstatement; that the T. P. Act clearly contemplates that a lessee should not be responsible for the consequences of fire unless he has definitely taken that burden on his own shoulders by his covenant; and that as the covenant of this lease did not contemplate the case of fire at all, the lessee could not be made responsible for the damage—*East India Distilleries Ltd. v. Matthias*, 51 Mad. 994. 55 M.L.J. 663, A.I.R. 1928 Mad. 1140 (1141, 1142), 114 I.C. 234.

584. Inspection by landlord:—Under the English law, the landlord has no right to go upon the premises if he desires to make repairs, and if he does so in the absence of an express power in the lease, he will be guilty of trespass and may be restrained by injunction, although the non-repair may cause a forfeiture of his own lease—*Barker v. Barker*, (1829) 3 C. & P. 557; *Stocker v. Planet Building-Society*, (1797) 27 W.R. (Eng.) 793.

Clause (n):—This clause throws a duty upon the lessee in order that the lessor may, if he chooses, protect his own interest and may be safeguarded against the results of a collusive eviction submitted to by the lessee—*Indu Bhusan v. Chowdhury Moazam*, 33 C.W.N. 106 (111).

585. Clause (o)—Scope:—This clause deals with the ordinary rights of a lessee in an ordinary lease, and its terms cannot be held to cut down the right to work a mineral expressly conveyed—*Satya Niranjan v. Ram Lal*, 4 Pat. 244 (P.C.), 29 C.W.N. 725, 86 I.C. 712, A.I.R. 1925 P.C. 42. If certain premises are let out as a go-down but the tenant sublets it for residential purpose and the premises are destroyed by fire, the tenant is *prima facie* liable for damages caused to the premises and the onus is upon him to show that there was no negligence either on his part or on the part of the sub-tenant—*Gurupada Haldar v. Haripada Mukherjee*, A.I.R. 1962 Cal. 263.

This clause means no more than that a tenant is to use the demised premises in a good tenant-like manner, and to effect all repairs which are necessary to be effected in order to prevent the building from falling

into ruin or at any rate give the landlord notice of the detection of any serious danger of that kind—*Bai Monghibai v. Doongersey*, 43 I.C. 273, 19 Bom. L.R. 887. Ordinarily, a tenant can make improvements on his holding, but has no authority to use it for any purpose inconsistent with the purpose for which the land has been given to him—*Binda Prasad v. Behari Tewari*, A.I.R. 1936 Oudh 316, 163 I.C. 186. Where the lease is for residential purpose the tenant may be restrained by an injunction from running a flour mill in the demised property—*Behari Lal v. Chandrawati*, A.I.R. 1966 All. 541. Storing of cloth in premises let out for selling cloth does not amount to use for a different purpose—*Mahmadumar Abdul Rahim v. Firm of Shah Manilal Gokuldas*, 9 Guj. L.R. 104.

Where the appellant had got a right from the Government to win and get oil from a well site and he let it to the respondent for tapping oil who sank wells, got no oil but gas came out which he enclosed in pipes and used for his purposes, it was held that the word "oil" did not include gas and there is nothing inconsistent with the terms of this section in the use of the gas which is set free by reason of the sinking of the oil well for the respondent's purposes without doing any damage or injury to the property—*U Po v. Burma Oil Co.*, A.I.R. 1929 P.C. 108 (110), 33 C.W.N. 545, 7 Rang. 157, 56 I.A. 140, 115 I.C. 705.

The "right to enjoy such property" in sec. 105 means the right to enjoy the property in the manner in which that property can be enjoyed. If the subject-matter of the lease is coal land, it can only be enjoyed and occupied by the lessee by working it as indicated in section 108 which regulates fully the rights and liabilities of lessors and lessees in this country—*Commissioner of Income Tax v. Kamakshya Narain*, 20 Pat. 13 (S.B.), 21 P.L.T. 897, A.I.R. 1940 Pat. 633 (647). Where land is leased for the purpose of cultivation and settling tenants thereon, the lessee is only entitled to a reasonable right of user in the soil, but he has no right to dig or quarry stone or to collect and sell surplus stones. The right to collect them can be established only by custom—*Kusum Kamini v. Jagadish Chandra*, A.I.R. 1941 Pat. 13 relying on *Bejoy Singh v. Surendra Narain*, 55 I.A. 320, 56 Cal. 1, A.I.R. 1928 P.C. 234 and *Bhupendranarayan v. Rajeswar Prasad*, 58 I.A. 228, 59 Cal. 80, A.I.R. 1931 P.C. 162. As to custom referred to above see *Tucker v. Linger*, 21 Ch.D. 18 affd. in 8 App. Cal. 508. A tenant has a right to take electric connection in the portion let out to him to improve the premises—*Sheodayal v. Daluram Agarwala*, A.I.R. 1965 Pat. 413.

Where there is an agreement between a Zemindar and tenant that the latter should have a specified area for the purposes of a grove, and the tenant either does not use a definite ascertainable portion for the purpose by neglecting to replant for a considerable period or affirmatively uses a definite ascertainable portion, even a small portion for some other purpose, e.g., building a house, he commits a breach of the contract and is liable to ejectment from the whole—*Bansidhar v. Bindeshwari*, A.I.R. 1940 Oudh 411 (412), 1940 O.W.N. 894, 190 I.C. 620. Here even if the structures erected are temporary, the Zemindar can sue for ejectment—*Ibid*; see also *Roghunath v. Md. Ali Hasan*, A.I.R. 1928 All. 117, 106 I.C. 268 and *Doraikannu v. Ramaswami*, A.I.R. 1940 Mad. 32, (1939) 2 M.L.J. 773, (1939) M.W.N. 1163 where injunction was granted

to demolish the house and buildings. The demolition of a wall is not necessarily an act of waste—*Ahmad v. Muhammad*, 1967 Ker. L. T. 841. The landlord can claim damages for cutting fruit-bearing trees or removing earth only at the time of recovering possession—*Lakshmi Amma v. Kalliani Amma*, I.L.R. (1967) 2 Ker. 168. A landlord cannot claim damages for the removal of fruit-bearing trees; he can claim damages only for timber trees—*Abdulla v. Govinda Nair*, 1968 Ker. L.T. 563.

The words "belonging to the lessor" have been added to this clause by the amendment of 1929.

Jack trees are both *timber* and fruit trees, and the lessee cannot cut them—*Gangamma v. Bhommakka*, 33 Mad. 253 (254). Trees of spontaneous growth on the land belong to the owner, A.I.R. 1955 Andhra 62. Timber includes bamboos—*B. L. Mehra v. State*, 1957 All. L.J. 917.

Act of waste :—The following are "acts destructive or permanently injurious to the property":—

(a) Felling the timber (see the section); "cutting down, destroying or tapping all trees which are timber either by the general law or by the particular custom of the country, is waste"—Woodfall, 16th Edn., p. 660. See also *Mahavaraya Udpa v. Dasa Tantri*, A.I.R. 1964 Mys. 179.

(b) Pulling down or damaging buildings (see the section);

(c) Working mines or quarries not open when the lease was granted (see the section); *In re Purmandas*, 7 Bom. 109; *Christian v. Tekaitni*, 19 C.W.N. 796;

(d) Converting arable land into woods and conversely meadow into arable land; suffering houses to be uncovered, whereby the rafters or other timber of the houses become rotten; permitting the walls of houses to decay for defaults of plastering; suffering the house to be wasted and then felling down timber to repair the same, etc.—Woodrall's *Landlord and Tenant*;

(e) Making bricks upon land not specially let for the purpose—*Anund v. Bissonath*, 17 W.R. 416.

(f) Digging tank on the property demised for agricultural purposes—*Tarini v. Debnarayan*, 8 B.L.R. App. 69;

(g) Converting land under cultivation into a mango-grove—*Lakshman v. Ram Chandra*, 10 Mad. 351; *Bholoi v. Raja of Bansi*, 4 All. 174;

(h) Making excavations of such a character as to cause substantial damage to the property demised, although the lease permits the lessee to make excavations—*Girish v. Sirish*, 9 C.W.N. 255; *Viswanath Iyer v. Kunju Ezhuthassan*, I.L.R. (1968) 1 Ker. 245.

Acts not amounting to waste :—

(a) Planting trees on the holding so long as it does not materially affect the character of the holding, even though the patta prohibits the planting of new trees—*Krishna Das v. Venkatappa*, 9 M.L.J. 146.

(b) Planting cocoanut trees in land cultivated with ragi and paddy

by an occupancy tenant paying a fixed money rent—*Venkaya v. Ramasami*, 22 Mad. 39.

(c) The digging of a well, especially if it is a *chaunda* well of a temporary nature—*Bholoi v. Raja of Bansi*, 4 All. 174.

(d) Merely allowing the land to remain uncultivated—*Dinabandhu v. Lokanadhasami*, 6 Mad. 322.

(e) Agricultural tenant letting part of the demised property to a theatrical company for the purpose of their holding theatrical performances thereon, at a time when no crops are growing on the holding—*Yusuf Ali v. Hira*, 20 All. 469.

586. Clause (p)—Permanent structures :—This clause prohibits the tenant from erecting any permanent structures on the land, but if he so erects, he is entitled to remove them according to the provisions of clause (h). If they are not so removed they vest in the landlord, *Pundarikaksha v. Chanda Singh*, A.I.R. 1967 Cal. 538.

The prohibition under this clause does not apply when according to the contract of the parties the land is let for the erection of a dwelling house or a shop thereon—*Ismail v. Nazarali*, 27 Mad. 211 (216). See also *Chandi Charan v. Ashutosh*, 40 C.W.N. 52; Alterations may be material even though they may not cause any damage to the premises or substantially diminish their value—*Manmohan Das v. Bishun Das*, A.I.R. 1967 S.C. 643.

If a tenant transfers the house built by him with the landlords' permission on agricultural land the transferee acquires right to the materials of the house but not to the site, because his right to occupy the site is personal—*Chhaju Singh v. Kanhai*, 1881 A.W.N. 144 (F.B.); *Amir Begam v. Balak*, 1900 A.W.N. 182; *Sri Girdhariji v. Chote Lal*, 20 All. 248. A structure with walls of bricks and roof of corrugated sheets is a permanent structure—*Surya Properties (P) Ltd. v. Bimalendu Nath Sarkar*, A.I.R. 1965 Cal. 408. Whether a structure is permanent or not is a question of fact—*Surya Properties (P) Ltd. v. Bimalendu*, A.I.R. 1964 Cal. 1 (S.B.); *Atul Sonatan*, A.I.R. 1962 Cal. 78.

587. Clause (q)—Lessee's duty to restore possession on expiry of term :—Where Government requisitions a portion of the land leased out the landlord can sue on the termination of the lease for the recovery of the residue—*Shankarlal v. Pandharinath*, A.I.R. 1951 Bom. 385, I.L.R. 1951 Bom. 670. The tenant giving up the demised lands to his landlord on the expiry of the term is bound to give him *vacant possession*—*Balaramgiri v. Vasudeva*, 22 Bom. 348; *Chandi Charan v. Ashutosh*, (1935) 40 C.W.N. 52. This rule applies not only where the tenant gives up possession on the expiry of the term, but also where the tenant treats the lease as void on account of destruction of the premises by fire—*Bruel & Co. v. Haji Siddick*, 12 Bom. L.R. 474, 6 I.C. 909. If the tenant does not give vacant possession the tenant is liable in damages; the tenancy is not continued indefinitely—*Balaramgiri v. Vasudeb*, 22 Bom. 348. On the termination of a lease compensation is payable not according to the terms of the tenancy, but according to normal rent—*Ubidal Rahaman v. Darbari Lal*, A.I.R. 1933 Lah. 509 (510), 146 I.C. 845. But it was held

in another case of the same High Court that ordinarily the proper measure of damages is twice the amount of rent payable by the tenant—*Sundar Singh v. Ram Saran*, A.I.R. 1933 Lah. 61 (64), 14 Lah. 137, 142 I.C. 754. Yet in another case it was held that the court has the discretion not to penalise the tenant—*Narain v. Dharam*, A.I.R. 1932 Lah. 275. If the property is in the possession of a sub-lessee, and the lessee does not turn him out, the landlord may maintain a suit for ejectment against the sub-lessee and recover damages from the lessee including the cost of ejecting the sub-lessee—*Henderson v. Squire*, L.R. 4 Q.B. 170; *Abdul Qayum v. Md. Fazal Azim*, A.I.R. 1937 Lah. 121 (124). If B, a lessee of land with a house under A creates a sublease in favour of C and C, after the destruction of the house by fire constructs a hut with the permission of A, B is entitled to recover possession of the land and the hut from C without paying the value of the hut to C, who, however, is entitled to remove the hut—*Munnuswamy v. Muniramiah*, A.I.R. 1965 And. Pr. 167. Where the demised premises are in the occupation of a trespasser and the tenant has not been included upon them, the landlord cannot recover damages from the tenant who has relinquished his tenancy after informing the landlord about the trespasser's possession—*Sah Sita Ram v. Syed Md. Mehdi*, A.I.R. 1959 Pat. 139.

If the landlord wrongfully refuses to take possession when asked to do so, the tenant's liability to pay ceases. For the subsequent re-entry of other persons the tenant incurs no liability, though landlord can recover from persons in occupation—*Ibid*, at pp. 124, 125.

Where after termination of a life tenancy by the tenant's death his representatives continue to pay rent to the landlord, the occupation by the representatives must be deemed to be in the capacity of tenants and the landlord would be entitled to a decree for possession provided that the possession of the defendants *as tenants* is traced within 12 years—*Jumma v. Madhusoodan*, A.I.R. 1941 All. 306, 1941 A.L.J. 327.

Where the lease provides for the purchase of the building erected by the lessee on the termination of the lease the building is to be valued according to the cost of reproducing the building after deducting depreciation and cost of repairs. No special value can be demanded for a cinema hall—*Ethirajulu v. Ranganatham*, A.I.R. 1942 Mad. 156, (1941) 2 M.L.J. 711, 1941 M.W.N. 938.

If the tenant had encroached upon any land and made it a part of his tenancy, he is bound, after the determination of tenancy, to give up those lands to his landlord—*Indu Bhushan v. Atul Chandra*, 42 C.L.J. 276, A.I.R. 1925 Cal. 1114 (1116), 67 I.C. 630. On the failure of a suit for ejectment based on the relationship of landlord and tenant it may be decreed on the plaintiffs' title—*Katamaswamy v. Ramayyu Pantulu*, A.I.R. 1958 Andh. Pra. 755.

The tenant is bound to preserve the boundaries of the lands he holds and not to permit them to be confounded with the boundaries of other land belonging to himself—*Attorney-General v. Fullerton*, 2 V. & B. 264; *Dugappa v. Tirthasami*, 6 Mad. 263. If owing to his negligence, the land demised is confounded with other lands, he is bound to compensate his landlord by making over to him a part of the property with

which it was mixed up, equal to its annual value—*Dugappa v. Tirthasami*, 6 Mad. 263; *Ismail Khan v. Broughton*, 5 C.W.N. 846.

Covenant for Renewal:—The assignee of the leasehold can enforce a covenant for renewal—*Nabakishore v. Madan Mohan*, A.I.R. 1924 Cal. 346; 69 I.C. 600; *Secretary of State v. Forbes*, 16 C.L.J. 217, 17 I.C. 180. *Secretary of State v. Volkart Brothers*, *infra*. The covenant is enforceable also against the lessor's transferee with notice of the lease—*Onkar Prasad v. Badri Das*, 23 N.L.R. 26, 89 I.C. 273, A.I.R. 1925 Nag. 281. Where in a deed of lease there is a clause that the lessee must deliver possession after the expiry of the term but may take resettlement the clause is not one for renewal—*Chimanlal Agarwala*, A.I.R. 1964 Assam 70.

Where a lease for a certain term confers an option to the lessee for renewal of the lease, but no time is fixed within which such option is to be exercised, and the lessee after the expiry of the term continues in possession, the landlord is bound to give notice to the original lessee for exercising his option of renewal—*Hemanta Kumari v. Safatulla*, 37 C.W.N. 9. Where the covenant of renewal was applicable to the whole, it did not permit renewal of a portion—*Secretary of State v. Volkart Brothers*, A.I.R. 1928 P.C. 258, 51 Mad. 885, 55 I.A. 423, 111 I.C. 404. Where there is a clause for renewal subject to such fair and equitable enhancement as the lessor shall determine the lease is not void for uncertainty, nor is the court precluded from considering whether the enhancement is fair and equitable—*Damodhar Tukaram v. State of Bombay*, A.I.R. 1959 S.C. 639. Where a lease for 10 years contains a provision that after the expiry of the period of the lease the lessee is entitled to remain in the suit land on a new Bandobasta only, the tenant is entitled to renewal on the original terms on payment of a fair rent—*Ramesh v. Atul*, A.I.R. 1959 Assam 22.

If the option in a lease does not state the terms of renewal, the new lease will be for the same period and on the same terms as the original lease in respect of all essential conditions except as to the covenant for renewal—*Prodyot Kumar v. Maynuddin*, A.I.R. 1938 Cal. 724 (727); *Shrish Chandra v. Doa Mahammad*, A.I.R. 1939 Cal. 77, 68 C.L.J. 128, 179 I.C. 813; *Secretary of State v. Digambar*, 27 C.L.J. 443, 45 I.C. 939. If a lease is given for three years and the lessee is given the right to take new settlement, he is entitled to one renewal for three years; he cannot claim a lease for an unlimited period—*Shrish Chandra v. Doa Mahammad*, *supra*, at p. 78. The leaning of Court is always against perpetual renewal, in order to establish that, the intention has to be unequivocally expressed—*Ibid*.

Premature determination of lease:—Where the term of a tenancy is brought to a premature termination, the lessee is entitled to damages and not to rent for the unexpired term of the lease, and the cause of action is not destroyed by acceptance of surrender—*Bejoy v. Howrah Amta Railway*, A.I.R. 1933 Cal. 524 (527), 32 C.L.J. 177, 72 I.C. 98.

109. If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the

lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him :

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee:

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

Principal :—The latter portion of the first para which lays down that the lessor shall not, by reason of transfer of his interest, cease to be subject to the liabilities unless the lessee elects to treat the transferee as his landlord, is an illustration of the equitable principle that a "man cannot assign obligations (*i.e.*, cannot substitute some one else as the performer of his duties), without the consent or the authority of those to whom the duties are owing"—*per Innes, J.*, in *Cheru Komen v. Govenden*, 6 M.H.C.R. 146 (at p. 151).

588. "Transfer" :—The word 'transfer' includes a lease, *i.e.*, a lessee of the lessor is entitled to all the rights enumerated in this section and can therefore eject a monthly tenant put in by the original lessor—*Parbhu Ram v. Tek Chand*, 1 Lah. 241, 53 I.C. 865.

Partition is a transfer within the meaning of sec. 5 and the present section, as it is a mixture of surrender and a conveyance—*Skattar Singh v. Rawela*, A.I.R. 1952 J. & K. 18; *Banarasilal v. Shri Bhagwan*, A.I.R. 1955 Raj. 167. A partition is transfer within the meaning of sec. 109—*Pyarelal v. Garachand*, 1964 M.P.L.J. 334. A tenancy created by a joint family can be terminated after a partition of the property of the joint family by the co-parcener to whom the tenanted portion is allotted—*Ibid.* Notice by the original landlord to the tenant after the former has parted with his rights does not have any legal effect or bind the latter in any way—*Gurumurthappa v. Chirkmunisamappa*, A.I.R. 1953 Mys. 62. Second lease by the lessor is permissible and the reversionary right vests in the second lessee, who can eject the previous lessee—*Bhagat Ram v. Keshab Deo*, A.I.R. 1965 Ass. 55.

Effect of transfer :—The purchaser of the rights of the lessor has *all the rights* of the lessor under the lease unless there is some express stipulation to the contrary—*Narayan Das v. Parasram*, 4 C.P.L.R. 61. Under the previous law the transferee could not sue the lessee for rent unless the latter had previously attorned to him—*Ram Lal v. Chandrabulle*,

13 W.R. 228. But under the present law an attornment is no longer necessary even in the Punjab—*Doulat Ram v. Haveli Shah*, A.I.R. 1939 Lah. 49 (50), 41 P.L.R. 346, 182 I.C. 533. Where a widow in possession of lands as widow's estate leases them out permanently she gets absolute right to the reversion on coming into force of the Hindu Succession Act and the reversioner would have no claim to it and cannot challenge the lease on the ground of want of legal necessity—*Thakur Ram Janki v. Jago Singh*, A.I.R. 1962 Pat. 131.

The transferee is entitled to take advantage of the forfeiture clause under section 111 (g)—*Vishveshwar v. Mahableshwar*, 43 Bom. 28 (37), 47 I.C. 330. See this case fully cited in Note 48 under sec. 6. The transferee of the lessor is entitled to eject the tenants put in by the original lessor, and it is not necessary for the original lessor to inform the tenants that he has transferred the house to the transferee—*Parbhu Ram v. Tek Chand*, 1 Lah. 241, 53 I.C. 865.

The words "all the rights of the lessor.....as to the property" clearly include rights of the lessor under covenants affecting the property, that is,—to use the English expression—under covenants "which run with the land" and that no other rights pass. A purely personal right against the original lessee who has parted with the land is not a right of the lessor as to the property—*Abdul v. Phiroz*, A.I.R. 1936 Bom. 88 (90, 91), 60 Bom. 394, 161 I.C. 57.

The assignee is also subject to *all the liabilities* of the lessor. Thus, a covenant to renew a lease is a covenant which runs with the land, and which according to this section creates a liability enforceable against the lessor's transferee—*Ramasami v. Chinnan*, 24 Mad. 449. The expression "if the lessee so elects, be subject to all the liabilities" is taken to mean the burden of all the covenants running with the land, such as covenant for quiet enjoyment. Where there is a breach of such a covenant and the lessee treats the transferee of the lessor as liable, he cannot turn round and charge the lessor in respect of the covenant as he having once made the election it is final—*Isuara v. Ramappa*, A.I.R. 1934 Mad. 658 (662), 152 I.C. 201. Open plots belonging to the Municipality were let out to A, who erected structures and let out the structures to tenants. The Municipality filed a suit for ejectment against A and a consent decree was passed providing inter alia that A was to give up possession of the plots with structures. The tenants resisted execution and thereafter filed a suit under Order 21, r. 103 contending that they had become tenants of the Municipality by reason of sec. 109, T.P. Act and therefore the decree for eviction against A could not be executed against them. *Held*: S. 109 did not apply as on the date of the so called transfer A had no interest in the property sold. Held further that the effect of the lease terminating was not a transfer from A to the Municipality—*Ram Bhagwan Das v. Bombay Corporation*, A.I.R. 1956 Bom. 364. A promise by the lessee to pay rent to the alienee from the landlord and his continued occupation with notice of the alienation amounts to attornment—*Munavar Basha v. Narayanan*, A.I.R. 1961 Mad. 200.

589. Para 2 :—The transferee is not entitled to arrears of rent accrued due before the transfer; nor is he entitled to rents accruing due

after the transfer, if the lessee had, without notice of the transfer, already paid such rent to the original lessor. Although the title of the assignee of the lease is complete upon execution and registration of the deed of assignment and is not postponed till notice has been given to the tenant, still the tenant is not bound to pay rent to him until he gets notice of the assignment. The tenant is thus able to escape the liability to the assignee if he alleges and establishes that he has paid rent to the assignor in good faith before he had notice of the assignment—*Peary Lal v. Madhoji*, 17 C.L.J. 372, 19 I.C. 865. But the lessee becomes liable to the assignee as soon as he has notice of the assignment—*Raisuddin v. Khodu*, 12 C.P.L.R. 479. Therefore, if the tenant pays rent to the assignor after he receives notice of the transfer, the payment is of no avail—*Peary Lal v. Madhoji*, 17 C.L.J. 372, 19 I.C. 865. So also, if the lessee surrenders his holding on the expiry of the term to the original lessor after the transfer and there is nothing to show that he had no notice of the assignment, the surrender is not valid and binding on the assignee who can claim rent from the lessee on the ground of his holding over after the expiry of the lease—*Rama Chandra v. Sheik Hussain*, 3 Bom. L.R. 679.

The mere fact that the notice of the transfer of the leased property was not given by the assignee to the tenant shall not lead the Court to assume that the tenant did not become the tenant of the assignee, and that the assignee was not entitled to recover any rent from the tenant. This section provides no penalty for want of notice except the loss of rent already paid by the lessee to the original lessor. That is, if the tenant does not receive any notice of the transfer and therefore pays rent to the original lessor, the assignee of the lessor cannot recover the rent from the tenant twice over—*Bhola Nath v. Supper*, 72 I.C. 86, A.I.R. 1923 Lah. 389.

Where the tenant receives notice of the assignment, he is bound by it, and it is immaterial whether the notice is received from the assignor or from the assignee. The real question which the Court has to consider is whether the payment alleged to have been made by the tenant was made *bona fide*. If he has made the payment with notice, actual or constructive, of the assignment, he cannot be deemed to have paid in good faith and he cannot escape liability merely by proof that the notice received was from the assignee and not from the assignor—*Peary Lal v. Madhoji*, 17 C.L.J. 372, 19 I.C. 865 (868). But payment of rent before it is due is not a fulfilment of the obligation to pay rent, but it is in fact an advance to the landlord with an agreement that on the day when the rent becomes due, such advance shall be treated as a fulfilment of the obligation to pay the rent—*De Nicholas v. Saunders*, L.R. 5 C.P. 569 (594).

589A. Para 3 :—Where it is found that the lessor, his transferee and the lessee have agreed as to the amount of rent payable to the transferee, the lessor or the transferee is entitled to sue for the rent payable to him without impleading the other—*Bhudeb v. Bhikshakar* A.I.R. 1942 Pat. 120 (126), 196 I.C. 837.

590. Transfer of portion of tenure :—A sale of a share in a tenure which has been let to a tenant in its entirety, does not of itself necessarily effect a severance of the tenure or an apportionment of the rent; but if the purchaser of the share desires to have such a severance or apportionment, he is entitled to enforce it by taking proper steps for that purpose.

In such a case, he must give the tenant due notice to that effect, and then if an apportionment of the rent cannot be made by amicable arrangement between all the parties concerned, the purchaser may bring a suit against the tenant for the purpose of having the rent apportioned, making all the other co-sharers parties to the suit—*Ishwar Chandra v. Ramkrishna*, 5 Cal. 902. And the apportionment may take place in respect of the arrears of rent alleged due as well as the future rent—*Rajnarain v. Ekadasi*, 27 Cal. 479. Where the tenant knows that in spite of the assignment, the assignor is holding himself out as his landlord in all proceedings in court to which the tenant is a party, the tenant is not liable to pay rent to the assignee—*Pulin Behary v. Miss Lila Dey*, A.I.R. 1957 Cal. 627. If on the death of the landlord the tenant makes an attornment in favour of a person having no title to the reversion the attornment is not effective as against a third person claiming title to the reversion unless the attornment is followed by payment of rent and the person in whose favour such attornment has been made cannot be regarded as in possession through the tenant—*V. Satyanarayanaraju v. J. Hanumayamma*, A.I.R. 1967 S.C. 174.

When a lessor sells a portion of his property, the rule of sec. 37 will be applied, and the tenants will be bound to pay to each of the owners his proportionate share of the rent. They are not bound to perform the various obligations imposed on them as lessees, wholly in favour of either the lessor or his transferee, if such obligation is capable of severance and such performance will not be to their prejudice. They are also bound, on the determination of the tenancy to put the lessor in possession of only so much of the property as he has not transferred. The rent payable and the property to be surrendered, unless all the parties agree, can only be ascertained in a suit to which all the lessors and the lessees are parties—*Sri Raja Simhadri v. Prattipati Ramayya*, 29 Mad. 29 (36).

Under this section it is not competent to an assignee of a part of the demised premises to eject the tenant from that portion only during the period of tenancy—*Kannyan Baduvan v. Alikutti*, 42 Mad. 603 (612) (F.B.), 51 I.C. 286.

110. Where the time limited by a lease of immoveable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease.

Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

591. Application of section :—The first sentence of this section may be compared with section 12 (1) of the Limitation Act which lays down

that "in computing the period of limitation, the day from which such period is to be computed shall be excluded." Compare also sec. 9 (a) of the General Clauses Act which enacts that wherever the word 'from' is used, the first in a series of days or any other period of time should be excluded.

This section is not confined to written leases only but applies to verbal leases also for the word "expressed" can include both kinds of leases—*Kedar v. Ramendra*, A.I.R. 1946 Cal. 460, 50 C.W.N. 306. But see *Calcutta Landing & Shipping Co. v. Victor Oil Co.*, A.I.R. 1944 Cal. 84, 48 C.W.N. 76, where Mukherjea J., has held that this section does not apply to verbal leases, but is confined to written leases only. The section has however no application to an oral lease by which no time is limited—*Kedar v. Ramendra*, supra. This section is not applicable to a monthly tenancy—*Mir Abdul Hanan v. Anil Chandra*, I.L.R. (1961) Cuttuck, 122; *Ramdhari Sarma v. Jogendra Kumar Biswas*, A.I.R. 1959 Assam, 174.

The first para of this section contemplates that a time or period should be limited by the lease and the period must be expressed to begin from a particular date. When both these conditions are fulfilled, the rule of interpretation laid down there applies and in computing the period that day is to be excluded—*Calcutta Landing & Shipping Co. v. Victor Oil Co.*, supra. See also *Sunder Singh v. Arjun Singh*, A.I.R. 1949 Aj. 38.

A tenancy for a term of 4 years which is said to commence from the 1st June 1921 must be deemed to have commenced on the 2nd June 1921 and ended on the midnight of the 1st June 1925. Thereafter, if the tenant held over as a monthly tenant, a notice given by the tenant on 1st February 1928 intending to vacate on the midnight of the 1st March 1928 was a valid notice—*Benoy Krishna v. Salsiccioni*, 60 Cal. 389 (P.C.), 37 C.W.N. 1 (3), A.I.R. 1932 P.C. 279, 141 I.C. 514. See also *Ganeshi Lal v. Snehalata*, A.I.R. 1947 Cal. 68, 51 C.W.N. 136. The decision of the Assam High Court as to the validity of a notice to quit in *Dharani Bai v. Sadhu Charan*, A.I.R. 1956 Assam 20 appears to be contrary to law. There the tenant was inducted by a registered lease dated 12.9.27 for three years. After the expiry of the lease the tenant continued in possession on payment of rent. The tenant was asked to quit with the end of, 13.9.50. The notice to quit was held to be valid. But according to the principle laid down in *Benoy Krishna v. Salsiccioni*, A.I.R. 1932 P.C. 279, the tenancy was from the 13th of a month to 12th of the next month. The notice to quit was evidently bad. An agricultural lease settling the lessee as permanent raiyat became operative on the date it was made—*Jangal v. Mukund*, A.I.R. 1948 Pat. 446. A monthly tenancy commencing from the 1st December 1924 must be deemed to commence on the 2nd December and ended on the midnight of the 1st January 1925, but if the parties stipulate that on the expiry of the monthly tenancy, the lease shall continue according to *calendar* months, it must be taken that after 1st January 1925, the lease shall continue for January (*i.e.*, 1st to 31st January), February (*i.e.*, 1st to 28th February), and so on; and the notice must be given accordingly. Therefore, a notice to quit given on 15th September must call upon the tenant to vacate on the

midnight of the 30th September and not on the 1st October—*Gnanaprakasam v. Vaz*, 60 M.L.J. 293, A.I.R. 1931 Mad. 352 (353).

The rule in this section applies not only in computing the time for the duration of a lease but also in computing the time from which a notice to quit commences; so that the day on which the notice is given is excluded from calculation. Thus, where the landlord served a notice on the tenant on the 16th of a month, requiring him to quit the land on the 30th of the same month, *held* that the day on which the notice was served (*i.e.*, the 16th) was to be excluded, and the tenant had therefore only 14 days' notice, which was invalid—*Subadini v. Durga Charan*, 28 Cal. 118.

Where there is no express stipulation for the commencement of a lease, the parties must be taken to have intended that the lease would take effect from the date of the execution of the instrument—*Kailas Chandra v. Bijoy*, 23 C.W.N. 190, 50 I.C. 177, even if the lessee holds over after expiry of the lease and the lessor accepts rent for the period—*Amar Singh v. Hoshier Singh*, A.I.R. 1952 All. 141. Unless it could be definitely shown that the tenancy was to commence at a particular date different from the date of the document by which it was created, it must be held ordinarily that the year of the tenancy commences from the date of the document. Thus, if the document of lease is dated 5th Aswin 1307 B. S., and there is nothing to show that the parties contemplated that the year of the tenancy would commence from any other date, it must be held that the tenancy commenced from 5th Aswin 1907 B. S.—*Dinanath v. Janaki Nath*, 55 Cal. 435, A.I.R. 1928 Cal. 392 (396), 110 I.C. 368.

The agreement referred to in the 2nd para must be an express agreement. If a lease for a term of 4 years is said to commence on the 1st day of June 1921, the term will be calculated from the 2nd June 1921 and will expire on the midnight of the 1st June 1925. The fact that the rent is payable monthly and that each month's rent is payable on the 7th of the next month is merely an agreement providing for the payment of the rent; it does not amount to an inconsistency between the provision with regard to the payment of rent and the provision with regard to the length of the term, and does not lead to an inference of an "agreement to the contrary," excluding the operation of this section, so as to treat the lease as commencing on the 1st day of June 1921 and ending on the 31st May 1925—*Binoy Krishna v. Salsicconi*, *supra*; *Rahmatulla v. Md. Husain*, A.I.R. 1940 All. 444, 1940 A.L.J. 502, 191 I.C. 223.

If a kabuliyat for a term of years commencing from the 1st day of a certain year, expressly stipulates that the lease is to terminate with the end of the last year of the term, then there is "an express agreement to the contrary" within the meaning of para 2. Such a lease shall not last during the whole of the anniversary day from which the lease commenced—*Deb Das v. Abdul Gani*, A.I.R. 1938 Cal. 138.

For other cases see Note 557A, *ante*.

Para 3 :—The third para lays down a rule of construction to be applied in case of doubt or ambiguity. If the term of the lease is explicit and clear, as for instance, where the lease is expressly made terminable

at the option of the lessor, it will be so terminable, and no other person will have that option. It is only where the language of the lease is doubtful that it is to be deemed as terminable at the option of the grantee.

III. A lease of immoveable property
Determination of lease. determines—

(a) by efflux of the time limited thereby :

(b) where such time is limited conditionally on the happening of some event—by the happening of such event :

(c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event :

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right :

(e) by express surrender ; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them ;

(f) by implied surrender :

(g) by forfeiture ; that is to say, (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter * * * ; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself ; or (3) *the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event ; and in any of these case the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease :*

(h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

Illustration to Clause (f).

A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease and such lease determines thereupon.

Amendment :—Clause (g) has been amended by sec. 57 of the T. P. Amendment Act (XX of 1929). See Notes 597, 599A and 600 below.

Application :—The principles of this section will apply to the Punjab, although the Act does not *propri vigore* apply to that province—*Chiragh Din v. Mahomed Usman Khan*, 70 I.C. 349 (Lah.), and in Pepsu—*Vasdev v. Custodian General*, A.I.R. 1953 Pepsu 26. This section and sec. 116

do not apply to the North Western Frontier Province—*Ishar Das v. Qazi Md.*, A.I.R. 1945 Pesh. 16.

Where the lease was created long before 1929 the incidents of the tenancy could not be governed by the amended sec. 111. In such a case all that is necessary to constitute forfeiture is disclaimer by the tenant and some act by the lessor indicating his intention to determine the lease—*Krishna Prasad v. Adyanath*, A.I.R. 1944 Pat. 77, 22 Pat. 513. A mere non-payment of rent does not of itself determine the tenancy—*Kamala v. Mt. Nashin*, A.I.R. 1951 H.P. 65.

The provision relating to notice under this section does not apply to a case of ejectment under the Rent Control Order—*Md. Gous v. Karimunnissa*, A.I.R. 1951 Hyd. 111, see also *Baijnath v. Ram Prasad*, A.I.R. 1951 Pat. 529, 30 Pat. 366; *Sunkavally v. Singaraju*, A.I.R. 1950 Mad. 60, (1949) 2 M.L.J. 339. *Karsandas v. Karasonji*, A.I.R. 1953 Sau. 113.

Scope :—This section will have no application to a suit by the successor in title of the original grantor of a service tenure to eject the tenant where the relation of landlord and tenant was in existence long prior to the passing of the Act and where there was no lease entered into at any subsequent time which would bring the matter within the provisions of one or other of the various sub-sections of this section. In such a case the tenancy *ipso facto* comes to an end at the time when the service failed to be rendered—*Prokash v. Rajendra*, A.I.R. 1932 Cal. 221 (223), 36 C.W.N. 823, 58 Cal. 1359, 135 I.C. 296.

Though the effect of granting a registered lease would be to determine the unregistered "lease" unexpired at such date, it does not cause it to disappear as though it had never been, rendering acts under it in the past and before the grant of the registered lease unlawful, as though done by a trespasser—*Mulji Sicca & Co. v. Nur Mohammad*, A.I.R. 1938 Nag. 377 (384).

592. Agricultural leases :—Although agricultural leases have been excluded from the purview of this Act by the express prohibition contained in sec. 117, and therefore section 111 cannot apply in terms to such leases, still the principles of equity as embodied in this section will be applied to agricultural leases. Therefore, where a mulgeni lease provided for previous notice to the lessor in case of an intended sale or mortgage of the leasehold interest by the lessee and for forfeiture of lease and re-entry on breach of the covenant, held that the lease would be forfeited and the lessor would be entitled to possession on breach of the covenant, on the application of the principle embodied in clause (g) of this section—*Krishna Shetti v. Gilbert Pinto*, 42 Mad. 654. See also *Souza v. Louis*, A.I.R. 1947 Mad. 119, (1946) 2 M.L.J. 362. Similarly, an agricultural tenant will forfeit his tenancy under clause (g) by setting up a title in a third person or by claiming title in himself—*Kemalooti v. Muhamed*, 41 Mad. 629 (630).

593. Clause (a)—Expiry of term :—Under this clause, a lease comes to an end upon the expiry of the term for which it was granted. But if there is a covenant for renewal, the lessee may claim enforcement of

such covenant. But in order to be enforceable, such covenant must be definite as to the terms upon which the renewal is to be granted. Where a lease for a term of nine years provided that at the expiry of the term the tenant might apply for re-settlement, in which case the landlord would grant him a re-settlement without any bonus, *held* that the above covenant did not specify any terms as to the amount of rent to be paid by the tenant, and was too vague to be given effect to, and the landlord was entitled to eject the tenant at the end of the term—*Surendra v. Dinabandhu*, 13 C.W.N. 595, 4 I.C. 535. A covenant for renewal may direct the lessee to exercise his option within a certain time and may provide for the giving of a notice, in which case it would be the duty of the lessee to give notice and obtain renewal within that time. But where the covenant for renewal was in the following terms: "After the expiration of the said term, if the lessee shall so desire, the executant shall have no objection whatever to renew the lease for a further term of twenty years on the terms and in consideration of payment of the rent mentioned in the lease" and there was nothing in the lease to indicate that notice of the intention to renew was to be given by the lessee before its expiration, it was held that the lessee had not forfeited his right to have the lease renewed by reason of having allowed some months to elapse after the expiration of the original term before he gave notice to the lessor of his intention to take advantage of the covenant for renewal—*Jaggilal v. Cooper*, 27 All. 696. Where the right to renewal is subject to certain conditions precedent, the right does not accrue unless those conditions are fulfilled—*State of Bihar v. Indian Copper Corporation Ltd.*, I.L.R. 38 Pat. 1160. Option to renew on the expiry of the lease does not create any present interest for the extended term—*Ibid.*

CL (a) has to be read with sec. 116. Where before the determination of the lease by efflux of time the lessee applies to the custodian for confirmation of the lease under sec. 5A, East Punjab Evacuees' (Administration of Property) Act, 1947 and the Custodian impliedly assents to his continuing in possession, the lessee does not become a trespasser—*Thakar Das v. Custodian*, A.I.R. 1950 E.P. 175.

Unlike a lease terminable under the Act by efflux of time, an agricultural lease does not determine of itself on the expiry of the lease, but it has to be terminated by a decree of Court under sec. 89, Bengal Tenancy Act—*Sakhisona v. Gourhari*, A.I.R. 1952 Cal. 567.

Since a lease does not terminate until the expiry of the term, a suit for ejectment and possession before the expiry of the period is premature; but the suit need not necessarily be dismissed, for although it is not maintainable so far as it relates to the claim for immediate possession, the landlord is entitled to a declaration of his right—*Ghulam Hussain v. Mahomed Hussain*, 6 A.L.J. 177, following *Sita Ram v. Ram Lal*, 18 All. 440. The Madras High Court holds that such a suit is not maintainable and must be dismissed, even though the lease expires during the pendency of the suit. The reason is that the rights of the parties must be determined as on the date of the action brought—*Ramanandan v. Pulikutti*, 21 Mad. 288.

No notice to quit is necessary when the action for ejectment is brought after the lease has expired and the tenancy has come to an end by efflux of time. When it is not shown that the lessors accepted rent after the termination of the lease, the lessees are tenants by sufferance and being no better than trespassers are liable to ejectment without notice—*Asa Ram v. Kishun Chand*, A.I.R. 1930 Lah. 386 (388), 120 I.C. 166; *Chandi Charan v. Ashutosh*, 40 C.W.N. 52; *Md. Fazihzzaman v. Anwar Husain*, A.I.R. 1932 All. 314, (1932) A.L.J. 126, 139 I.C. 828; *Bhagabat Patnaik v. Madhusudan Panda*, A.I.R. 1965 Orissa 11. In such a case a suit by the lessor's lessee is maintainable when the lessor is impleaded as a defendant—*Bihsen Sarup v. Abdul Samad*, A.I.R. 1931 All. 649 (651), (1931) A.L.J. 666.

593A. Clause (b) :—If the term of the lease is limited conditionally on the happening of some event, the lease is determined by the happening of such event. Thus, where the term is limited for thirty years if the lessee shall so long live, the lease is terminable at the end of thirty years or upon the death of the lessee, which event may first happen. See Woodfall's *Landlord and Tenant*, 16th Ed., p. 313; *Chauthmal v. Sardarmal*, A.I.R. 1959 Raj. 24.

For the distinction between a forfeiture under cl. (b) and that under cl. (g) see *In re Srinath Zamindary*, A.I.R. 1952 Cal. 207, where it has been pointed out that in cl. (b) the term is fixed conditionally and depends upon the happening of a future event. In cl. (g) on the other hand the term is brought to an end by a defeasance clause. A lease for 99 years granted to a company provided *inter alia* that in case the company goes into liquidation voluntarily or otherwise, it will cease to be operative. The company went into liquidation: *Held* that cl. (b) did not apply—*ibid*. Where a lease for 40 years contained a clause that if the lessee carried on any business other than manufacture of salt the lease would stand cancelled; *Held* that cl. (b) did not apply—*Krishna Chandra v. National Chemical etc.*, A.I.R. 1957 Orissa 35. Where an employee of the landlord occupying a building is liable to be evicted on his ceasing to be in employment, the tenancy is governed by sec. 111 (b), T. P. Act and no notice under sec. 106, T. P. Act is necessary for terminating the tenancy—*Tata Iron and Steel Co., Ltd. v. Gouribala Devi*, I.L.R. 47 Pat. 359.

593B. Clause (c) :—If the lessor holds the property for his own life or for the life of another, the lease would terminate on the death of himself or that other person. A lease granted by a Hindu widow would fall under this clause. Such a lease is, however, voidable and not void on the grantor's death—*Madhu Sudan v. Rooke*, 25 Cal. 1 (8) 24 I.A. 164; *Bijoy Gopal v. Krishna Mahishi*, 34 Cal. 329 (333), 34 I.A. 87.

This clause does not mean that if in the exercise of his power of due management the mortgagee has entered into an agreement of tenancy, on the mere redemption of the mortgage the tenancy would automatically lapse—*Hardie v. Wahid*, A.I.R. 1954 All. 16. A lease from year to year granted by the manager of a temple in course of management does not come to an end with the expiry of the office of

the manager or his successors—*Atyam Veerraju v. Pechetti Venkanna*, A.I.R. 1966 S.C. 629.

594. Clause (d)—Merger :—Under this clause a merger takes place when the tenant acquires the immediate reversion, and the greater estate and the less coincide in the same person without any intermediate estate—*Suraj Chandra v. Behari Lal*, I.L.R. (1939) 2 Cal. 551, A.I.R. 1939 Cal. 692 (695), 43 C.W.N. 1126. Where a lessee has purchased the equity of redemption belonging to the lessor, the existence of a mortgage on the superior right, even if it cannot be held to be an intermediate estate which would prevent merger, would certainly constitute a criterion to determine the lessee's intention. In the absence of evidence to the contrary the lessee cannot have intended a coalescence of the two rights which is manifestly to his prejudice—*Ibid* at p. 696. This clause is an embodiment of the maxim "*nemo potest esse tenens et dominus*", i.e., nobody can be both landlord and tenant at the same time (in respect of the same property). Thus, if a patnidar purchases the Zemindari rights in the mahal, his rights as patnidar would be merged—*Prosonno v. Jagut Chunder*, 3 C.L.R. 159. The principle of merger enunciated in this clause equally applies where the merger takes place by virtue of transfers by operation of law. Thus, a patni interest determines when the same is purchased by the Zemindar at an execution sale—*Promotho Nath v. Kali Prosonno*, 28 Cal. 744, but see *Bijoy v. Tarini*, 39 C.W.N. 694 where it was held that if a tenure created before the Act is acquired by the holder of the superior interest after the Act, the clause (d) being excluded by sec. 2 (c) would not apply and there will be no merger of the tenure in the superior interest by operation of law if the holder keeps the two separate. The same view has been taken by Nasim Ali and Remfry, J.J. in the recent case of *Kumar Chandra v. Sarat Chandra*, A.I.R. 1938 Cal. 128 (129).

For constituting merger within this clause the interest of the lessor and the lessee in the entire property should become vested in the same person at the same time in the same right. Thus where the acquisition of the dar-patni interest by the patnidar did not have the effect of extinguishing the dar-patni interest, there was no merger in the eye of law—*Maya Debi v. Rajlakshmi*, A.I.R. 1950 Cal. 1. Where the lessor purchases the lessee's interest, the lease no doubt is extinguished, for the same person cannot at the same time be both a landlord and a tenant. But where one of several lessees purchases only a part of the lessor's interest, there is no extinction of the lease—*Badri Narain v. Rameshwar*, A.I.R. 1951 S.C. 186, 1951 S.C.J. 252, 30 Pat. 664. As an instance of merger, see *Ram Narain v. G. G. in Council*, A.I.R. 1947 Pat. 263, 13 B.R. 34.

This clause cannot apply to a lease granted *prior* to the passing of this Act, by virtue of sec. 2 (c). Therefore, where a mokarari lease was granted to a person prior to this Act, and he subsequently acquired a *putni* lease, this clause did not apply and there was no merger of the interests—*Hirendranath v. Hari Mohan*, 18 C.W.N. 860 (865), 22 I.C. 966; *Dulhin Lachimbati v. Bodhnath Tewari*, 48 I.A. 485 (P.C.), 26 C.W.N. 565, 3 P.L.T. 383, 15 L.W. 343, 66 I.C. 551, A.I.R. 1922 P.C. 94. Similarly, where a *patni* interest was created prior to the passing of the T P. Act, no merger could take place by reason of the *patni* interest

coming into the same hands as the *Zemindary* interest—*Jibanti Nath v. Gokool Chunder*, 19 Cal. 760.

So also, in cases not governed by the provisions of this Act, the union of a superior and a subordinate interest does not necessarily merge the subordinate in the superior interest. The question in such cases is one of intention, and the conduct of the party concerned may show that he did not intend to keep the two interests alive as mutually *distinct* rights—*Ram Krishen v. Haripada*, 23 C.W.N. 830, 51 I.C. 389, 29 C.L.J. 427. On the other hand, if the two interests (e.g., *mokarari* and *patni* leases) held by a joint family in the same land were in the names of different members, that would be a material circumstance in showing that the intention was to keep the interests distinct—*Dulhin Lachimbai v. Bodh Nath*, 48 I.A. 485 (P.C.), 26 C.W.N. 565, 3 P.L.T. 383. Where a *mokarari* tenure had all along been treated as a distinct sub-tenure, there was no merger by acquisition of a *patni* tenure and the *mokarari* tenure by the same person—*Hirendra v. Hari Mohan*, 18 C.W.N. 860 (864), 22 I.C. 966.

The principle of merger implies the union of two *unequal* interests at the same time and in the same right; that is, in order that there may be merger, it is essential that there should be a greater and a less estate—*Ulfat Hossain v. Gayani Das*, 36 Cal. 802; *Surja Narayan v. Nanda Lal*, 33 Cal. 1212; *Hirendra v. Hari Mohan*, 18 C.W.N. 860 (862), 22 I.C. 966. Thus, where the proprietor purchases the inferior right of his lessee, the transaction comes directly within the four corners of this clause, and the inferior interest merges in that of the superior interest—*Hriday Narain v. Kali Charan*, A.I.R. 1928 Pat. 273, 107 I.C. 819. But, if the lessee of a holding takes a usufructuary mortgage of the holding from his landlord, the lease is not merged in the mortgage, because the two interests are co-ordinate, and not inconsistent or incompatible—*Lord Dynevor v. Tenant*, 13 App. Cas. 279; *Kashi v. Durga*, 7 N.L.R. 154, 12 I.C. 734; *Motilal v. Gopikrishna*, 1961 M.P.L.J. 66; *Lachman Das v. Heera Lal*, A.I.R. 1966 All. 323; *Roshanlal v. Baboo Lal*, A.I.R. 1964 Raj. 120. But see *Sardarilal v. Ramlal*, A.I.R. 1962 Punj; 48 where it has been held that if a house is mortgaged to the tenant with right of occupation the tenancy is determined by merger in the mortgage. In such a case, the tenant would not lose his possession as tenant, after his possession as mortgagee has ceased. The tenant's rights would only be in abeyance and the rent suspended during the term of the mortgage, but as soon as the landlord redeems the mortgage, the parties would revert to their former status and the landlord would not be able to get possession except by ejecting the tenant in due course of law—*Kalu v. Divram*, 24 All. 487; *Kashi v. Durga*, 7 N.L.R. 154, 12 I.C. 734. So also, if a person who held a *malguzari* tenure directly under the 16 annas *Zemindar*, afterwards took a *mokarari* lease from *patnidar* under 8 annas *maliks*, the *malguzari* interest did not merge in the *mokarari*—*Amattoo v. Sheikh Mukshad Ali*, 19 C.W.N. 435, 28 I.C. 314.

Another requisite of merger is that the *entire* interest of the lessee and the entire interest of the lessor must vest in the same person—*Monmatha v. Mohendra*, 65 I.C. 469, A.I.R. 1922 Cal. 284 (285). *Lala Nathuni Prosad v. Anwar Karim*, 53 I.C. 16 (Pat.). See also 19 C.W.N.

435 cited above. If a lessee of a portion of the property acquires a fractional share of the proprietary interest in the property, there is no merger of his tenancy right in his proprietary right so as to extinguish his lease—*Faqir Bakhsh v. Murli Dhar*, 6 Luck. 197 (P.C.), 35 C.W.N. 502 (505), A.I.R. 1931 P.C. 63, 131 I.C. 334. Where a co-proprietor, who had merely one-anna share in the property, purchased for himself the interests of the lessees of the whole property, there could be no merger—*Parmeshwar v. Sureba*, 6 P.L.T. 805, A.I.R. 1925 Pat. 530, 88 I.C. 495. A sale of the demised property to the tenant terminates the lease even though there is a condition for repurchase and the possession of the tenant after reconveyance of the property in the absence of a fresh tenancy is wrongful—*Reoti Saran v. Harzu Lal*, A.I.R. 1964 All. 542.

595. Clause (e)—Surrender:—This clause applies only to leases which can be surrendered; where a lease is entered into for a definite term, and there is a covenant in it expressly forbidding surrender by the tenant before the expiry of the term, this clause has no application—*Jotindra Mohan v. Emam Ali*, 9 C.L.J. 632.

In cases of surrender, as indeed in every other transaction, one has to look to the substance of the transaction and not merely to what it might have been called by the parties—*Kashiprasad v. Bedprasad*, A.I.R. 1940 Nag. 113, 1939 N.L.J. 216, 189 I.C. 111. A formal deed of reconveyance is not necessary to effect a valid surrender—*Imambandi v. Kamaleswari*, 14 Cal. 109 (119) (P.C.). Nor is any particular form of words essential to make a good surrender. The question is one of intention. Thus, when the lessee executed a *razinama* in the following terms: "Up to the present time I have been cultivating the land, but the land belongs to the *inamdar*. I have no title to it, and the *inamdar* can give it for cultivation to any one he pleases," it was held that a valid surrender was made—*Bhutia v. Ambo*, 13 Bom. 294. But mere non-payment of rent for several years does not amount to surrender, in the absence of an intention to yield up—*Obhoya v. Kailash*, 14 Cal. 751; *Prem Sukh v. Bhupia*, 2 All. 517 (F.B.). It is no doubt true that the tenant of a house in urban areas who abandoned a site leaves it to revert to the Zemindar, but there must be proof of intention to abandon. The mere fact that a house falls into disrepair and is not rebuilt does not necessarily prove that the tenant means to abandon the site or lead to the result that the Zemindar is entitled to enter upon the land—*Misri Lal v. Durga Narain*, A.I.R. 1940 All. 317, 189 I.C. 623. Where the original lease is registered the surrender of a portion of the tenancy with an abatement of rent can be effected only by a registered instrument—*B. Ahmed Maracair v. Mathuwallappa*, A.I.R. 1961 Mad. 28.

Surrender consists in the yielding up of the term by the lessee to the lessor accompanied by delivery of possession and the acceptance of the same by the lessor. Where the Government takes possession of the property under a requisition order, it takes the possession from both the lessor and the lessee. It cannot, therefore, operate as a surrender so as to terminate the tenancy—*Tarabai v. Padamchand*, A.I.R. 1950 Bom. 89, 51 Bom.L.R. 791. In a surrender all parties must agree—*Pusaram v. Deorao*, A.I.R. 1947 Nag. 188, I.L.R. 1946 Nag. 991; *Sudhir Kumar Bose v. Phanindra Kumar Sanyal*, 62 C.W.N. 176.

A relinquishment by a tenant without surrender of possession is ineffectual. So a relinquishment in writing without surrender of possession on the part of the tenant does not constitute a sufficient right in the landlord to recover possession by means of a suit in ejectment—*Amar Nath v. Har Prasad*, A.I.R. 1932 Oudh 79, 7 Luck. 425. There is no relinquishment when the lessee says that 'he has kept leased premises vacant'—*State of Mysore v. Ramoo*, B. R., (1967) 2 Mys. L. J. 625.

There can be no valid surrender unless the surrender takes place by mutual agreement between the lessor and the lessee. Therefore, the lessee cannot make 'a valid surrender by merely giving notice to his landlord that he is going to relinquish the land, and the mere fact that the landlord silently receives the notice, which the lessee has no legal right to give, cannot be regarded as an assent to the relinquishment—*Judoonath v. Scheone, Kilburn & Co.*, 9 Cal. 671. If the lessor has mortgaged the land as well as the right to recover the rent, the lessee cannot make a surrender of his lease in favour of the lessor, because it was not competent to the lessor to accept the surrender without the concurrence of the mortgagee. The right to agree to the surrender of the lease did not remain in the lessor-mortgagor but passed to the mortgagee, and without the latter's consent the surrender was not valid. Consequently, the lessee remained liable to pay rent to the mortgagee—*Havu v. Ganapati*, 32 Bom.L.R. 689, A.I.R. 1930 Bom. 329 (330). Where the lease is in favour of joint lessees surrender must be made by all the lessees—*Gopaldoss Dwarkadoss Family Trust Estate v. Michalswami Pillai*, I.L.R. (1964) 1 Mad. 443.

596. Clause (f)—Implied surrender :—An implied surrender takes place either by the creation of new relationship between the lessor and the lessee, such as the acceptance of a new lease, or in other ways based on consent of the parties, or by relinquishment of possession by the lessee and taking over possession by the lessor which would lead to the inference of an implied surrender of the lease—*Amar Krishna v. Nazir Hasan*, 14 Luck. 723, A.I.R. 1939 Oudh 257, 1939 O.W.N. 825; *Cengalvaraya Chettiar v. Nataraja Chettiar*, A.I.R. 1966 Mad. 19. If the lessee takes a usufructuary mortgage, terms of which are incompatible with the terms of the lease there is an implied surrender of the lease—*Goda-sankara v. Tharappa*, A.I.R. 1961 Ker. 293. If a lessee accepts from his lessor a new lease of the property leased, in substitution of the existing lease, it operates as a surrender of the original lease. See Illustration; also, *Crowley v. Vitty*, L.R. 7 Exch. 319; *Upendra v. Meghnath*, 18 Pat. 370, A.I.R. 1939 Pat. 598, 183 I.C. 56. See also *Md. Ibrahim v. Bani Madhab*, A.I.R. 1952 Cal. 196; *Faquira v. Jiwan Singh*, A.I.R. 1947 All. 240; *Velu v. Lakshmi*, A.I.R. 1953 Tr.-Coch. 584. But a mere alteration of the terms of the tenancy, namely the rent reserved under the lease, is not equivalent to an implied surrender of the lease—*Jamini Mohan v. Debendra*, 71 I.C. 976, A.I.R. 1924 Cal. 355. Surrender of existing lease cannot be inferred from a mere increase or reduction of rent. A surrender does not follow from a mere agreement made during the tenancy for the reduction or increase of rent, unless there is a special reason to infer a new demise—*Gappalal v. Shiraji*, A.I.R. 1969 S.C. 1291. It is not necessary that in order to operate as a surrender, the new lease should

be of the same duration as the existing lease. If a lessee for twenty years takes a new lease for ten years, the old lease is deemed to be surrendered. But if a lessee for years accepts a new lease of a part of the lands, it is surrender for that part only and not for the whole—*Venkayya v. Venkata Subbarao*, A.I.R. 1957 Andh. Pra. 619.

To constitute an implied surrender it is necessary that the new lease should be a valid one. Where the new lease is void or voidable or does not pass an interest according to the contract, the acceptance of it does not operate as a surrender of the original lease—*Jamini Mohan v. Debendra*, supra. See also, *Munnuswamy v. Muniramaiah*, A.I.R. 1965 Andh. Pra. 167. A direction given by the tenant to his sub-tenant to attorn to the landlord amounts to an implied surrender of the tenancy—*Naratmal v. Mohonlal*, A.I.R. 1966 Raj. 89.

The subsequent grant of a mining lease to a lessee who held a prior lease for coffee cultivation over the same area does not necessarily imply a surrender of the prior lease. It is only in cases where there is some incompatibility between the enjoyment under the new lease and the enjoyment under the prior lease that the acceptance of the second lease will involve a surrender of the first. Even where the leases are of the same kind and they are overlapping, and the terms of the second are somewhat inconsistent with the terms of the first, all that can be implied is a cancellation of the first, only for a period which is overlapped by the second—*Manavendan Tirumalpad v. Parry & Co.*, 48 Mad. 815, A.I.R. 1925 Mad. 1277 (1278), 49 M.L.J. 390, 90 I.C. 729.

Where a possessory mortgage is executed in favour of a lessee, the lessee's interest gets merged in the mortgage right and there is an implied surrender of the lease—*Meenakshi v. Kizhakka Valathi Narayan*, (1956) 2 Mad. L.J. 235. But see *Lachman Das v. Heeralal*, A.I.R. 1966 All. 323; A.I.R. 1965 Andh. Pra. 86; *Cheekati Kurimainaidu v. Kari Padmanabhan Bhukta*, A.I.R. 1964 Andh. Pra. 539; *C. Kurimi Naidu v. K. Padmanavan Bhukta*, (1964) 2 An. W.R. 325. If some land in the occupation of a tenant is mortgaged to the tenant the tenancy is not thereby terminated—*Varada Bangar Raju v. Kintali Avatharam*, (1964) 2 An. W.R. 369. If the tenant of some land becomes the mortgagee and a fresh rent note is executed by the mortgagor the original tenancy revives on the redemption of the mortgage entitling the mortgagee to avail of the protection given by the Rent Act—*Puran Chand v. Bakshi Gopi Chand*, (1968) 70 Punj. L.R. 1115.

Clause (g)—Amendment :—The following amendments have been made in this clause: the words "or the lease shall become void" have been omitted from sub-clause (1); sub-clause (3) has been newly added; and the words "gives notice in writing to the lessee of" have been substituted for the words "does some act showing". The reasons are stated in Notes 599A and 600 below.

Scope :—This clause, as amended, embodies a principle of justice, equity and good conscience and governs even agricultural leases—*Umar v. Dawood*, A.I.R. 1947 Mad. 68, (1946) 2 M.L.J. 229.

596A. Forfeiture :—The principle of English law as to forfeiture

apply both to tenancies created before the Act came into force and to those excepted from its operation. There can be no forfeiture by disclaimer in cases not covered by the Act unless the disclaimer is a matter of record. The power of the Court in India to relieve against forfeiture arising by disclaimer on grounds of justice, equity and good conscience is not necessarily limited to the cases where the tenant proves that the denial was occasioned by fraud, mistake or accident of the landlord and the tenant himself was neither careless nor negligent—*Rachotappa v. Konher*, A.I.R. 1937 Bom. 41, 59 Bom. 194, 155 I.C. 516. There are however no provisions for relief against forfeiture when the lessee renounces his character by setting up a title in himself or any other person—*Anand v. Taiyab*, A.I.R. 1943 All. 279. Forfeiture ensues when the tenant fails to admit that he is holding the property as such—*ibid*. To entitle the plaintiff to a decree for ejectment on the ground of determination of the lease by forfeiture, there must be both disclaimer and manifestation of intention to determine the lease before institution of the suit—*Salla v. Jainat*, A.I.R. 1953 Nag. 353. If the defendant simply denies the title of the plaintiff who is not the lessor but claims as heir of the lessor, there is no disclaimer—*ibid*.

A forfeiture clause must be literally and strictly construed and should be taken most strongly against the lessor—*Kuchwar Lime & Stone Co. v. Secretary of State*, A.I.R. 1936 Pat. 372 (376), 15 Pat. 460, 163 I.C. 501; *Raman v. Malabar & Co.*, A.I.R. 1935 Mad. 163, 58 Mad. 378, 154 I.C. 445; *Kesab v. Gopal*, A.I.R. 1937 Cal. 636, 65 C.L.J. 305. In the case of successive forfeitures the landlord can rely on the last act entailing forfeiture—*Karumanchi v. Karumanchi*, A.I.R. 1960 Andh. Pra. 166.

A usufructuary mortgagee as the lessor's transferee is entitled to enforce a forfeiture clause in a lease between the lessor-mortgagor and the lessee—*Vamana v. Venkata*, A.I.R. 1936 Mad. 116 (117), 160 I.C. 530, following *Havu v. Ganapati*, A.I.R. 1930 Bom. 329 and *Kannyan v. Ali-kutti*, 42 Mad. 60 (F.B.).

597. Breach of express condition :—This section contains no clause providing for the termination of the lease at the option of the lessee on account of a breach of a term of the contract, nor is there anything in section 108 to enable the lessee to avoid the lease. The lessee is not entitled to put an end to the lease for breach of a covenant in the lease, but he can only claim damages for such breach, if any—*Govindaswami v. Palaniappa*, 48 M.L.J. 397, A.I.R. 1925 Mad. 833, 87 I.C. 10.

A transfer by the lessee in contravention of the terms of the lease is not wholly void but is merely voidable at the lessor's instance. If the lessor after termination of the lease accepts rent from the transferee, the latter will be entitled to remain in possession till the lease is determined—*Jankhep v. Kuer Majhi*, A.I.R. 1949 Ass. 61. Where a tenant occupies a portion of the house not included in the rent note, there is no breach of any term of the tenancy. At most he is a trespasser of that portion—*Keshavlal v. Bai Ajawali*, A.I.R. 1953 Sau. 119.

What is meant by an "express" condition is, not that the wording of it should be in any particular form, but that the condition can be gathered from the words of the instrument, giving to them their ordinary

meaning. If a clause in a lease is so expressed that it can only be read as reserving the right of forfeiture to the landlord in certain circumstances, that is a sufficiently 'express' condition—*Mussa Kutti v. Rangachariar*, 8 M.L.T. 238 (309). Thus, where the lease contained an express provision for re-entry on "breach of any of the conditions of the lease" and the tenant failed to pay rent, *held* that as the payment of rent was one of the conditions on breach of which the landlord was entitled to re-enter, the non-payment of rent operated as forfeiture of the lease—*Ibid*. But where the lessor does not allege that the tenancy has come to an end by forfeiture, but relies on sec. 14, Tenancy Act which provides that the tenancy shall terminate if the tenant fails to pay rent, the present clause does not apply, nor does the principle underlying the clause—*Jagannath v. Vasant*, A.I.R. 1953 Bom. 332, 55 Bom. L.R. 341. Where the relation created is that of a "grantor" and "grantee" of a perpetual tenure, rather than that of landlord and tenant, the law of forfeiture on non-payment of rent is not applicable in the absence of proof of a definite contract to that effect—*Tirtha Naik v. Lal Sadananda*, A.I.R. 1952 Or. 99.

Where one of two partners after dissolution of the partnership assigns to the other partner his interest in the leasehold of the partnership premises, it does not amount to a breach of the covenant prohibiting an assignment of the lease without the lessor's consent—*Devarajulu v. Thayaramma*, A.I.R. 1950 Mad. 25, (1949) 2 M.L.J. 423.¹

A waqf created by a tenant is not such a dealing with the leasehold as to entail a forfeiture of the tenancy—*Md. Sharif v. Waqf Banam-i-Khuda*, A.I.R. 1947 All. 49.

The refusal by a tenant to perform services which are incidental to his holding, is sufficient of itself to ground a suit for ejectment—*Prokash v. Rajendra*, A.I.R. 1932 Cal. 221 (225), 35 C.W.N. 823, 58 Cal. 1359, 135 I.C. 296. In case of a service tenure, the discontinuance of services by the lessee does not, however, amount to a forfeiture of the lease, where modern conditions make the services highly burdensome to the lessee without any corresponding benefit to the lessor, and where it is doubtful whether a strict compliance with the provisions of the patta relating to services would not be of public inconvenience—*Maharaj of Jeypore v. Rukmini*, 42 Mad. 589 (601) (P.C.).

When it is claimed that the lessor is entitled to *re-enter* by reason of the lessee's breach of covenant, it is first necessary to ascertain what it was that the lessee covenanted to do, or not to do, then to see whether the agreement provides for re-entry on breach of such covenant and finally whether there has been a breach of covenant by the lessee—*Pancham v. Pramatha*, A.I.R. 1936 Pat. 450 (451), 15 Pat. 680, 164 I.C. 358. The landlord may re-enter even on the breach of a covenant in a permanent lease prohibiting transfer—*Taduri Gopala Krishna Rao v. Kodeg Narayya*, A.I.R. 1964 Andh. Pra. 528. But the tenant will not incur forfeiture by a partial transfer—*Indraloke Studio Ltd. v. Santi Devi*, A.I.R. 1960 Cal. 609. In order to entitle the landlord to treat the lease as forfeited it is necessary that the lease should contain an express provision that on breach of such and such condition, *the landlord would be entitled to re-enter*.

Unless there is an express provision for *re-entry* for breach of any covenant in it, the lessor will not be entitled to treat the lease as forfeited and to eject the tenant—*Kishori Mohun v. Nund Kumar*, 24 Cal. 720 (724). Thus, where the lease merely contained a covenant on the part of the lessee not to alienate the property, but there was no provision for re-entry by the lessor in the event of such alienation, *held* that an alienation by the lessee in breach of such a covenant would not entitle the landlord to consider the lease as forfeited or to treat the alienation as void and to sue the tenant in ejectment. The relief of the landlord would be by way of damages for breach of the covenant against alienation—*Narayan v. Ali Saiba*, 18 Bom. 603; *Madar Buksh v. Sannabawa*, 21 Bom. 195. *Timapa v. Timaya*, 7 Bom. 262 (265); *Udipi v. Seshamma*, 43 Mad. 503, 61 I.C. 658; *Parmeshri v. Vittappa*, 26 Mad. 157; *Nilmadhab v. Narotam*, 17 Cal. 826; *Mahananda v. Saratmani*, 14 C.L.J. 585; *Basarai v. Manirulla*, 36 Cal. 745; *Netrapal v. Kallyan*, 28 All. 400; *Shankar Dayal v. Vinayak*, A.I.R. 1924 Oudh 305 (306), 79 I.C. 695, 27 O.C. 1; *Krishna Chandra v. National Chemical etc.*, A.I.R. 1957 Orissa 35. See Note 92 under sec. 10. So also, in the absence of an express condition as regards forfeiture, a lease cannot come to an end merely because the lease-money is not paid by the lessee—*Mahadoo v. Jainarayan*, 62 I.C. 850. Similarly, where there was a stipulation in the lease against sub-letting but the lease contained no stipulation giving a right of re-entry to the lessor upon sub-letting by the lessee, *held* that the mere prohibition against sub-letting was in the nature of a threat, and in the absence of a provision for re-entry, the tenant could not be ejected on the ground of sub-letting—*Gordon Stuart & Co. v. Taylors*, W.R. 9 (F.B.); *Sital Prosad v. Dildar Ali*, 1 P.L.J. 1, 33 I.C. 408; *Pramatha Nath v. Prabulla Chandra*, A.I.R. 1960 Assam 105. Where a lease is in favour of several persons jointly and the share of each is specified, and there is a covenant for re-entry on transfer of the property or even a portion of it and one of the lessees transfers his share, the landlord is entitled only to re-enter on such lessee's share but not on the whole property in the absence of an express clause empowering him to do so—*Pancham v. Pramatha*, *supra*, at p. 455.

The forfeiture clause in the lease-deed would be very strictly construed. So, where the lease contained a provision that an alienation of the tenure by the lessee without the lessor's consent would entitle the landlord to re-enter as upon a forfeiture, the sale of a *portion thereof* by one of the joint tenants would not work as a forfeiture of the whole tenure; the others will continue in possession as before—*Kundan v. Kallu*, 12 A.L.J. 650, 24 I.C. 79; *Dassorathy v. Rama Krishna*, 9 Cal. 526; *Krishna Chandra v. National Chemical*, A.I.R. 1957 Orissa 35. A covenant against alienation does not prevent the tenant from assigning a portion of the premises, and unless the covenant is expressly worded to exclude a partial alienation of the premises, such partial alienation will not work as a forfeiture—*Grove v. Portel*, [1905] 1 Ch. 727; *Kesab v. Gopal*, A.I.R. 1937 Cal. 636, 65 C.L.J. 305; *Swarnamoyee v. Aferaddi*, A.I.R. 1932 Cal. 787, 60 Cal. 47, 36 C.W.N. 819, 139 I.C. 239; *Venkata-ramana v. Krishna*, 47 M.L.J. 307, A.I.R. 1925 Mad. 57, 81 I.C. 1006. But where the entire right in a *mulgeni* lease is transferred by the tenant by separate alienations in parts, the condition against transfer is broken, and there would be a forfeiture of the lease—*Veda Bhat v.*

Mahalaxmi, A.I.R. 1947 Mad. 441, (1947) 1 M.L.J. 229. See also *Souza v. Louis*, A.I.R. 1947 Mad. 119 (1946) 2 M.L.J. 362. Where a lease contains a covenant prohibiting assignment without a previous written consent of the landlord and such consent is not to be unreasonably withheld in case of a respectable or responsible person, an assignment by the tenant to a respectable person without the landlord's consent does not amount to a breach of covenant—*Kamala Ranjan v. Baijnath*, A.I.R. 1951 S.C. 1, 1951 S.C.J. 13. An alienation in favour of a co-lessee is not an alienation within the clause, but a sale by a lessee to his daughter is—*Koragalva v. Jakri*, A.I.R. 1927 Mad. 261, 52 M.L.J. 8, 99 I.C. 700. If a term is granted subject to a condition against assignment, an assignment by the lessee will be void; but if the restraint is by covenant only, the lessee by assigning commits a breach of covenant, but the assignment itself is not void though the landlord can put an end to it as soon as the assignment comes to his knowledge if the lease contains a power of re-entry—*Sreedhar v. Kusum Kumari*, A.I.R. 1938 Cal. 478 (479), 42 C.W.N. 932. Thus, where a clause in a *maurasi makarari* provides that in the case of a transfer, the transferee shall pay one-fourth of the consideration money to the landlord and also that in default of such payment the transfer shall not be valid; this clause is not in the nature of a covenant, but it is in effect a restrictive condition which limits the power of alienation, and a transfer in breach of it is void—*Ibid.* A mortgage by conditional sale followed by a decree for foreclosure and the taking of possession thereunder constitutes a transfer within the meaning of such a stipulation which is binding as between the parties and their representatives. Consequently on failure to pay the transfer-fee on the date of the decree for foreclosure the landlord becomes entitled to get a decree for eviction of the transferee—*Chandi Charan v. Taranath*, (1942) 46 C.W.N. 6, 75 C.L.J. 434. In this particular case their Lordships (Biswas and Akram, JJ.) relieved the transferee against eviction by directing him to pay the amount of transfer-fee with interest. When a landlord is entitled to re-enter by reason for forfeiture, he is also entitled to claim rent or mesne profits up to the date of obtaining possession and the fact that he claims in a suit for ejectment rent or mesne profits till he gets possession cannot be said to be a waiver of the right to re-enter—*Koragalva v. Jakri*, supra. The mere fact that the landlord refrained from enforcing his right on one or more previous occasions, whether for consideration or not does not amount to a surrender of his right to enforce it when a subsequent occasion arises—*Dayal Singh v. Pramatha*, A.I.R. 1936 Pat. 493 (495), 15 Pat. 673, 164 I.C. 811. The landlord is entitled to eject transferees from the original tenant against whom an *ex parte* decree for ejectment has been passed—*Ibid.* A purchaser from a permanent lessee who has covenanted not to alienate, if recognized by the lessor, is not, however, bound by the covenant against alienation—*Khetra Nath v. Bahar Ali*, A.I.R. 1929 Cal. 228, 49 C.L.J. 89, 116 I.C. 153.

Leases of quarry lands were granted to a company subject to the covenant providing that neither the lessee nor any parson claiming through him should assign the lease or transfer any right or interest thereunder, or underlet the whole or any portion of the premises without the assent of the Board of Revenue and the penalty for infraction would be forfeiture of the lease. The company contracted with a person for sale

of the leasehold rights but subject to the sanction of the Board of Revenue. It was also provided that in the meantime the intended vendee should act as the agent for the company in respect of the leasehold rights in the quarries, that he should pay to the company the royalties and other sums payable by it to the Government and that he should be entitled to work the quarries for his own benefit. The contract, though the value of the interest created was more than Rs. 100, was not registered: *Held* that the transaction created an agency coupled with an interest and did not amount to sub-letting. The transaction, however, amounted to a transfer of an interest in the leasehold property [on this point reversing *Kuchwar Lime & Stone Co. v. Secretary of State*, A.I.R. 1936 Pat. 372, 15 Pat. 460, 163 I.C. 501 which is to be read in this connection]. But the contract not being registered, the transfer was not effective, and hence there was no forfeiture of the lease—*Secretary of State v. Kuchwar Lime & Stone Co.*, A.I.R. 1938 P.C. 20 (22), 17 Pat. 69, 65 I.A. 46, 42 C.W.N. 593, 66 C.L.J. 485, 172 I.C. 443.

Where the terms of a lease provided that the lessee was entitled to underlet but not to "assign" his right in any way, and then the lessee mortgaged the said lease by way of sub-demise, *held* that the word 'assign' meant 'part with *absolutely*', i.e., the parties intended and agreed that the lessee should be entitled to part with possession of the land and premises by way of sub-demise or otherwise, so long as he did not *absolutely* transfer the whole of his right, title and interest therein; consequently, the mortgage did not operate as a forfeiture of the lease—*per* Page, J., in *Bejoy Lal v. Benarasidas*, 54 Cal. 948, 110 I.C. 296, A.I.R. 1928 Cal. 99 (101). And this view has been affirmed by the Privy Council in *Hansraj v. Bejoy Lal*, 57 Cal. 1176, 34 C.W.N. 342 (347), 122 I.C. 20, A.I.R. 1930 P.C. 59, reversing the judgment of the Division Bench in *Bejoy Lal v. Benarsidas*, 32 C.W.N. 353, A.I.R. 1928 Cal. 681, 114 I.C. 786. By creating the mortgage, the lessee has merely deposited the lease as a security, which it was competent for him to do so. There is no parting with the interest absolutely, because the lessee might at any time redeem the indenture by paying off the incumbrance upon it—*Doe v. Hogg*. (1824) 4 Dow. & Ry. 226.

Where a lease stipulates for forfeiture in case of alienation by the lessee, it means a covenant against *voluntary* alienation, and the lease cannot be forfeited where the land is sold against the will of the lessee by the act of a Court, e.g., in execution of a decree—*Nilmadhab v. Narottam*, 17 Cal. 826; *Hamaya v. Timapa*, 7 Bom. 262 (265); *Subbaraya v. Krishna*, 6 Mad. 159. But where the lease contained a covenant that "the lessee is not to let the land be sold or attached and sold in *satisfaction of judgment-debts*, and that if he does so, the lessor will take away the land and give it to others," and the tenant allowed the land to be attached and sold, and not taking measures to satisfy his judgment-debts, *held* that there was a breach of the clause in the lease, which gave the lessor a right of re-entry—*Vyankatraya v. Shivrambhat*, 7 Bom. 256 (262). If there is a term in the lease that if the lessee does not start construction within three years the lease shall stand cancelled the landlord can forfeit the lease if the term is not complied with—1966 All. L.J. 531.

The forfeiture clause in the lease enures not only for the benefit of

the lessor but also of his representatives and assigns. Thus, where a lease contained a covenant reserving to the lessor a power of re-entry, on default of payment of rent, and there was no mention in such covenant of a similar power being also reserved to the lessor's "heirs, successors or assigns", and the lessee sold his rights in the leased property to third persons, it was held that although re-entry was reserved only to the lessor, yet the vendees of the lessor could take advantage of the covenant—*Kristo Nath v. Brown*, 14 Cal. 176; *Vishveshwar v. Mahableshwar*, 43 Bom. 28 (31), 47 I.C. 330. A mineral lease under the Mines and Minerals (Regulation and Development Act) 1957 is outside the operation of the T. P. Act; hence secs. 111(g) and 114 T. P. Act do not apply to a mineral lease—*Serajuddin Md. v. State of Orissa*, A.I.R. 1969 Orissa 152.

"Or the lease shall become void":—These words occurring in the old clause (g) have now been omitted because a lessor cannot re-enter on the breach of any condition in a lease unless there is an express stipulation to that effect.

598. Denial of landlord's title:—In the absence of any law, usage or custom to the contrary the principles of Chapter V apply to leases for agricultural purposes as rules of justice, equity and good conscience. Consequently, such leases are forfeited by repudiation by the tenant of the tenancy by claiming title in himself—*Faqiria v. Kalu Mal*, A.I.R. 1952 Punj. 52. See also *Tatya v. Yeshwant*, A.I.R. 1951 Bom. 283, I.L.R. 1951 Bom. 293. In cases where this Act does not apply, clear and unambiguous denial of the lessor's title would be enough to entail forfeiture, and the landlord is not required to show his intention to determine the lease—*Ramachandra v. Mahadevi*, A.I.R. 1946 Mad. 57, (1945) 2 M.L.J. 416. Such a denial in a notice sent by the tenant in reply to the landlord's notice is sufficient to work out forfeiture of the tenancy—*ibid.*

A tenant who denies his landlord's title renders the lease liable to forfeiture, notwithstanding that the lease is permanent—*Kally Das v. Monmohini*, 24 Cal. 440; *Abhram Goswami v. Shyama Charan*, 36 Cal. 1003 (P.C.); *Ananda v. Abraham*, 4 C.W.N. 42; *Mela Ram v. Sandhi*, 13 Lah. 796, 141 I.C. 825, A.I.R. 1933 Lah. 221; *Ramji v. Shib Charan*, A.I.R. 1930 All. 479 (481), (1930) A.L.J. 908. This is an application of the general principle of law that a man cannot blow hot and cold, *i.e.*, cannot both approbate and reprobate.

The denial of a landlord's title by one of the joint tenants cannot be held to bind the other co-tenants, and such a denial cannot work as a forfeiture—*Jharu v. Mahatabuddin*, A.I.R. 1928 Cal. 713; *Gani Mia v. Wajid Ali*, 39 C.W.N. 882. A disclaimer made by the manager of a joint Hindu family which is effective as forfeiture is however binding on the other members in the absence of anything to suggest the contrary—*Krishnarao v. Ghamon*, A.I.R. 1935 Bom. 144, 155 I.C. 249. It is permissible to a tenant to deny his landlord's title, if it is shown that he executed the lease in ignorance—*Alagammai v. P. L. & C. Firm*, A.I.R. 1938 Rang. 227.

A tenant who has been let into possession cannot deny his landlord's title however defective it may be, so long he has not openly restored

possession by surrender to his landlord—*Bilas v. Desraj*, 37 All. 55 (P.C.); *Shankar v. Jagannath*, A.I.R. 1928 Bom. 265, 30 Bom. L.R. 741, 111 I.C. 911; *Krishnarao v. Ghamon*, supra; *Krishna Rao v. Mungara*, A.I.R. 1932 Mad. 298 (299), 55 Mad. 601, 138 I.C. 34.

In order to work a forfeiture, the denial must be unequivocal, unambiguous and absolutely definite; for the law leans strongly against forfeiture. Omission to pay rent or even refusal to pay it does not constitute such a denial of the landlord's title—*Shiam Behari v. Madan Singh*, A.I.R. 1945 All. 293; I.L.R. 1945 All. 248; *Prag Narain v. Kadir Bakhsh*, 35 All. 145, 18 I.C. 728. The mortgaging of premises by a tenant does not amount to an unequivocal and unambiguous denial of the landlord's title. The denial must also be made to the knowledge of the landlord—*Md. Mahmud Khan v. Laja Mal*, A.I.R. 1934 Lah. 289, 15 Lah. 683, 151 I.C. 209; *Karumanchi v. Karumanchi*, A.I.R. 1960 Andh. Pra. 166. The test to apply would be, whether the assertion would operate as a starting point for adverse possession against the landlord—*Doe v. Williams*, (1777) 2 Cowp. 622; *Kemalooti v. Muhamed*, 41 Mad. 629 (636). Under this clause, there is a denial of title when "the lessee renounces his character as such, by setting up a title in a third person or by claiming title in himself." The word "renounce" connotes that some act is done *to the knowledge of the landlord* which is calculated to convey to him the impression that the tenant *repudiated his title*. Where the tenant disclaimed the landlord's title and asserted his own by an incidental and casual statement made in a document executed by him to a third party purporting to convey some property other than that to which the assertion related, but the assertion was not addressed to the landlord nor was followed up by transferring the particular property to a third party, *held* that such a *collateral* reference as the one contained in the said document was not enough to constitute a disclaimer of the landlord's title justifying the forfeiture of the tenancy—*Kemalooti v. Muhamed*, 41 Mad. 629 (632, 636). Where the permanent tenants made a partition among themselves describing themselves as owners, and also passed several mortgages and sale-deeds in favour of strangers, in which also they described themselves as owners, but they never communicated to the landlord their desire to renounce the relationship of landlord and tenant, it was held that this fact did not bring about a forfeiture of the tenancy—*Narayan v. Mangesh*, 34 Bom. L.R. 1287, 140 I.C. 567, A.I.R. 1932 Bom. 599 (601). The mere receipt and retention by the tenant of a document of sub-lease in which he is spoken of as the Jenmi of the lands demised, cannot operate as a denial of the landlord's title, when there was nothing to show that the tenant actually assumed the role of a Jenmi and the landlord was made aware of such assumption—*Raman Nair v. Mariyamma*, 43 Mad. 480. The law has been thus stated: "In order to make either a verbal or a written disclaimer sufficient, it must amount to a direct repudiation of the relationship of landlord and tenant, or to a distinct claim to hold possession of the estate upon a ground wholly inconsistent with that relation, which by necessary implication is a repudiation of it"—Woodfall's *Landlord and Tenant*, 19th Edn., p. 431; William's *Ejectment*, 2nd Edn., p. 56; *Doe d Gray v. Stanion*, (1836) 1 M. & W. 695 (703); *Vivian v. Moat*, (1881) 16 Ch. D. 730.

It is not necessary that the denial of landlord's title by the tenant

should be accompanied by an *express assertion* that the title is either in the tenant or in some third person—*Rukmini v. Rayaji*, A.I.R. 1924 Bom. 454, 48 Bom. 541, 83 I.C. 45. If the landlord's title is denied, it involves the assertion that the title is either in the tenant or in some third person—*Padmanabhaya v. Ranga*, 34 Mad. 161 (163). If the tenant does not claim a right in himself but merely sets up a title in a third party as his landlord under whom he admits to be occupying the status of a tenant, (i.e., where he does not *renounce the status of a tenant*), still it would amount to a denial of the title of the real landlord—*Hatimullah v. Md. Arju*, 32 C.W.N. 391 (396), A.I.R. 1928 Cal. 312, 113 I.C. 13. Where a tenant alleges that his landlord is only a co-sharer with another, he incurs forfeiture for denying the landlord's title—*Hashmat Husain v. Saghir Ahmad*, A.I.R. 1958 All. 847.

A permanent lease is within the provisions of cl. (g). Where a permanent lessee in a suit by the lessor claims to have been in adverse possession for over 12 years, the lessee claims title in himself and it amounts to a disclaimer of the landlord's title—*Md. Hafiz v. United Provinces*, A.I.R. 1945 All. 285, I.L.R. 1945 All. 222.

Where a building is in the possession of a mortgagee, the tenant is not the tenant of the owner. When the mortgage is redeemed and the owner becomes entitled to possession, the tenant cannot set up any title as against the owner—*Balkishen v. Baldeo*, A.I.R. 1953 Punj. 297.

A denial by the lessee of his landlord's title even by parol declarations entitles the landlord to exercise his option of determining the lease—*Satyabhama v. Krishna Chandra*, 6 Cal. 55; *Vishnu v. Balaji*, 12 Bom. 352.

The denial of landlord's title by the original lessee will not work as a forfeiture against the assignee of the lessee—*Gopal v. Shriniwas*, 42 Bom. 734.

The disclaimer of landlord's title which is relied on as a ground for ejecting the tenant must have been made *before* the suit in ejectment was instituted. A disclaimer contained in the written statement of the defendant (tenant) cannot be made the basis of a decree for ejectment in the suit—*Mallika v. Makhanlal*, 9 C.W.N. 928; *Pran Nath v. Madhu*, 13 Cal. 96; *Nizamuddin v. Mamtazuddin*, 28 Cal. 135; *Maharaja of Jeypore v. Rukmini*, 42 Mad. 589 (P.C.); *Pratap Narain v. Harihar*, 36 Cal. 927; *Vithu v. Dhondi*, 15 Bom. 407; *Subba v. Nagappa*, 12 Mad. 353; *Madavan v. Athi Nangiyar*, 15 Mad. 123; *Unhamma v. Vaikuntha*, 17 Mad. 218; *Reria v. Subrahmanian*, 31 Mad. 261; *Samundar v. Mukh Lal*, 37 I.C. 935 (Pat.); *Rajaram v. Vithal*, 6 N.L.R. 83, 6 I.C. 927; *Chiragh Din v. Mahomed Usman*, A.I.R. 1924 Lah. 281, 70 I.C. 349; *Mukat Singh v. Paras Ram*, A.I.R. 1924 All. 726, 79 I.C. 106; *Jharu v. Mahatabuddin*, A.I.R. 1928 Cal. 713; *Gulam Mohammood v. Ammani Ammal*, (1960) 2 M.L.J. 351; *Warner v. Sampson* (1959) 2 W.L.R. 109.

But a denial of title in a suit for *rent* causes a forfeiture of the tenancy—*Mahomed v. Habibar Rahaman*, 45 I.C. 642 (Pat.). The denial of the landlord's title in a previous suit for rent, coupled with the setting up of a third party as the landlord, makes the lessee liable to have his tenancy forfeited—*Gopal Ram v. Dhakeswar*, 35 Cal. 807 (810).

There is no provision for relief against forfeiture for renunciation of the character of tenant and setting up a title in himself—*Anand v. Taiheb*, A.I.R. 1943 All. 279. Non-admission of the landlord's title amounts to a denial. Consequently, forfeiture comes into existence when the tenant fails to admit that he is holding the property as such—*ibid*.

Where in a suit for rent brought by the lessor against the lessee the latter denied the title of the lessor, and the suit was dismissed on the ground that the relationship of landlord and tenant did not subsist between them, and the lessor then brought another suit to eject the lessee, *held* that it was not open to the lessee in the latter suit to set up the tenancy which he had denied in the previous suit, and that by repudiating his landlord's title in the previous suit he had rendered himself liable to ejectment—*Khatar Mistri v. Sadruddi*, 34 Cal. 922; *Nilmadhab v. Ananta*, 2 C.W.N. 755; *Fayi Dhali v. Aftabuddin*, 6 C.W.N. 575; *Malika v. Makhanlal*, 9 C.W.N. 928. *Ramgati v. Pranhari*, 3 C.L.J. 201; *Sheik Miadhar v. Rajanikant*, 14 C.W.N. 339, 5 I.C. 708; *Ekbar v. Hara*, 15 C.W.N. 335, 13 C.L.J. 1, 8 I.C. 660.

Where a tenant who is entitled to notice denies the title of the landlord, no notice is necessary to eject him—*Karam Chand v. Amar Nath*, A.I.R. 1933 Lah. 377 (378), 145 I.C. 922. See also *Ratneswar v. Mongoli*, A.I.R. 1951 Ass. 70, (1950) 2 Ass. 166. But after the amendment in clause (g) it is apprehended, a notice in writing of the lessor's intention to determine the lease is necessary. Since this observation was made by the editor in the previous edition, it has been held that as a result of amendment of sec. 111 (g) in 1929, it is incumbent on the lessor to give notice in writing to the lessee of his intention to determine the lease before a suit can be instituted for eviction of the lessee—*Tatya v. Yeshwant*, A.I.R. 1951 Bom. 283, I.L.R. 1951 Bom. 293. See also *Jai Narain v. Ali Murtaza*, A.I.R. 1951 Pat. 190. But see *Gajadhar Lodha v. Khas Mahatadih Colliery Co.*, A.I.R. 1959 Pat. 562.

Where a service tenure was created after the passing of the T. P. Act and the tenant renounced his character as service tenant in Chaitra, 1342 B.S., i.e., in 1936, the landlord before succeeding in a suit in ejectment must prove that there was an overt act on his part to determine the lease—*Narendra v. Rajendra*, 45 C.W.N. 654, 73 C.L.J. 159, A.I.R. 1941 Cal. 506. In this case Mr. Justice B. K. Mukherjee observed: "Had the point been taken at the proper time, the plaintiff would have been able to prove that there was at any rate a demand for possession which would be quite enough to satisfy the requirements of sec. 111 (g) of the Transfer of Property Act". But as the cause of action arose after the amendment in clause (g) came into force, would not a notice in writing of the lessor's intention to determine the lease have been necessary?

599. What does not amount to denial of title :—If the tenant has never denied his liability to pay the rent fixed but has asserted a higher status as lessee than what was admitted by the landlord, such an assertion does not amount to denial of title of the landlord or claiming title for himself—*Amar Krishna v. Nazir Hasan*, 14 Luck. 723, A.I.R. 1939 Oudh 257, 1939 O.W.N. 825. A denial of the landlord's title to enhance the rent or the setting up of a permanent tenancy is not necessarily a dis-

claimer of his title as landlord—*Kali Krishna v. Golam Ali*, 13 Cal. 248; *Haidri Begum v. Nathu*, 17 All. 45; *Parshotam v. Dattatraya*, 10 Bom. 669; *Vithu v. Dhondi*, 15 Bom. 407; *Lalu Gagal v. Bai Motan*, 17 Bom. 631; *Dodhu v. Madhavrao*, 18 Bom. 110; *Venkaji v. Lakshman*, 20 Bom. 354 (F.B.); *Suba v. Nagappa*, 12 Mad. 353; *Unhamma v. Vaikunta*, 17 Mad. 218. The setting up of a *mulgeni* right by the tenant is not a disclaimer of the landlord's title; it only amounts to a denial of the particular kind of tenancy under which the tenant holds possession and the setting up of a different kind of tenancy, but it does not amount to a denial of title of the landlord—*Unhamma v. Vaikunta*, 17 Mad. 218. Similarly, an assertion by a tenant from year to year that he is a permanent tenant is not tantamount to a denial of the landlords' title—*Gol Daji v. Dod Laxman*, 22 Bom. L.R. 648, 58 I.C. 226.

Where after the death of the original lessor the tenant did not directly deny the claimant's title, but refused to pay rent until he knew who was the real owner, and it appeared that the succession was at that time disputed, it was held that there was no denial of the landlord's title—*Jones v. Mills*, 10 C.B. (N.S.) 788. But see *Ramdas v. Ram Lakshman*, A.I.R. 1953 All. 797 where it has been held that if the title of the lessor's heir is denied, the denial causes forfeiture of the tenancy. A tenant's plea that "as the plaintiff and a third person both claim rent from him, he is ready to pay either when the Court finds who is entitled to", is not tantamount to a disclaimer—*Rakmini v. Rayaji*, A.I.R. 1924 Bom. 454, 48 Bom. 541, 83 I.C. 45. Where the tenant denies the plaintiff's title to recover rent from him, *bona fide* for the purpose of seeing such title established in a Court of law in order to protect himself, he is not to be charged with disclaiming the plaintiff's title—*Hatimullah v. Mahammad Arju*, 32 C.W.N. 391 (395), A.I.R. 1928 Cal. 312, 113 I.C. 13. Similarly, there is no disclaimer of the relationship of landlord and tenant, where the tenant merely puts the landlord to the proof of his title by purchase—*Mallika v. Makhan Lal*, 9 C.W.N. 928; *Venkatachariar v. Rangaswami*, 36 M.L.J. 532, 51 I.C. 709; *Ram Das v. Lach. Janki*, I.L.R. (1962) 2 All. 554. The denial by the tenant of the right of an assignee from the original lessor does not work a forfeiture of the tenancy. Where there was no specific denial of the title of the original lessor but the tenant merely denied the right of the purchaser, and set up the right of one of the heirs of the original lessor, held that this could not work as a forfeiture—*Abdulla v. Md. Muslim*, A.I.R. 1926 Cal. 1205, 96 I.C. 1056; *Somti Prakash v. Natha*, I.L.R. (1964) 1 Punj. 616; *Ram Das v. Lach. Janki*, I.L.R. (1962) 2 All. 554; *Sugga Bai v. Hiralal*, A.I.R. 1969 Madh. Pra. 32.

There is no denial of title where the tenant merely questions the extent of the landlord's interest and his title to receive the entire rent—*Mallika v. Makhan Lal*, 9 C.W.N. 928. A denial of tenancy after the institution of the suit for eviction does not entail forfeiture—*Gulam Mohamood v. Ammani Ammal*, (1960) 2 Mad. L.J. 351.

Where the tenants could not obtain possession of the whole area leased to them, and on reference to their lessors, got no satisfaction from them, and then took a lease of the portion, of which they could not get possession, from a stranger whom they found in possession, held that

there was no renunciation by the tenants of their character as such so as to entail a forfeiture—*Farman Bibi v. Shaik Tasha*, 12 C.W.N. 587. Where the tenants did not repudiate their lease but rather stuck to it and only questioned the right of the plaintiffs as transferees from their lessor, the alleged transfer appearing to be of a date prior to the lease, *held* that there was no denial of landlord's title so as to cause a forfeiture of the tenancy—*Farman Bibi v. Shaik Tasha*, 12 C.W.N. 587. Where the land leased was acquired by the Government, and in the Land Acquisition case the pleader for the tenant described the latter as the owner of the land acquired, but throughout the proceedings the tenant never referred to himself otherwise than as tenant, *held* that the expression used by the *pleader* did not amount to a renunciation by the client of his character of a tenant. The Court must consider the intention of the tenant and his intention must be gathered from the attitude he himself adopted throughout the proceedings rather than from the formal grounds framed by his counsel—*Zia-uddin v. Fakhruddin*, 4 Lah. 160, A.I.R. 1923 Lah. 454, 73 I.C. 791. When a person claiming to have a permanent and heritable interest says that the land belongs to him and that he is the owner of it, his statements do not amount to a denial of the landlord's title and hence no forfeiture on that ground—*Raja Mohammad Amir Ahmad Khan v. Municipal Board of Sitapur*—A.I.R. 1965 S.C. 1923.

600. Notice of intention to determine lease :—The opening words of cl. (g) no doubt seem to imply that the lease comes to an end as soon as the notice to quit is given, but the concluding words show that something more, such as an actual entry or the filing of an ejectment suit is necessary to determine the lease. This clause means that even after service of the notice, the lease is voidable and not void, otherwise there will be a conflict between this clause and sec. 112—*Chotu Mia v. Mt. Sundri*, A.I.R. 1945 Pat. 260 (F.B.), 24 Pat. 109. The institution of a suit for ejectment is an intimation to determine the lease. Notice of termination is not necessary—*Amar Singh v. Hoshiar Singh*, A.I.R. 1952 All. 141. Where the tenancy has been determined, one of the co-owners can maintain a suit for ejectment of a trespasser without impleading the other co-owners—*Vinod Sagar v. Vishnubhai*, A.I.R. 1947 Lah. 388.

The provisions of cl. (g) as to notice in writing as a preliminary to a suit for ejectment based on forfeiture is not founded on any principle of justice, equity or good conscience and do not govern leases executed prior to the coming into force of the present Act of 1st April, 1930. The rights and obligations under those leases will be determined according to the rules of law prevailing at the time and those are that a tenant cannot by his unilateral act and by his own wrong determine the lease, unless the lessor gives an indication by some unequivocal expression of intention of taking advantage of the breach—*Namedeo v. Narmadabai*, A.I.R. 1953 S.C. 228 on appeal from A.I.R. 1950 Bom. 123, I.L.R. 1949 Bom. 883, *overruling Pulavar v. Rowther*, A.I.R. 1947 Mad. 68 and *Tatya Savla v. Yeshwanta*, A.I.R. 1951 Bom. 283.

Although forfeiture may be incurred by reason of a breach of condition or of denial of the landlord's title, still the landlord cannot enforce the forfeiture clause unless he "gives notice to the lessee of his intention to determine the lease." These words have been substituted for the

words "does some act showing his intention to determine the lease". The words in the old clause left it uncertain as to what act the lessor should do showing his intention to determine the lease. It was held in some cases that the mere filing of a suit for ejectment by the landlord did not amount to doing some act showing the intention of the landlord to determine the tenancy—*Prag Narain v. Kadir Baksh*, 35 All. 145, 18 I.C. 728; *Matilal v. Chandra Kumar*, 24 C.W.N. 1064, 60 I.C. 312; *Nowrang v. Janardan*, 45 Cal. 469, 41 I.C. 952; *Padmanabhaya v. Ranga*, 34 Mad. 161 (164), 6 I.C. 447; *Shib Charan v. Kharka*, 47 All. 348, A.I.R. 1925 All. 346, 86 I.C. 174; *Kadir Baksh v. Prag Narain*, 9 A.L.J. 794, 14 I.C. 747; *Anandamoyi v. Lakhi Chandra*, 33 Cal. 339; *Sheikh Yusuf v. Jyotish*, A.I.R. 1932 Cal. 241, 35 C.W.N. 1132, 59 Cal. 739, 137 I.C. 139; *Creet v. Gangaraj*, A.I.R. 1937 Cal. 129 (139), I.L.R. (1937) Cal. 203, 170 I.C. 214 (and the cases cited in this case). The Bombay High Court however held in *Isabali v. Mahadu*, 42 Bom. 195, 43 I.C. 851 (followed in *Prokash v. Rajendra*, 58 Cal. 1359, 35 C.W.N. 823, at p. 828), that the institution of a suit for ejectment was a sufficient manifestation of such an intention. It was also held that the act showing intention to determine the lease need not be a formal notice to quit, and may be a demand for possession, oral or written—*Naurang v. Janardan*, supra. In a Madras case, a lawyer's notice was held to be sufficient—*Sivarama v. Alagappa*, 1915 M.W.N. 845, 31 I.C. 211. So also the withdrawal of an ejectment suit with the liberty to institute a fresh suit on the same cause of action—*Ramnath v. Sibasundari*, 25 C.L.J. 332, 40 I.C. 348; *Mazoor v. Padiapurayil*, 8 M.L.T. 99, 6 I.C. 264; or the lessors' act of taking possession of the leased premises was held to be an act showing an intention to determine the lease—*Cook & Co. v. Phillips*, 34 C.W.N. 785 (788), 130 I.C. 222, A.I.R. 1931 Cal. 133. But where the landlord after withdrawal of his suit, in which his title had been denied by the tenant, did nothing for 9 years to show his intention to determine the lease, and then filed another suit in ejectment, it was held that in the circumstances there was no forfeiture—*Shib Charan v. Kharka*, A.I.R. 1925 All. 346, 47 All. 348, 86 I.C. 174. It was necessary that the lessor should do some act showing his intention to determine the lease—*Ramji v. Shib Charan*, A.I.R. 1930 All. 479 (481), (1930) A.L.J. 908. Oral notice was sufficient before the amendment—*Sripada v. Ravikanta*, A.I.R. 1935 Mad. 454, 157 I.C. 804.

This uncertainty has now been set at rest, and the doubt as to the nature of the act which the lessor must do has been removed by requiring the lessor to *give notice in writing* of his intention to determine the lease, and this notice should be given before a right to institute a suit can arise. Now the giving of notice in writing is an essential condition of forfeiture taking effect in law. In fact the act of the lessee renouncing his character as such makes the lease only voidable. A lessor cannot file a suit for ejectment until after he has given notice, because till then the relationship of lessor and lessee subsists—*Saheb Din v. Gauri Shankar*, 15 Luck. 92, A.I.R. 1940 Oudh 92, 1939 O.W.N. 980. When the lessor sues in ejectment without giving such notice, a plea of want of notice going to the very root of the case can be entertained for the first time in second appeal—*Ibid.* Under the present cl. (g) read with sec. 114A only one notice to quit is necessary and not two, but when the breach is capable of remedy, the lessor should require the lessee to remedy it and to give him reasonable

time to do so, while when the breach is one not capable of remedy, he has simply to give a written notice conveyning his election to forfeit the tenancy. No particular form of notice is required in the latter case, but in the former a notice to quit forthwith would be a bad notice—*Provat v. Bengal Central Bank*, A.I.R. 1938 Cal. 589, 42 C.W.N. 761. The landlord may give one notice combining the elements of notices under sec. 111(g) and sec. 114A—*Kshiroda Sundari v. Bhupendra Mohan*, A.I.R. 1961 Assam 70. Where a lease provides for re-entry on assignment and the tenant assigns, the landlord must serve a notice under sec. 111(g) though he is not required to serve any notice under sec. 114A—*Chandra Nath v. Chulai Pashi*, A.I.R. 1960 Cal. 40.

In the absence of any such act on the part of the landlord, a mere denial of the landlord's title by the tenant does not entail forfeiture—*Ramasami v. Thayammal*, 26 Mad. 488; *Dyamappa Butti v. Somappa*, A.I.R. 1969 Mys. 252. So also, the failure by the tenant to renew a lease for a term in compliance with the provision for renewal contained therein, does not operate as a forfeiture relieving the tenant from liability to pay rent, unless the lessor does some act showing his intention to determine the lease—*Bourammiah v. Mallammal*, 4 M.L.T. 315.

Where there are several lessors, *all* the lessors must act together. If *all* of them have not shown their intention to determine the lease, *e.g.*, if all the co-owners in the land have not joined in giving the notice, they cannot succeed. See *Gopal Ram v. Dhakeswar*, 35 Cal. 807 (811); *Motilal v. Chandra Kumar*, 24 C.W.N. 1064 and *Panchu v. Benode* 39 C.W.N. 246. But the Madras High Court is of opinion that one of several joint lessors who has become separately entitled to his share of the lands leased, is entitled to enforce the forfeiture clause in the lease-deed separately as regards his share of the lands, as if he had given a separate lease of his own share alone originally to the lessee—*Korapalu v. Narayana*, 38 Mad. 445 (447), following *Sri Raja Simhadri v. Prattipati Ramayya*, 29 Mad. 29, and dissenting from *Gopal Ram v. Dhakeswar*, *supra*. It is not open to a landlord to treat the tenancy as forfeited in part and subsisting as to the remainder—*Vaddapanti v. Vodoori*, A.I.R. 1936 Mad. 252 (255).

If the notice is served on one of the joint tenants and similar notices correctly addressed are posted to the others, service on one is *prima facie* evidence of service on others—*Bhusan Chandra Paul v. Bengal Coal Co. Ltd.*, A.I.R. 1966 Cal. 63.

Where the landlord gives notice of his intention to determine the lease, *i.e.*, when he elects to determine the tenancy, the election is irrevocable, and the parties cannot by a subsequent agreement revive the old tenancy—*Chengiah v. Raja of Kalahasti*, 24 M.L.J. 263, 15 I.C. 445. Thus, there can be no revival when a forfeiture has been incurred and the lessor has given a *fresh lease* of the land to a third party. In such a case the old lease cannot be revived by simply saying that the lessor and the lessee agree to be bound by the terms of the old lease. It is difficult to see how a transaction which the law requires to be in writing registered can be created by a declaration of the parties that an extinct lease subsists—*Malabar Timber Co. v. Prapraavan*, 126 I.C. 284, A.I.R. 1930 Mad. 272 (276). Similarly, if he elects not to enforce the forfeiture, and manifests

and communicates to the lessee his intention accordingly, that is, when he elects to waive the forfeiture, his election is also irrevocable—*Chengiah v. Raja of Kalahasti*, 24 M.L.J. 263, 15 I.C. 445. As to what amounts to waiver of forfeiture, see section 112. Where a deed of lease contains a clause for forfeiture for non-payment of rent for three months and the lessor gives notice on three months' default forfeiting the lease and asking the tenant to quit and vacate on the expiry of June, 1951 the notice is one under sec. 111 (g) and not under sec. 106—*Luxmi Spinning & Weaving Mills v. Ibrahim*, A.I.R. 1958 Cal. 428. Where no notice under sec. 111 (g) is given forfeiting the lease for non-payment of rent, the lease subsists even though the lease provides for automatic termination on non-payment of rent—*Ramniranjan v. Gajadhar*, A.I.R. 1960 Pat. 525.

This clause, however, does not apply to leases created prior to the passing of this Act. See sec. 2 (c). In case of such leases, it is not necessary that the lessor should, prior to the action for ejectment, give notice of his intention to determine the lease. The institution of an action on the ground of forfeiture itself amounts to a manifestation of the lessor's intention to determine the tenancy—*Padmanabhaya v. Ranga*, 24 Mad. 161 (166), 6 I.C. 447; *Venkatachariar v. Rangaswami*, 36 M.L.J. 532, 51 I.C. 709; *Ramkrishna v. Baburaya*, 23 M.L.J. 715, 24 I.C. 139. In *Venkataramana v. Gundaraya*, 31 Mad. 403, however, the principle of this clause was applied to a lease created before the passing of the Transfer of Property Act.

This clause is also inapplicable to leases not governed by this Act (e.g., agricultural leases), and the landlord will in those cases be entitled to bring a suit for ejectment without having done any prior act evincing his intention to determine the lease—*Korapalu v. Narayana*, 38 Mad. 445 (448), 20 I.C. 930; *Vidyapurna v. Rangappayya*, 25 M.L.J. 486, 21 I.C. 405. But the principles embodied in sec. 111 (g) are equally applicable to tenancies to which the T. P. Act does not apply because they are in consonance with justice, equity and good conscience—*Raja Mohammad Amir Ahmad Khan v. Municipal Board of Sitapur*, A.I.R. 1965 S.C. 1923. Sec. 111 (g) applies to a permanent tenancy—*Ibid*.

602. Clause (h)—Notice to quit:—A suit for ejectment cannot be maintained unless the tenancy has been determined by either a previous notice to quit or demand for possession. Whether a mere demand for possession is enough in a particular case, or whether a notice to quit is necessary, depends upon the status of the tenant. If the status of a tenant is that of a mere tenant-at-will, a demand for possession would be sufficient—*Deonandan v. Meghu*, 34 Cal. 57. Where some of the joint-lessors give a notice to quit denying the title of the remaining co-sharers a suit for ejectment is not maintainable by the co-sharers giving notice—*Vijai Kumar Tandon v. Sm. Ganga Devi Rathor*, 1969 All. L.J. 403. Where a suit for eviction is instituted before the expiry of the period of the notice but the plaint is subsequently amended by stating that the claim for possession has matured during the suit, the suit cannot be dismissed as pre-mature—*Pundlik v. Mamraj*, 1969 Mad. L.J. (Notes) 33.

If a lease is granted by a Municipality, it can be terminated by the Municipality according to law, and only by issuing a proper notice as

required by the Transfer of Property Act, because the Municipality is not outside the provisions of this Act. The Municipality cannot determine the lease by simply passing a resolution, and then and there requiring the lessee to quit—*Aminullah v. Emp.*, 26 A.L.J. 328, 107 I.C. 690, A.I.R. 1928 All. 95. As to what is a valid notice, see Notes under sec. 106.

Where the defendant has failed to prove his tenancy, he is not entitled to a notice to quit—*Shiba Prasad v. Chamru Pasi*, A.I.R. 1939 Pat. 167 (168), 178 I.C. 362. Where a tenant after termination of the lease continues in possession of the house without the landlord's assent, his position is no better than that of a trespasser and he can be turned out of the house without any notice to quit—*Rahmat Ullah v. Md. Husain*, A.I.R. 1940 All. 444, 1940 A.L.J. 502, 191 I.C. 223. If a tenancy is terminated by two co-sharer landlords any one of them is competent to sue for eviction even though the other co-sharer does not join—*Motilal v. Basant Lal*, A.I.R. 1956 All. 175. Where a monthly tenant spends money on the improvement of the site, he does so at his own risk and on his ejection, he is not entitled to compensation—*Gaya v. Debarchan*, A.I.R. 1939 Pat. 155 (156), 19 P.L.T. 663, 180 I.C. 159.

One decision of the construction of a notice to quit in one context does not afford much guidance for construing a notice couched in different words in a different context. The intention of the landlord and the language used should be looked into to make it sensible. Thus where instead of addressing the notice to a limited company which was the tenant, it was addressed to a person who was its managing director and the name of the company was written after his name with the word "Limited", and the notice was treated by the addressee and the company as a notice to the company itself, it was held that the notice was a valid notice to the tenant—*Tulsiram v. R. C. Pat, Ltd.*, A.I.R. 1953 Cal. 160. Where a lease was terminated by notice but the landlord refused to take possession, the lease did not continue—*Raman v. Kunhi*, A.I.R. 1953 Mad. 996. The landlord's suit for ejection is competent, even though the tenant tenders thereafter the whole rent due where the U. P. (Temporary) Control of Rent and Eviction Act III of 1947 applies—*Khumani v. Saktey Lal*, A.I.R. 1952 All. 579. A monthly tenancy is heritable—*Mannalal Serowgie v. Iswari Prasad Jain*, A.I.R. 1966 Cal. 447.

Removal of structures :—Where a decree for ejection provides that if the tenant fail to remove certain structures raised by him within the time fixed by the decree, the landlord would be entitled to remove the same and to claim costs of removal from the tenant, and he fails to comply with the terms of the decree, he loses his right of removing the structures. After the days of grace allowed to the tenant the landlord has the option either to keep the structures without any compensation to the tenant or to dismantle them—*Raghubir v. Rawson*, 70 C.L.J. 598, A.I.R. 1940 Cal. 197, 189 I.C. 467.

112. A forfeiture under section 111, clause (g), is waived

by acceptance of rent which has become due since the forfeiture or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting :
 Waiver of forfeiture.

Provided that the lessor is aware that the forfeiture has been incurred :

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

602A. This section has been enacted for the benefit of the tenant, and hence Woodfall gives the following warning to the landlords: "Courts of law always lean against forfeiture; therefore whenever a landlord means to take advantage of any breach of covenant or condition so that it should operate as a forfeiture of the lease, he must take care not to do anything which may be deemed an acknowledgment of the continuance of the tenancy and so operate as a waiver of the forfeiture"—*Landlord and Tenant*, 9th Edn., p. 367. The principle of the section is this:—"The landlord may elect to avoid a lease and bring ejectment when his tenant has committed a forfeiture. If, with knowledge of the forfeiture, by receipt of rent or other unequivocal act he shows his intention to treat the lease as subsisting, he has determined his election for ever, and can no longer avoid the lease. On the other hand, if by bringing ejectment he unequivocally shows his intention to treat the lease as void, he has determined his election, and cannot afterwards waive the forfeiture"—*per Mellor, J. in Clough v. London and N. W. Ry. Co.*, (1871) 7 Ex. 26 (34). See also *Shiva Prasad v. Mandira Kumari*, A.I.R. 1940 Pat. 478, 21 P.L.T. 257, 186 I.C. 686. This, however, does not mean that the landlord for ever waived his right to claim forfeiture against the tenant. Waiver could operate only in respect of a particular breach—*Md. Hasan v. Baidyanath*, A.I.R. 1940 Pat. 140, 21 P.L.T. 117, 184 I.C. 605.

The principle laid down in this section regarding waiver of forfeiture applies to the Punjab and Delhi Province as being in consonance with justice, equity and good conscience—*Mt. Gindori v. Shani Lal*, A.I.R. 1946 Lah. 330 (F.B.), 48 P.L.R. 487.

603. Waiver of forfeiture by acceptance of rent :—The words "due since the forfeiture" qualify the word "rent" in this section. Hence demand and acceptance of rent which became due before the forfeiture does not constitute waiver. The fact that such demand was made after the notice of forfeiture and therefore with the knowledge of the breach does not amount to waiver either of the breach or of the forfeiture, because if it were so, then the lessee could rely on his own wrong to avoid payment and the landlord would be powerless to forfeit the lease without losing money already accrued due as rent—*Talbot & Co. v. Haricharan*, A.I.R. 1952 Cal. 47. See also *Habib v. Mt. Koeli*, A.I.R. 1946 All. 328, 1946 A.L.J. 121. A Full Bench of the Patna High Court has held that acceptance by a lessor, prior to the institution of an ejectment suit on the ground of forfeiture, of rent which has accrued due subsequent to the forfeiture operates as a matter of law as a waiver of the forfeiture. The fact that the rent accepted had accrued due since the forfeiture and prior to the issue of the notice, and the actual acceptance was subsequent to the service of the notice is immaterial—*Chotu Mia v. Mt. Sundri*, A.I.R. 1945 Pat 260 (F.B.), 24 Pat. 109. Where after the forfeiture the lessee remits a certain amount as rent and the landlord accepts it only as damages for use and

occupation, the acceptance must be deemed to be as rent and operates as a waiver of the forfeiture—*ibid.* The giving of a notice to quit may in certain circumstances operate as a waiver of forfeiture—*ibid.* See in this connection *Mohan Lal v. G. G. in Council*, A.I.R. 1945 Nag. 255, I.L.R. 1945 Nag. 629.

The breach of covenant in a lease not to erect any structure on the land is not a continuing breach. It is waived by subsequent acceptance of rent—*Amulya v. Corpn. of Calcutta*, A.I.R. 1950 Cal. 256. Where the landlord being fully aware of a continuing breach acquiesces in it for a long period by accepting rent even though he had served the notice to quit on the ground, there is a waiver—*B. N. Gupta v. Satya Wati*, A.I.R. 1954 Punj. 41. But see in this connection *Ganpatrao v. Anant Ramchand*, A.I.R. 1954 M.B. 20. If a lessor, after notice of forfeiture of the lease, accepts rent which accrues after, this is an act which amounts to an affirmation of the lease and a dispensation of the forfeiture—*Pennant's Case*, 3 Rep. 64a cited in *Croft v. Lumley*, 6 H.L.C. 672 ; *Motilal v. Pure Jambad Colliery, Ltd.*, 44 C.W.N. 1109. It is only when such rent is accepted after the institution of a suit for ejectment that there is no waiver of forfeiture—*Ibid.* Where the lessee incurred a forfeiture of the lease by reason of construction of some buildings in contravention of the terms of the lease, but the lessor afterwards accepted rent from the tenant and there was no reason to suppose that the rent was accepted in ignorance of what the tenant had been doing, *held* that there was a waiver of forfeiture—*Chattar v. Nand Kishore*, 12 A.L.J. 1139, 26 I.C. 107 (108). Where there is a proviso in a lease for forfeiture on assignment without the consent of the lessor, the acceptance of rent by the lessor from the assignee operates as a waiver of forfeiture—*Saraf Ali v. Subraya*, 20 Bom. 439. So also, where after the denial of landlord's title, the landlord receives rent from the tenant, he cannot rely upon the denial as a ground of forfeiture—*Farman Bibi v. Shaikh Tashi*, 12 C.W.N. 587. Where a lease provided that out of the rents payable by them the lessees were to pay the Government revenue, then if after the termination of the lease, the lessor allowed the lessees to pay the Government revenues on two occasions, such payments were in reality payments of rent, and the lease was not therefore brought to a termination but was allowed to run out—*Sadai Nath v. Serai Naik*, 28 Cal. 532.

Waiver by the subordinate officers of the Government is binding on the Government. Thus, where the realisation of rent by the subordinate officers of Government were on behalf of the Government and the Government had the benefit of those realisations, and the officers had knowledge of the incurring of the forfeiture, the waiver was binding on the Government—*Basanta Kumar v. Secretary of State*, 59 I.C. 273 (Cal.). Acceptance of rent by a trustee who has been held out by his co-trustees as having authority to receive payments amounts to an acceptance binding on the trustees—*Sripada v. Ravikanti*, A.I.R. 1935 Mad. 454, 157 I.C. 804.

Acceptance of the rent even under protest amounts to an acceptance under this section sufficient to operate as a waiver—*Davenport v. Queen*, L.R. 3 App. Cas. 115 followed in *Kali Krishna v. Fuzle Ali*, 9 Cal. 843 ; *B. N. Ry. Co. v. Balmukunda*, 80 I.C. 200, A.I.R. 1923 Cal. 663 (664) ; *Amar Krishna v. Nazir Hasan*, 14 Luck. 723, A.I.R. 1939 Oudh 257, 1939 O.W.N.

825. The protest is altogether inoperative,^o because the lessor had no right at all to take the money unless he took it as rent; he cannot be allowed to say that he wrongfully took it on some other account; and if he took it as rent, the legal consequences of such act must follow, however much he may repudiate them—*Croft v. Lumley*, 6 H.L.C. 672. Therefore, acceptance of rent constitutes waiver of forfeiture, notwithstanding that the lessor expressly states that he accepts the money as compensation for use and occupation and not as rent—*Ibid.* A conditional acceptance of rent by the lessor after default involving forfeiture is none the less a waiver—*Sripada v. Ravikanti*, supra. Where a deed of lease provides for forfeiture on the breach of any one of the conditions of the lease and at the same time says that the lease will be renewed on the observance of all the conditions of the lease, then, if the tenant incurs forfeiture by breaking a condition but the landlord waives the forfeiture by accepting rent after the breach, such waiver does not disentitle the landlord to refuse renewal on the ground of non-fulfilment of all the conditions of the lease—*State of Bihar v. Indian Copper Corporation Ltd.*, I.L.R. 38 Pat. 1160.

There is a waiver of forfeiture under this section if the lessor accepts or demands rent which has accrued due *after* the forfeiture; but a claim, in a suit for ejectment, for rent which fell due *before* forfeiture, does not amount to a waiver and cannot negative the plaintiff's right to seek ejectment—*Padmanabhaya v. Ranga*, 34 Mad. 161 (162), 6 I.C. 447; *Raj Mohan v. Mati Lal*, 22 C.L.J. 546, 33 I.C. 331; *Purna Chandra v. Ali Mahammad*, A.I.R. 1924 Cal. 520, 37 C.L.J. 548, 70 I.C. 999; *Rambux v. Sohanlal*, I.L.R. (1962) 12 Raj 172; *Puranmal Jaiswal v. Onkar Nath*, A.I.R. 1959 Pat. 128. Where it appeared that rent for a period *subsequent* to the forfeiture had not only been accepted but was realised by attaching the moveable property of the lessee, *held* that there was a waiver of forfeiture—*Basanta Kumar v. Secy. of State*, 59 I.C. 273 (Cal.). A forfeiture may be waived by acceptance of rent or by suing for rent, but if the landlord *definitely determines the lease*, after the forfeiture, by giving a notice to quit, a subsequent suit for rent for the period subsequent to the forfeiture, does not amount to a waiver, and the tenant is not liable to pay rent for the period subsequent to the termination of the lease by notice to quit—*Upendra v. Dhubeshwar*, 12 P.L.T. 225, A.I.R. 1931 Pat. 240.

Where two persons have jointly leased out a land, and have subsequently become divided, one of them may enforce the forfeiture clause in the lease with respect to his moiety of the land, notwithstanding that the owner of the other moiety has waived his right to enforce the same by receiving his moiety of the rent—*Korapalu v. Narayan*, 38 Mad. 445, 20 I.C. 930.

604. "Any other act":—The forfeiture may be waived by subsequent demands for rent—*Kristo Nath v. Brown*, 14 Cal. 176 (184). Thus, if in a suit for ejectment brought on the ground of forfeiture for non-payment of rent, the plaintiff also claims rents for periods subsequent to the period of default, the suit fails, because by making such a claim the plaintiff must be deemed to have waived the forfeiture under this section—*Abdul Rashik v. Safor Ali*, 42 I.C. 614 (Cal.). Where in a suit for ejectment on the ground of forfeiture, the plaintiff makes an alternative claim that the notice given by him should be treated as a notice terminating the tenancy in suit, he is

estopped from relying upon the forfeiture since the claim amounts to an assertion that the tenancy is still subsisting, and is therefore a waiver of forfeiture—*Rukmini v. Rayaji*, A.I.R. 1924 Bom. 454 (456), 48 Bom. 541, 83 I.C. 45. So also, where a lease provided for forfeiture on assignment by the lessee without the consent of the lessor, landlord's entering into an agreement with the assignee in respect of repairs of the premises operated as a waiver of forfeiture—*Saraf Ali v. Subraya*, 20 Bom. 439.

But merely lying by and witnessing the breach is no waiver; some positive act must be done. The general rule is that if a lessor or the person legally entitled to the reversion, knowing that a forfeiture has been incurred by the breach of any covenant or condition, does any act whereby he acknowledges the continuance of the tenancy at a later period, he thereby waives such forfeiture—Woodfall's *Landlord and Tenant*, 19th Edn., p. 376. Where a landlord instead of exercising his right of forfeiture allowed a tenant to continue in possession of the premises and treated him as tenant, he must be held to have waived the forfeiture—*Thandu Parakel v. Ammalu*, 8 M.L.T. 238, 8 I.C. 309. If the landlord elects not to take advantage of the forfeiture, it is waived. The election may be express or implied—*Baddaparti v. Vodoori*, A.I.R. 1936 Mad. 252 (255).

604A. Waiver cannot be revoked :—If the lessor elects not to enforce the forfeiture and manifests or communicates to the lessee his intention accordingly, that is, if he waives his forfeiture, the waiver is irrevocable—*Chengiah v. Raja of Kalahasti*, 24 M.L.J. 263, 15 I.C. 445. If a certain condition, the breach of which entails forfeiture, is violated repeatedly, a mere waiver of the earlier breaches does not preclude the landlord from enforcing a subsequent breach—*Krushna Patra v. Berhampur Municipality*, I.L.R. (1959) Cut. 56.

1st Proviso :—There can be no waiver unless the lessor has acted with notice or *actual knowledge* of the forfeiture. It is not enough for the lessee to prove merely an act of the lessor showing recognition of the tenancy or to show that the lessor's ignorance of the breach has not been proved. The onus is on the lessee to prove positively that the lessor had knowledge of the breach and yet continued to recognise the tenancy—*Swarnamoyee v. Royajaddi*, 36 C.W.N. 819 (822), 139 I.C. 239, A.I.R. 1932 Cal. 787; *Mathews v. Smallwood*, [1910] 1 Ch. 777; *Fatalal v. Dayalal*, A.I.R. 1949 Nag. 218, I.L.R. 1949 Nag. 167.

605. 2nd Proviso—Acceptance of rent after suit :—Acceptance of rent by the landlord from the tenant, after the institution of a suit for eviction on the ground of forfeiture incurred by the tenant for breach of a condition in the lease, does not operate as a waiver of the forfeiture—*Padmanabhaya v. Ranga*, 34 Mad. 161 (162); *Mazhoor v. Podiyapurayil*, 8 M.L.T. 99, 1910 M.W.N. 484, 6 I.C. 264. Where the lessors brought ejectment against the tenant on the ground of forfeiture for breaches of covenants which provided for re-entry, it was held that a distraint for rent after commencement of the action did not operate as a waiver, and the plaintiffs were entitled to judgment—*Grimwood v. Moss*, 7 C.P. 360. See also *Mt. Gindori v. Sham Lal*, A.I.R. 1946 Lah. 330 (F.B.). If the suit for ejectment is brought on the ground of forfeiture for *non-payment of rent*, and after such suit the tenant pays rent, the rule in sec. 114 will apply.

113. A notice given under section 111, clause (h), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting.

Waiver of notice to quit.

Illustrations.

(a) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires, B tenders, and A accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(b) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires, and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived.

606. Scope of section :—This section deals with the waiver of notice to quit just as the last section deals with the waiver of forfeiture. But the distinction between the two lies in this: a forfeiture can be waived without the lessee being a consenting party thereto; it is entirely at the option of the lessor to waive the forfeiture or not. But in a waiver of a notice to quit the express or implied consent of the lessee is necessary; in other words, a notice to quit cannot be waived without the assent of both the lessor and lessee—*Blyth v. Dennett*, (1853) 13 C.B. 178 (180). Thus under this section a notice is waived by an act showing the person giving notice showing an intention to treat the lease as subsisting provided there co-exists the express or implied consent of the person to whom it is given. When both the landlord and tenant contends that by acceptance of rent the old tenancy on old terms continued then the old tenancy within the default clause also continued—*Ranjit v. Mohitosh*, A.I.R. 1969 S.C. 1187. The parties must be *ad idem* in making a new agreement—*Navnilal v. Baburao*, A.I.R. 1945 Bom. 132, I.L.R. 1945 Bom. 68. Secs. 113 and 116 have not made the Indian law different from the English law—*ibid*. See also *Muralidhar v. Tara Dye*, A.I.R. 1953 Cal. 349 where in the circumstances of the case it was held that a letter sent by the lessor after notice to quit, demanding possession of the premises did not constitute waiver of the notice; nor was there any waiver because the lessee was allowed to collect rent and pay taxes. See also *Hindusing v. Nihalkaranji*, *infra*. The parties must come to a definite agreement; otherwise there can be no waiver. The mere fact that negotiations and discussions which did not come to anything took place between the parties, subsequent to the notice to quit, does not show that there was waiver—*Thei Un v. Mahomed Ajnm*, 6 Bur. L.J. 164, 104 I.C. 335, A.I.R. 1927 Rang. 276 (277).

A waiver to be effective must be made by the entire body of joint owners—*Motilal v. Basant Lal*, A.I.R. 1956 All. 175. There can be no waiver after the institution of the suit for ejectment—*Ibid*. The question of waiver is one of intention and the acceptance of rent after the expiry of the notice to quit does not necessarily operate as waiver—*Harbhajan Singh v. Munshi Ram*, A.I.R. 1956 Punj. 246. Acceptance of rent by the landlord for seven months after the termination of the tenancy by a notice to quit amounts to a waiver of the notice to quit even though the tenant

unsuccessfully claims to be a permanent tenant—*Kapur Chand v. Kanji*, A.I.R. 1959 Andh. Pra. 346.

Though this section is in terms inapplicable to agricultural leases, as based on general principles, it will apply to such leases. In such cases a reasonable notice to quit only is necessary and the notice will be waived only where there is in effect an agreement to restore the old tenancy—*Hindusingh v. Nihalkaranji*, A.I.R. 1954 M.B. 37. In the last cited case it was held on the facts that payment of rent in the case was not to the landlord but to his servant who had no authority to accept it, hence the notice was not waived. Where a landlord applies for possession on the ground of personal cultivation after notice to quit and thereafter files a suit for rent for a period subsequent to the application for possession both the notice to quit and the order of possession are waived—*Bapurao v. Waman*, A.I.R. 1963 Bom. 179 (Nag.). Acceptance of rent for a period prior to the termination of tenancy does not operate as waiver—*Ved Prakash v. Din Dayal*, 1961 All. L.J. 637. If subsequent to the notice to quit validly given rent is accepted without reservation or condition the notice is waived—*M/s. Mehra C. L. v. Kharak Singh*, 70 Punj. L. R. (D.) 55. Receipt of rent subsequent to the notice to quit and pending suit, by itself, does not amount to waiver; the intention to waive must be established—*Saleh Bros. v. K. Rajendran*, (1969) 1 M.L.J. 247.

Where after the notice to quit has been served and the ejectment proceeding instituted, the landlord has claimed and accepted rent which has *accrued after the* expiration of the notice, such claim and acceptance of rent would amount to a waiver of the notice to quit. But a claim for arrears of rent due *prior* to the ejectment, proceedings, even though such claim is made after the notice to quit was served, does not constitute a waiver of the notice to quit—*Shah Wali Ahmad v. Hussaini Begum*, 2 P.L.J. 595, 42 I.C. 655. See also *Khumani Saktey Lal*, A.I.R. 1952 A. 579; *Kamlapat v. Manho Bibi*, A.I.R. 1948 Oudh 127; *Ilahibux v. Munir Khan*, A.I.R. 1953 Nag. 219, 1953 N.L.J. 147. The question of waiver is a question of fact—*Maharana Shri Bhagwati Singhjee v. Keshulal*, A.I. R. 1963 Raj 113.

Where subsequent rent is accepted after the notice to quit whether before or after a suit for ejectment has been filed, the landlord thereby shows an intention to treat the lease as subsisting. It cannot be argued on the analogy of the second proviso to sec. 112, that the acceptance of rent after the suit for ejectment has been filed does not amount to a waiver of the notice to quit; for had it been intended that acceptance of rent after suit should not operate as a waiver in the case of a notice to quit, a proviso similar to that in sec. 112 would have been incorporated in sec. 113—*Maniklal v. Kadambini*, 43 C.L.J. 272, 94 I.C. 156, A.I.R. 1926 Cal. 763. *Ram Dayal v. Jowla Prasad*, A.I.R. 1966 All. 623. But see *Purusottam v. Ram Chandra*, 1960 M.P.L.J. 631 and other cases noted below where it has been held that mere acceptance of rent does not necessarily operate as waiver. Plaintiff accepted rent from the tenant defendant after the termination of the monthly tenancy by a notice to quit and also after the institution of the suit for eviction. The defendant was a statutory tenant during the period for which rent was accepted under the local law. Held that the acceptance of rent did not amount to a waiver of the notice to quit

—*Pulin Bihari v. Lila*, A.I.R. 1956 Cal. 106. This view was accepted on appeal—*Pulin v. Lila*, A.I.R. 1957 Cal. 627. Illustration (a) to s. 113 is not applicable to a lease governed by control laws—*Narayana Tyengar v. Subba Rao*, A.I.R. 1958 Mys. 113.

If within the time fixed in the notice to quit rent already due from the lessee for a period prior to the date on which he has to vacate is accepted by the lessor, such acceptance does not amount a waiver—*Ram Sarup v. Gayatri Devi*, A.I.R. 1952 All. 863. Where by an arrangement between the lessor and the lessee municipal taxes paid by the latter would be set off against the rent, any tax paid by the lessee after service of the notice to quit would not constitute a waiver of the notice—*Sant Kuer v. Ganesh*, A.I.R. 1949 Pat. 137, 27 Pat. 695. Withdrawal of rent deposited by a statutory tenant does not operate as waiver—*Bhagat Ram v. Keshabdeo*, A.I.R. 1965 Assam 55. Acceptance of rent from a statutory tenant for a period subsequent to the period of the notice to quit does not amount to a waiver of the notice to quit—*Hari Shankar v. Chaitanya Kumar*, 1968 All. L.J. 387.

Illustration (a) shows that the rent accepted must be for a period after the notice. The effect of a second notice to quit and of a waiver of forfeiture is that the determination of the lease under cls. (g) and (h) of sec. 111 does not take effect. The tenancy that runs after the waiver is not a fresh tenancy—*Chotey Lal v. Sheo Shankar*, A.I.R. 1951 All. 478. The mere fact that a second notice to quit is given when the first notice is found defective or is waived does not affect the permission granted under the U. P. Act III of 1947—*ibid.* See in this connection *Ram Sarup v. Gayatri Devi*, supra. If a tenant on receipt of a notice on April 11, 1959 requiring him to pay arrears within one month and asking him to vacate by April 30, 1959 sends a cheque on June 25, for arrears of rent and also for rent upto June and the landlord after accepting the cheque sends a second notice to quit on July 9 asking the tenant to vacate by the end of July, suit on second notice is competent—*Mangilal v. Sujan Chand*, A.I.R. 1965 S.C. 101.

Mere production of rent receipts for periods subsequent to the termination of the tenancy by notice to quit should not be sufficient to prove an agreement to continue the tenancy so as to constitute a waiver of notice when the rent is paid for the protection of his rights under the Rent Control Act—*Manindra v. Man Singh*, A.I.R. 1951 Cal. 342; *Babulal v. Hanuman Prasad*, 1964 All. L.J. 1143; *Ganga Narain v. Bal Krishna Dass*, A.I.R. 1964 Punj. 356. Where the landlord even after the service of notice to quit and the institution of the ejectment suit continues his proceedings for fixing the standard rent, this is not sufficient to show that the landlord had waived the notice to quit—*Joy Kumar v. S. K. Choudhury*, A.I.R. 1952 Cal. 130; *Commissioners of Hazaribagh Municipality v. Fulchand Agarwalla*, A.I.R. 1966 Pat. 434.

A notice to quit may be waived only by mutual consent, whereas forfeiture may be waived by the unilateral act of the lessor—*Hirajibhai v. Balarambhai*, A.I.R. 1956 Nag. 125. Where a tenant continues in possession even after the receipt of the notice to pay enhanced rent or to quit, he accepts the enhanced rent and consents to the waiver of the notice

to quit—*Hossankhan v. Pandit Sharada Charan*, A.I.R. 1957 Madh. Pra. 233. Where there is a repudiation of the tenancy a mere demand for rent for the period subsequent to the termination of the tenancy by a notice to quit does not constitute a waiver—*Pran Mal v. Onkar Nath*, A.I.R. 1959 Pat. 128. A mere combination of the claim for both rent and damages for the period subsequent to the expiration of the notice does not operate as waiver—*Ibid.* Where the landlord accepts rent for a period subsequent to the period of the notice on the tenant's assurance to vacate as the house is too small there is no waiver—*Kamaksha v. Parwatibai*, A.I.R. 1960 Madh. Pra. 192. Where the landlord files a suit on a notice to quit demanding rent in arrears and damages, the notice is not waived by acceptance of sums sent by money order after the institution of the suit—*Laxminarayan v. Jaisiram*, 1960 Nag. L.J. (Notes) 52.

114. Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment pass an order relieving the lessee against the forfeiture ; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

Relief against forfeiture
for non-payment of rent.

607. Principle :—This section is based upon the principle that as a right of re-entry was intended merely as a security for rent, the lessor, by the lessee's bringing the rent into Court, recovered full compensation and was put into his original position. The proper rule, as established by judicial decisions, is that if at any time the relief is asked the position has been altered so that relief cannot be granted without causing injuries to third parties relief will be refused. If no injustice will be done, there is no real discretion and the Court should make the order—*S. K. Shaw v. Brij Raj*, A.I.R. 1949 Pat. 475, 30 P.L.T. 183.

Scope :—This Act does not apply to agricultural lease, but the principle of this section may be acted upon in case of such lease. A condition in a lease which enables the landlord to re-enter on non-payment of rent is regarded as penal, and should be relieved against by the Court, even though the case does not fall under this Act—*Vaguran v. Rangayyanger*, 15 Mad. 125 (126) ; *S. K. Shaw v. Brij Raj*, supra. This section will apply to relieve the tenant against forfeiture even though the case is governed by the special provisions of the Calcutta Rent Act. The Transfer of Property Act must not be deemed to have been abrogated by the provisions of the Calcutta Rent Act which is an Act of a Local Government—*Ahindra v. Twiss*, 49 Cal. 150 (160), A.I.R. 1922 Cal. 394, 70 I.C. 75.

For attracting the provisions of this section the lease must be expressed for a term and on breach of the covenant to pay rent at a specified time the lessor must have a right to re-enter—*Pandit v.*

Narsinghdas, A.I.R. 1951 Nag. 207, I.L.R. 1950 Nag. 870. Forfeiture in the technical sense employed in this section with reference to cl. (g) of sec. 111 is incurred in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter, and even in such a case the lessor has to give notice in writing to the lessee of his intention to determine the lease—*Bhagwant v. Ramchandra*, A.I.R. 1953 Bom. 129, 54 Bom.L.R. 833. Where the conditions of the lease are not strictly complied with, forfeiture cannot be relieved against—*Shammugam v. Annalakshmi*, A.I.R. 1950 F.C. 38, (1950) 1 M.L.J. 683. In this case subsequent acceptance of payment of rent was held not to amount to waiver.

This section has been enacted to relieve the tenant from the extreme penalty of forfeiture to which the literal enforcement of his contract might have otherwise exposed him. Under this section the Court has a discretion to relieve him against forfeiture and not to make a decree for ejectment, if the lessee pays or tenders the rent in arrears with interest and full costs of suit—*Kundan v. Kallu*, 12 A.L.J. 650, 24 I.C. 79. Provisions for forfeiture of leases for non-payment of rent are intended merely as a security for the non-payment of rent, and a Court of Equity will relieve the lessee and set aside a forfeiture, on his bringing the rent into Court. The principle of English law has been recognized by the Legislature in sec. 114 of the T. P. Act—*Megh Lal v. Raj Kumar*, 34 Cal. 358 (368). Thus, where the landlord had taken a large sum by way of premium under a registered lease for ten years, and the rent was payable on the first of every lunar month failing which the lease was to stand cancelled, held that it was against equity and good conscience to allow the landlord to cancel the lease, after having taken a large sum as premium, simply on account of a few days' delay in payment of rent, especially in a case in which the lessee had not even then taken possession of the leased premises—*Kallan v. Jawahir*, 5 Lah.L.J. 99, 71 I.C. 837, A.I.R. 1924 Lah. 49 (50). And this section gives the lessee the last chance of saving himself from the operation of the forfeiture clause.

It should be noted that this section relieves only against forfeiture for non-payment of rent, and does not relieve against forfeiture occasioned by other causes. Section 114A has been newly enacted to give relief against forfeiture due to breach of an express condition.

Under this section the Court is invested with a *discretionary* power to grant relief which it may or may not exercise in favour of the tenant. It cannot be said that merely because the tenant has complied with the conditions laid down in sec. 114 by depositing in Court the rent in arrear he becomes entitled as of right to the relief. The Court has a discretion to give relief or not, according to the special circumstances of the case, having regard to the conduct of the tenant and to any equities that may have arisen between the date of forfeiture and the application for relief—*Debendra v. Cohen*, 54 Cal. 485, A.I.R. 1927 Cal. 908 (910), 106 I.C. 477; *Gopinath Auddy v. Thakars Press and Directories Ltd.*, 66 C.W.N. 449. The discretion has to be exercised on proper judicial grounds, and if the Court of first instance has exercised that discretion, and there is nothing to show that there was anything wrong in principle, the Appellate Court should not interfere. But if the Appellate Court finds that the discretion

has been exercised by the first Court in a capricious and whimsical manner, and not on any judicial principle, then the Appellate Court should interfere—*Ramabrahmon v. Rami Reddi*, 1927 M.W.N. 305, 108 I.C. 273, A.I.R. 1928 Mad. 250 (253). Provided that the principles on which the trial Court acts, no Court of second appeal will interfere with the exercise of the discretion—*Ladhuram v. Chimmiram*, A.I.R. 1947 Bom. 86, 48 Bom.L.R. 608. In exercising the discretion the delay, the conduct of the parties and the difficulties which the landlord has been to should be weighed against the tenant. It is a maxim of equity that a person who comes in equity must do equity and must come with clean hands and if the conduct of the tenant is such that it disentitles him to relief in equity, then the Court's hands are not tied to exercise it in his favour—*Namdeo v. Narmadabai*, A.I.R. 1953 S.C. 228 ; *Dwarkaprasad Arya v. Omprakash Mohta*, A.I.R. 1967 Cal. 612.

The mere fact that the lessee pleads payment of rent which he fails to prove does not in itself disentitle him to the relief given under this section—*Ramakrishna v. Baburaya*, 23 M.L.J. 715, 24 I.C. 139 (141).

The principle of this section is applicable not only to the original lessee but also to the transferee of the lessee (where the lessee is permitted to transfer); the transferee by act of parties or by operation of law must be deemed to stand in the shoes of the transferor and is as much entitled to be relieved against as the original tenant—*Ahmad Husain v. Riaz Ahmad*, 12 A.L.J. 1085, 25 I.C. 186 ; *Ladhuram v. Chimmiram*, *supra*.

Although this section does not apply to agricultural leases, still the Court has got power to relieve against forfeiture in case of such leases independently of this section, on such conditions as may appear equitable on the facts of each particular case, and is not bound by the conditions of this section—*Rama Krishna v. Fernandez*, A.I.R. 1927 Mad. 239, 98 I.C. 851. An appellate Court has also power to grant relief against forfeiture when this section does not in terms apply to the case—*Shrikishanlal v. Ramnath*, A.I.R. 1944 Nag. 229, I.L.R. 1944 Nag. 877.

Relief against forfeiture for non-payment of rent was given in case of leases created prior to the passing of this Act. See *Narayana v. Narayana*, 6 Mad. 327 (330).

608. Payment or tender of rent :—Under this section there must be an actual payment or tender before the Court. Mere readiness to pay is not enough. The advantage of this section should be taken at the earliest opportunity and not at the appellate stage—*Habib v. Mt. Keoti*, A.I.R. 1946 All. 328, 1946 A.L.J. 121 ; *Bhusan Chandra Paul v. Bengal Coal Co. Ltd.*, A.I.R. 1966 Cal. 63. But after the landlord has refused to receive the rents, it is useless to make the tender any more—*Shrikishanlal v. Ramnath*, *supra*. Since the lessee is allowed to pay the arrears of rent at the time of hearing, it follows that the lessee is at liberty to tender the amount at any time *before* the institution of the suit, and the lessor cannot refuse to accept it. If the lessor refuses to accept it and files a suit for ejectment, he does so at his own risk, and the lessee will not be liable for forfeiture, not to pay the costs of the suit—*Krishnaswami v. Natal Emigration Board*, 17 Mad. 216.

If the tenant deposits the rent with the Rent Controller, under the provisions of the Calcutta Rent Act, that would be a sufficient compliance with the provisions of this section and would relieve the tenant against forfeiture—*Ahindra v. Twiss*, 49 Cal. 150, A.I.R. 1922 Cal. 394, 70 I.C. 75.

The lessee is not entitled to the benefit of this section when he omits to make any tender before suit, or to pay the money into Court, and on the contrary pleads payment unsuccessfully—*Narayana v. Handu*, 15 M.L.J. 210.

“Rent in arrear” :—The expression includes *time-barred* rents, also the word “lessor” includes the transferee of the lessor—*Vamana v. Venkatu*, A.I.R. 1936 Mad. 116 (117), 160 I.C. 530; *Janab Vellathi v. K. Kadervel Thayammal*, A.I.R. 1958 Mad. 232. Though in a suit for rent the landlord cannot recover arrears for more than three years, yet in a suit for ejectment by the landlord on the ground of forfeiture of the lease owing to the non-payment of rent, the Court can relieve the tenant against the forfeiture only on condition of his paying the full arrears of rent, though it is for a longer period than three years—*Vasudeva v. Krishna Udpa*, 44 Mad. 629, 40 M.L.J. 460, 62 I.C. 583.

The rent to be tendered under this section need not be the rent stipulated in the lease; if a standard rent has been fixed by the Rent Controller under the Calcutta Rent Act, the tenant may deposit that rent, and by so doing will be entitled to relief against forfeiture—*Ahindra v. Twiss*, *supra*.

The “rent in arrear” means not only the rent claimed in the suit but includes all that is due to the lessor up to the date when the application for ejectment is heard—*Dhurrumtolia Properties Ltd. v. Dhunbai*, 58 Cal. 311, A.I.R. 1931 Cal. 457, 133 I.C. 87. Rent includes the entire amount which the tenant is liable to pay upto the date of tender—*Narsing Das v. Peremshwari Das*, A.I.R. 1962 All. 65.

609. Forfeiture and nullity :—In the old clause (g) of sec. 111, it was stated that forfeiture could take place upon the breach of an express condition which provided that on breach thereof the ‘lessor may re-enter’, or the ‘lease shall become void’. So that, no distinction was made between a case in which a lessor could re-enter on breach of an express condition and a case in which the lease became void on breach of the condition. In other words, the Act made no difference between a condition of forfeiture and a clause of nullity. And in either case the Court could grant relief under sec. 114. Therefore, where there was a covenant in a lease that ‘on failure to pay rent the lease shall become null and void’, this section operated to relieve against the forfeiture, in spite of the nullity clause, and protected the tenant from ejectment for non-payment of rent, if he paid the rent in Court—*Hiranandan v. Ramdhar*, 1 Pat. 363, A.I.R. 1922 Pat. 528, 69 I.C. 886.

In the present clause (g) of sec. 111, however, the words “or the lease shall become void” have been omitted, and the ruling of the above Patna case is no longer of any importance.

610. Relief when period of grace is allowed :—The equitable relief given to the lessee under this section is provided as a matter of grace.

And the Court will not grant any relief under this section where a period of grace has already been allowed by the lease itself for the payment of rent. Thus, where the lease contains a provision to pay rent on the 15th of April, but no forfeiture is provided for on account of default of such payment, and it further provides that if the default continues until December then the lease is to be forfeited, *held* that the lease provides a sufficiently long period of grace, and that if the tenant fails to pay within December and the landlord has consequently to sue for ejectment upon forfeiture, the Court will not grant relief to the lessee by allowing him to pay the rent during the hearing of the suit—*Narayana v. Vesudeva*, 28 Mad. 389; *Narayana v. Handu*, 15 M.L.J. 210; *Mahalakshmi v. Lakshmi*, 21 M.L.J. 960, 12 I.C. 456; *Adhiragi v. Billa*, 20 M.L.J. 944, 6 I.C. 438; *Arju v. Narayana*, 19 N.L.R. 50, 71 I.C. 445, A.I.R. 1923 Nag. 193. But the Bombay High Court does not favour this view, and holds that the tenant should be relieved against forfeiture, even though the rent was not paid within the period of grace allowed by the lease—*Krishnaji v. Sitaram*, 45 Bom. 300, 59 I.C. 769, 22 Bom.L.R. 1439. In some other cases the Madras High Court has said that the question whether a tenant is entitled to relief against forfeiture for non-payment of rent must depend upon the *facts of the particular case*, and that the Courts have power to grant relief even in cases where a period of grace is allowed for payment of the rent. The condition of forfeiture of a tenancy should be regarded as penal in its nature and the equitable provision of sec. 114 should generally be given effect to—*Ramabrahman v. Rami Reddi*, 1927 M.W.N. 305, A.I.R. 1928 Mad. 250 (252), 108 I.C. 273; *Appayya v. Mahomed Behari*, 29 M.L.J. 381, 30 I.C. 596. This holds good equally in the case of a lease for agricultural purposes—*Tripura v. Venkateswarlu*, A.I.R. 1949 Mad. 841, (1949) 1 M.L.J. 586. Sec. 114 is not applicable to a forfeiture on account of default under the West Bengal Premises Tenancy Act, 1956—*Ganesh Chandra Nandy v. Chatterjee Brothers*, 70 C.W.N. 676. Sec. 114 has no application in a suit on a notice to quit—*Ram Pakhpal v. Dropodi Devi*, 1965 All. L.J. 249. Relief under this section cannot be invoked on principles of equity—*Tippayya v. Rama Narayana*, A.I.R. 1961 Mys. 131. When there is no forfeiture under sec. 111 (g), no relief under sec. 114 can be given—*Ibid*.

611. Which Court can grant relief :—Besides the original Court, the Appellate Court also can grant relief against forfeiture incurred for non-payment of rent, on the tenant making the payment or tender of the arrears of rent at the hearing of the appeal, even though such offer was not made in the lower Court—*Praduman Kumar v. Virendra*, A.I.R. 1969 S.C. 1349; *Vidyapurna v. Rangappaya*, 25 M.L.J. 486, 21 I.C. 405; *Janab Vellathi v. K. Kaderval Thayammal*, A.I.R. 1958 Mad. 232. Relief against forfeiture can be given even in the case of an agricultural lease and the court is not bound by the condition laid down in this section—*Janab Vellathi v. K. Kaderval Thayammal*, A.I.R. 1958 Mad. 232.

Relief after decree :—The execution Court also has power to grant relief against forfeiture, if the decree is a *consent decree*. Thus, where a compromise decree contained a stipulation that on failure by the defendant to pay the rent within the time fixed for each year, the lease was to be forfeited, and the defendant not having tendered the rent for a particular

year, the decree-holder applied for possession of the lands according to the terms of the decree, whereupon the defendant contended that relief ought to be given to him, *held* that it was competent to the Court to relieve the defendant against the forfeiture by allowing him to pay the rent—*Nagappa v. Venkat Rao*, 24 Mad. 165 ; *Krishnabai v. Hari*, 31 Bom. 15 (F.B.) (overruling *Shirekulli v. Mahabyla*, 10 Bom. 435). See also *Gajanan v. Pandurang*, A.I.R. 1951 Bom. 290, I.L.R. 1951 Bom. 240 ; *Ladhwam v. Chimmiram*, A.I.R. 1947 Bom. 36, 48 Bom. L.R. 608. If a decree, which is *not a consent decree*, was to the effect that “if the defendant pays to the plaintiffs the arrears of rent together with interest and costs on or before the 20th February, he be relieved as against forfeiture, and in case of default, the defendant be evicted and plaintiffs be put into possession of the respective land,” and the defendant failed to pay within 20th February, whereupon the plaintiffs applied for getting possession of the property, *held* that the decree not being a consent decree, no relief could be granted, even though it appeared that the defendant made some payments after 20th February which were accepted by the plaintiffs—*Giridharadoss v. Para Appadurai*, 51 Mad. 157, 54 M.L.J. 316, A.I.R. 1928 Mad. 193 (194), 107 I.C. 792. See also *Perdan v. Saraswati*, A.I.R. 1951 Raj. 148. In *Krishna Rao v. Balwant*, 27 Bom. L.R. 678, 89 I.C. 217, A.I.R. 1925 Bom. 404, relief was granted on the special facts of the case, although it was not a consent decree.

Relief may be given to a tenant under this section even though he is not entitled to any relief under sec. 4 of Madhya Pradesh Accommodation Control Act by reason of his failure to pay arrears within one month of the service of notice—*Rajaram Dhaniram v. Ramswaroop Sunderlal*, A.I.R. 1961 Madh. Pra. 56. Relief may be given in respect of agricultural holdings—*Palaniswamy v. Kundappa*, A.I.R. 1968 Mad. 96.

114A. *Where a lease of immoveable property has determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing—*

Relief against forfeiture in certain other cases.

- (a) specifying the particular breach complained of; and
- (b) if the breach is capable of remedy, requiring the lessee to remedy the breach ;

and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy.

Nothing in this section shall apply to an express condition against the assigning, under-letting, parting with the possession, or disposing, of the property leased, or to an express condition relating to forfeiture in case of non-payment of rent.

611A. This section has been inserted by sec. 58 of the T. P. Amendment Act (XX of 1929).

Prior to the enactment of this section it was held that the Court

could not give relief where the forfeiture took place by reason of breach of condition in the lease, e.g., breach of a covenant to repair—*Debendra v. Cohen*, 54 Cal. 485, A.I.R. 1927 Cal. 908 (910), 106 I.C. 477. The present section would give relief to the tenant in such cases.

The Act is not in force in the Punjab and the technical provisions of this section do not apply to that Province—*Md. Hussain v. Secretary of State*, A.I.R. 1939 Lah. 330 (338), 41 P.L.R. 895, 186 I.C. 45.

The provisions of this section have no retrospective effect and cannot govern suits instituted before its enactment—*Ibid.* See also Note 1A, *ante*.

The object of this section is to give the lessee a clear intimation as to the breach complained of. Once this purpose is substantially complied with, mere technical defects should not stand in the way of the lessor from availing himself of the right of forfeiture—*Wood v. Spain*, A.I.R. 1953 Mad. 313, (1952) 2 M.L.J. 758. Two notices in writing, one under cl. (g) of sec. 111 and one under this section are not necessary. This section must be deemed to have specified the nature of the notice required under cl. (g) of sec. 111—*Ibid.* Where the notice of forfeiture was not in accordance with sec. 114A, the Court gave relief against forfeiture of an agricultural lease—*Souza v. Louis*, A.I.R. 1947 Mad. 119, (1946) 2 M.L.J. 362. Where there was a breach of the covenant and the lessor gave the necessary notice of forfeiture, forfeiture followed as a matter of legal consequence. As the breach in this case was capable of remedy and the lessee failed to remedy the breach, the Court had no power to grant relief against forfeiture—*Charusila v. Madan Theatres, Ltd.*, A.I.R. 1953 Cal. 536, 90 C.L.J. 263.

A landlord cannot enforce his right of forfeiture of the tenancy, unless and until he gives an opportunity to the tenant to remedy the breach—*Fatelal v. Dayalal*, A.I.R. 1949 Nag. 218, I.L.R. 1949 Nag. 167. There is however no provision in the Act for granting relief against forfeiture for denial of the landlord's title—*Mt. Gindori v. Sham Lal*, A.I.R. 1946 Lah. 330 (F.B.), 48 P.L.R. 487. Where a person has never been a lease-holder no question under secs. 111 and 114A arises—*Md. Azim v. Pateswari*, A.I.R. 1943 Oudh 105. As this section has no application to a lease created before April 1, 1930, such a lease can validly be terminated on the ground of forfeiture by a notice that satisfies the requirements of sec. 111 (g) but not those of sec. 114A—*Sakuthalammal v. Chandrasekhar Reddiar*, A.I.R. 1968 Mad. 195.

The second para lays down that this section does not apply to a case of breach of an express covenant against assigning the property leased. See sec. 14 (6), Conveyancing Act, 1881, reproduced in sec. 146 (8), Law of Property Act, 1925. The reason is obvious: relief can be given against forfeiture for breach of a condition, when the breach is *capable of remedy*, but when it is incapable of remedy by reason of the fact that at the time the relief is asked for the position of parties has been altered, and the interests of third parties have intervened, the relief cannot be given, for to do so would be to cause injury to third parties—*Newbolt v. Bingham*, (1895) 72 L.T. 852; *Stanhope v. Hanworth*, (1886) 3 T.L.R. 34. In a

Madras case, it was likewise held, following the English law, that there was no relief where the tenant forfeited the tenancy by reason of an *alienation* of the leasehold interest without the consent of the landlord—*Krishna Shetti v. Gilbert Pinto*, 42 Mad. 654 (659).

Two transactions, one a sale and the other a lease, took place in respect of the same property on the same date. Under the first the purchaser was to pay the price in certain instalments, and in case of default in respect of any instalment, the seller would have the option to extend the time for payment of the instalment up to three months; but if he did not extend the time or if the instalment was not paid within the time extended, the entire balance due would become immediately payable and if the purchaser did not pay the same within a month of being called upon to do so, the seller would have the right to rescind the agreement, forfeit the instalment paid and sue either for specific performance or for damages. The lease provided that in case of default in the payment of any instalment under the agreement for sale, the landlord would have the right to re-enter: *held* that the dates for payment of the instalments were of the essence of the contract and non-payment of any instalment on the due date was a breach incapable of remedy. Accordingly, on the occurrence of such a breach a notice terminating the lease forthwith was a good notice—*Provat v. Bengal Central Bank*, A.I.R. 1938 Cal. 589, 42 C.W.N. 761.

Where in an agricultural lease there was a covenant against alienation, and the tenant mortgaged his land, whereupon the landlord sued to eject the tenant, it was held that relief should be given to the tenant, *firstly*, because it was an agricultural lease which is exempted from the T. P. Act and therefore the restrictions contained in this Act did not apply; and *secondly*, because there was no absolute alienation, but only a mortgage. And so the Court gave the tenant three months' time within which to release the land from the mortgage—*Janardhan v. Mahalappa*, 50 Bom. 450, A.I.R. 1926 Bom. 304 (305), 94 I.C. 1054.

But neither the Transfer of Property Act nor the English law gives relief to a tenant, where the forfeiture takes place by reason of *denial of landlord's title*, unless the tenant can prove that the denial was occasioned by fraud, mistake or accident of the landlord and that the tenant himself had not acted with carelessness or negligence—*Kemalooti v. Muhamed*, 41 Mad. 629 (631), following *Barrow v. Isaacs*, (1891) 1 Q.B. 417 (*per* Lord Esher, J.).

115. The surrender, express or implied, of a lease of immoveable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease; but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor.

Effect of surrender and forfeiture on under-leases.

The forfeiture of such a lease annuls all such under-lease, except where such forfeiture has been procured by the lessor in fraud of the under-lessees, or relief against the forfeiture is granted under section 114.

612. Principle and scope :—"It is a rule of law that if there is a lessee, and he has created an underlease or any other legal interest, then if the lease is *forfeited*, the under-lessee, or the person who claims under the lessee, loses his estate as well as the lessee himself; but if the lessee *surrenders*, he cannot, by his own voluntary act in surrendering, prejudice the estate of the under-lessee or the person who claims under him"—*Great Western Railway Co. v. Smith*, 2 Ch. 235.

This section is confined only to underleases, and does not apply to the assignee of a lessee. Therefore, a denial of the lessor's title by the original lessee will not work a forfeiture against the *assignee of the lessee*. The second para of this section will not apply to the case, as it speaks of the effect of forfeiture on *under-leases*. "The Transfer of Property Act very emphatically recognises that the interests of the lessee in the property may be transferred to an assignee and this may be done without the consent of the lessor; and if that can be done it seems to me to follow as a matter of reason that when the entire interest has been transferred by the lessee to the assignee, then the assignee is not responsible for the acts done by the lessee"—*per* Heaton, J. in *Gopal Jaycant v. Shrinivas*, 42 Bom. 734 (741), 20 Bom. L.R. 820, 47 I.C. 635. Where the tenant, subsequent to a mortgage, surrenders his land only to benefit the landlord at the expense of the mortgagee, the tenancy continues for the purpose of preserving the rights of the mortgagee—*Kanchadilal v. Jabbarsha*, A.I.R. 1936 Nag. 171 (174), 166 I.C. 686; see also *Prem Narayan v. Jhado*, A.I.R. 1931 Nag. 129 .

Where a lessee has given a sub-lease and thereafter surrenders the head-lease to the lessor, the position of the sub-lessee remains unaffected and he becomes the lessee of the original lessor on the same terms as in the sublease. If, however, the lessee surrenders the head-lease for the purpose of obtaining a new lease, the sub-lessee continues as before to hold under the lessee—*Subman v. Darabshaw*, I.L.R. 1939 Bom. 144, 41 Bom. L.R. 25, A.I.R. 1939 Bom. 98 (100). A lease by voluntary surrender of his lease cannot prejudice the right of his under-lessee—*Yusuf v. Jyotish*, 59 Cal. 739.

Under this section, the sub-lease becomes void when the original lease becomes *forfeited*—*Sheikh Yusuf v. Jyotish*, A.I.R. 1932 Cal. 241; if the interest of the original lessee is not forfeited but merely sold in execution of a decree obtained against him by his lessor for arrears of rent, the interest of the sub-lessee is not affected by such sale—*Vishnu Atmaram v. Anant Vishnu*, 14 Bom. 384. In case of forfeiture of a lease the under-leases become extinguished inspite of any contract to the contrary between the lessor and the lessee—*Bhupatrai Hirachand v. Choonilal Chunder*, 70 C.W.N. 62.

Whatever rights the sub-lessee may have against the lessee, do not affect the rights of the landlord. So far as the landlord is concerned, the

sub-lessee does not exist at all, and any proceedings by which the landlord has got a decree against the lessee would bind the sub-lessee—*Devaraju v. V. S. Raja*, A.I.R. 1953 Mad. 356, (1952) 2 M.L.J. 179. When the landlord acquired a right to evict his tenant under sec. 7 of the Madras Act XV of 1946 after giving a valid notice to quit, the sub-tenant who cannot claim higher rights than the tenant is liable to be evicted. The fact that he was not made a party to the proceedings before the Rent Controller does not affect the question, as he would be bound by the order passed against the tenant obtained without any fraud or collusion—*Parthasarathy v. Krishnamoorthy*, A.I.R. 1949 Mad. 387, (1948) 2 M.L.J. 391.

Where a decree for ejectment is passed against the tenant and the sub-tenant, the latter has a right of appeal; but if the decree has become final as against the tenant, the sub-tenant would be bound by the decree on the second para of this section, and the appeal by the sub-tenant alone would be incompetent—*Shankarrao v. Kisanlal*, A.I.R. 1950 M.B. 19.

116. If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106.

Illustrations.

(a) A lets a house to B for five years. B underlets the house to C at a monthly rent of Rs. 100. The five years expire, but C continues in possession of the house and pays the rent to A. C's lease is renewed from month to month.

(b) A lets a farm to B for the life of C. C dies, but B continues in possession with A's assent. B's lease is renewed from year to year.

Scope :—For the application of this section two things are necessary: (1) the lessee must be in possession after expiry of the lease; and (2) the lessor or his representative should accept rent or otherwise assent to the lessee's continuing in possession. What is contemplated is that the payment of rent and its acceptance should be made at such a time and in such a manner as to be equivalent to the landlord assenting to the continuance in possession—*Karnani Industrial Bank v. Province of Bengal*, A.I.R. 1951 S.C. 285, 1951 S.C.J. 407, on appeal from A.I.R. 1949 Cal. 47, 53 C.W.N. 195. Where the landlord had accepted rent for a period subsequent to the determination of the lease nearly a year before its expiry, the landlord's consent to the tenant's continuing in possession could not be inferred—*ibid*.

This section has to be read along with cl. (a) of sec. 111 which deals with the termination of a tenancy by efflux of time. This section does not affect the rights of the landlord and tenant as contained in secs. 112

and 113—*Novnitlal v. Baburao*, A.I.R. 1945 Bom. 132, I.L.R. 1945 Bom. 68. The principles are applicable to an agricultural lease—*Anantmal v. Lala*, A.I.R. 1964 Raj. 88.

This section does not apply to matters arising under the Rent Control Act where after an order for eviction of the tenant, but pending an appeal therefrom and the stay order, the landlord accepts cheques sent by the tenant as rent, the latter does not acquire any fresh right to continue in possession—*Kuppuswami v. Mahadeva*, A.I.R. 1950 Mad. 746 I.L.R. 1950 Mad. 844. See also *Ghulam v. Raja Rao*, A.I.R. 1947 Mad. 436, (1947) 1 M.L.J. 354. Where the person in occupation is not a tenant but a sub-lessee, the doctrine of holding over does not apply—*Nawabali v. Md. Ramzan*, A.I.R. 1944 Nag. 141, I.L.R. 1944 Nag. 267.

By cl. (j) of sec. 108 the lessee's right to sublet the whole or part of his interest has been recognized. Where on expiry of the lease the lessor finds a number of sub-lessees continuing in occupation and accepts rent from one or more of them, sec. 116 will apply—*Kaikhushiroo v. Bai Jerbia*, A.I.R. 1949 F.C. 124, 53 C.W.N. (F.R.) 73, per Patanjali Sastri, J..

In the case of a lease governed by sec. 107 and not by sec. 106 when there is no acceptance of rent by the lessor after the determination of the lease or any agreement by him that the former lessee should remain in possession without the execution of a fresh lease, this section is not applicable—*Thakur v. Jagdambika Pratap*, A.I.R. 1942 Ohdh 93 (95), 1941 O.W.N. 1065, 196 I.C. 694.

613. English and Indian law :—The rule embodied in this section differs from the English law in this respect that while under this section the term of the new tenancy is decided according to the *purpose for which the property is leased*, under the English law the tenancy is deemed to continue according to the *terms of the original tenancy*. Thus, where a lease of land was granted for a term of years, and the property leased was not used for agricultural or manufacturing purposes and was held over by the lessee after the expiration of the term, *held* according to Indian law that the lessee must be deemed to be a tenant from month to month (sec. 106) and entitled only to 15 days' notice to quit—*Troilokya v. Sarat Chandra*, 32 Cal. 123; *Bijoy Chandra v. Howrah Amta Light Ry.*, 38 C.L.J. 177, 72 I.C. 98, A.I.R. 1923 Cal. 524. See in this connection *Khater v. Gopal*, A.I.R. 1930 Cal. 262, 33 C.W.N. 1207, 125 I.C. 654. The Patna High Court has, however, held that when the tenant is found to be continuing in possession, he will be presumed to be a tenant from year to year in the absence of any evidence that he holds on a different tenure—*Ramsundar v. Duthin*, A.I.R. 1935 Pat. 271, 155 I.C. 367. The Allahabad High Court has also held in a recent case that when the lessee holds over after the expiry of the term fixed by the lease, the relations between the parties are governed by the same terms as are embodied in the original lease—*Badal v. Ram Bharosa*, A.I.R. 1938 All. 649 (650), (1938) A.L.J. 983. Under the English law, "where a tenant for a term of years holds over after the expiration of lease.....a new tenancy from year to year is thereby created upon the same terms and conditions as those contained in the expired lease so far as the same is applicable to and not inconsistent with the yearly tenancy.....In

the absence of any evidence one way or the other, it seems that upon the holding over and payment of rent, the Jury would be directed to find a tenancy on the terms of the expired lease"—Woodfall's *Landlord and Tenant*, 17th Ed., p. 246.

614. Holding over :—A distinction should be drawn between a tenant continuing in possession after the determination of the lease, *without* the consent of the landlord, and a tenant doing so *with* the landlord's consent. The former is called a *tenant 'by sufferance'* in the language of English law; the latter class of tenant is called a tenant 'holding over' or a *tenant-at-will*. A tenant by sufferance is no better than a mere trespasser and he can be turned out at any time without any notice to quit—Woodfall, p. 366; *Barry v. Goodman*, 2 M. & W. 768; *Moore v. Makham Singh*, 53 I.C. 180 (P.C.); *Bansidhar v. Ram Charan*, A.I.R. 1940 Oudh 401 (403), 1940 O.W.N. 586, 189 I.C. 488; *Punjab National Bank v. Chaudhury*, A.I.R. 1943 Oudh 392. The tenancy-at-sufferance is merely a fiction to avoid continuance in possession operating as a trespass. It therefore cannot be created by contract, and arises only by implication of law when a person who has been in possession under a lawful title continues in possession, after the lawful title has determined, without the consent of the person entitled. The tenancy-at-will again arises by implication of law in cases of permissive occupation—*Mozam v. Ananda*, A.I.R. 1942 Cal. 341, 46 C.W.N. 366. "The difference between a tenancy-at-will and a tenancy by sufferance is that in the one case the tenant holds by right and has an estate or term in the land, precarious though it may be, and the relationship of the lessor and the lessee subsists between the parties; in the other, the tenant holds wrongfully and against the will and permission of the lord, and has no estate at all in the occupied premises"—Addison's Law of Contract, 10th Edn., p. 618. Thus, if a Hindu woman in possession of a raiyati holding as a limited owner grants a *mokarari* lease of the holding, the lease is valid only during the lifetime of the limited owner, and after her death the reversioner may treat the tenant as trespasser and sue to eject him without giving any formal notice to quit—*Raghubir Singh v. Jethu Mahton*, 2 Pat. 171, 4 P.L.T. 396, A.I.R. 1923 Pat. 130, 70 I.C. 290. But where a Mohant leased a house site for 95 years, and after his removal from the *gadi* his successor continued to receive the rent from the lessee and then instituted a suit to eject him, a fresh tenancy was deemed to have been created from month to month—*Har Nath v. Mohar Singh*, A.I.R. 1931 Lah. 675, 32 P.L.R. 469. Where a lessee holds over after the expiry of his term without the express or implied consent of his landlord, he is only a trespasser and if he is dispossessed by a person claiming under the landlord, he cannot maintain a suit for possession or declaration of title based upon his previous possession—*Mathura Prasad v. Naju Khan*, 4 P.L.T. 696, A.I.R. 1921 Pat. 463, 80 I.C. 568, and 6 P.L.T. 142 (But see *Rudrappa v. Narasingrao*, 29 Bom. 213, where a tenant by sufferance, who was evicted by his landlord *proprio motu*, brought a suit against the landlord under sec. 9 of the Specific Relief Act, and recovered possession). If he refuses to leave the premises after being requested to depart, and offers any resistance, the landlord may use such force and violence as may be necessary to overcome such resistance—Woodfall, p. 780. But entirely different is the position of tenant holding over, whose possession

continues with the consent of the landlord and is therefore not wrongful, and he cannot be ejected without due notice—*Chaturi v. Mukund*, 7 Cal. 710; *Bose A. L. v. Sayed Nayyur Abbas*, A.I.R. 1967 All. 209.

In the case of a holding over, it is the acceptance of rent or the express or implied assent of the landlord that has the effect of renewing the lease and not continuing the original lease—*Ambar Ali v. Anjab Ali*, A.I.R. 1949 Ass. 87. Where in pursuance of an invalid lease the plaintiff got possession and paid rent to the landlord for several years, the plaintiff would be deemed to be a tenant from month to month under this section—*Surya Lall v. Tulsi Modak*, A.I.R. 1951 Pat. 483. Mere delay in filing a suit for ejectment does not create a tenancy by holding over—*Pritilal Devi v. Banke Behari Lal*, A.I.R. 1962 Pat. 446. Where no rent is paid by the lessee, nor any rent accepted by the lessor after the expiry of the lease and a claim for the rent of the second half of the month though the tenancy expired on the 15th of the month is made through mistake, there is no holding over by the lessee with the consent of the landlord—*Ibid*.

This section enacts that if after the termination of the lease, the tenant continues in possession, and the landlord accepts rent or otherwise gives consent to his remaining in possession, such action has the effect of converting the tenant by sufferance into a tenant-at-will. But this rule applies only to the original tenant, and not his *representatives*. Therefore, if the original tenant dies and his representative enters into possession, he does so as a trespasser, and the landlord cannot, by mere assent under this section, convert such representative into a tenant, unless a new tenancy is created by the consent of both parties—*Vadapalli v. Dronamraju*, 31 Mad. 163. Section 116 deals with the effect of holding over by a lessee, and with the creation of a fresh tenancy by implication. The kind of tenancy under section 116 is only created by law in favour of the *original* lessee. Therefore section 116 applies only to the case of a lease fixed for a term of years and not a lease for life. The *representatives* as assignees of the tenant for life will not become tenants from year to year, without the formalities of sed. 107; that is, they can become tenants from year to year only by means of a registered document. They may, of course, become tenants-at-will or for a year without any registered document, that is, by verbal contract—*Ram Rachhya v. Kamakhya Narayan*, 4 Pat. 139, A.I.R. 1925 Pat. 216, 84 I.C. 586, 6 P.L.T. 12. And so, where after the death of the original mukarraridars, who were tenants for life, the heirs remained in possession and paid rent to the lessor, but the receipts were given in the *marfatdari* form, and the lessor refused to give receipts to the persons paying the rent in their own name, *held* that the lessor did not recognize the heirs of the mukarraridars as tenants from year to year, that there was not even any relationship of landlord and tenant between the parties, and that sec. 116 did not apply—*Kamakhya Narayan v. Ram Raksha*, 7 Pat. 649 (P.C.), 9 P.L.T. 501, 32 C.W.N. 897 (901, 902, 905), A.I.R. 1928 P.C. 146, 109 I.C. 663, affirming *Ram Rachhya v. Kamakhya Narayan*, *supra*. Section 116 does not contemplate the holding over by the heirs of the original lessee, and therefore the heirs cannot, by continuing in possession, acquire the status of a tenant holding over after the deter-

mination of the lease—*Chāran v. Kamākhyā Narayan*, 6 P.L.T. 98, 88 I.C. 387, A.I.R. 1925 Pat. 357. But where the original lessee holds over by consent of the lessor and becomes a tenant, his interest is assignable, and the lessor can sue the assignee for rent from the date of transfer—*Bengal National Bank v. Janoki Nath*, 54 Cal. 813, 31 C.W.N. 973, 104 I.C. 484, A.I.R. 1927 Cal. 725 (730). But see *Mahendra Ramayya v. Mahendra Govindu*, (1966) 1 Andh. L.T. 424. If on the death of the original tēnant before the expiry of the term of the lease his heirs remain in possession even after the expiry of the original term with the assent of the landlord they will be tenants by holding over—*Janardan Swarup v. Devi Prasad*, A.I.R. 1959 All. 33.

The holding over by one or more co-tenants without the consent of the others cannot render the person not so holding over liable for rent. In order to make the estate of a deceased co-tenant liable for rent due for holding over, the onus lies heavily on the plaintiff (landlord) to prove clearly and conclusively that after the expiry of the old lease a new contract was made by and between the plaintiff on the one hand and all the co-tenants (including the co-tenant whose estate is sought to be made liable) on the other, making themselves jointly and severally liable to perform the conditions of the tenancy—*Brojo Lal Roy v. Belchambers*, 9 C.W.N. 340. But where one only of the joint lessees vacated the premises and not the others, all of them were liable to pay the rent till a new agreement was substituted for the original—*Maragathammal v. Azimunnissa*, A.I.R. 1954 Mad. 92.

615. Assent of lessor :—In order to justify a holding over, it must be proved that the landlord has either accepted rent or has otherwise assented to the tenant's continuing in possession—*Durgi v. Gobordhan*, 19 C.W.N. 525. *Punjab National Bank v. Chaudhury*, A.I.R. 1943 Oudh 392; *Amirchand v. Sadhoram*, 1968 All. W.R. (H.C.) 641. Simply because the landlord waited for a number of years for instituting the suit after the formal delivery of possession in execution of a decree for arrears of rent against the tenant the tenant cannot be deemed to have held over—*E. H. Christian v. Hari Prasad*, A.I.R. 1955 Pat. 158. If absence of dissent continues for a sufficiently long period, it may give rise to an inference of assent by the landlord—*Ram Barai Singh v. Tirthu Pada Misra*, A.I.R. 1957 Cal. 173. Whether a tenancy has been created by holding over is a question of fact—*Bhagwan Das Sukul v. Dhanjoy Paul*, A.I.R. 1963 Assam 137. Mere delay in filing a suit for eviction after the expiry of the lease does not constitute assent on the part of the landlord—*Digambar Narain v. Comm. of Tirhut Division*, A.I.R. 1959 Pat. 1 (F.B.). It must be proved that there was a direct consent on the part of the landlord; no implication of consent can arise merely by reason of the landlord's passive failure to take steps to eject the tenant—*Govindaswami v. Ramoswami*, 30 M.L.J. 492, I.C. 6 (8); *Ratan v. Farashi Bibi*, 34 Cal. 396. But where after the expiry of the lease, the landlord neither took rents nor brought a suit for ejectment for so long a period as 10 years, it must be presumed that he assented to the holding over, and that the lessee was not to be deemed a trespasser—*Safar Ali v. Abdul Majid*, 31 C.W.N. 282 (285), 100 I.C. 614, A.I.R. 1927 Cal. 279. But mere failure by the landlord to take any action against the sub-tenant immediately after expiry of the lease cannot be construed

an assent to his continuing the lease. Something more, such as demand of rent, must be shown—*Baban v. Champabai*, A.I.R. 1949 Nag. 336, I.L.R. 1949 Nag. 432. If a tenant holds over after the expiry of his lease he ordinarily becomes a trespasser, unless the landlord in some manner signifies his intention of recognizing the continuance of the tenancy, which is sufficiently indicated by the fact that a suit for rent has been instituted—*Ramsundar v. Duthin*, A.I.R. 1935 Pat. 271, 155 I.C. 367. Where after the expiry of the period of the *kabuliat*, the landlord sued the tenant for rent and obtained a decree, that decree must be held to be an adjudication that after the date of the expiry of the *kabuliat*, the defendant continued in possession as a tenant and was liable to payment of rent—*Balaji v. Ramchandra*, 27 Bom. 262. Where the landlord according to his own admission has for 4 or 5 years protested against the tenant holding over, the institution of a rent suit by him for rent does not amount to a consent to the tenant holding over. In such a case the landlord is not entitled to recover rent from the tenant after the expiry of the lease—*Bachu Narain v. Md. Umrao*, A.I.R. 1940 Pat. 555, 21 P.L.T. 336, 190 I.C. 733. But see *Monohar Lal v. Braja Kishore*, A.I.R. 1957 Mad. Pra. 214. If the landlord brings a suit for *damages for use and occupation*, it does not convert the defendant into a tenant, and the lease is not renewed—*Govindaswami v. Ramaswami*, *supra*. The mere claim of rent after the notice to quit for the period after the expiry of the lease does not operate either as waiver of the notice to quit or holding over—*Zaffar Hussain v. Mahabir Prasad*, A.I.R. 1957 Pat. 206.

The burden of proving that the landlord has assented to the continuance of possession lies on the tenant. Although it is a general presumption of law that when the existence of a relationship is once proved such relationship continues till it is shown to have ceased, still when it appears that the relationship of the parties is such that, but for the existence of some special contract, the landlord would have had a right to eject the tenant, the burden of proving that the latter is entitled to resist ejectment lies on the tenant—*Keshav v. Puran*, 1 N.L.R. 32; *Zaffar v. Mahabir*, A.I.R. 1957 Pat. 206.

Where a landlord accepts rent for a quarter from a tenant holding over, it does not imply a promise by the landlord that the tenant would be allowed to stay for the whole year—*Matilal v. Darjeeling Municipality*, 17 C.L.J. 167, 18 I.C. 844. If the lessee deposits rent with the Rent Controller under the order of the court in a suit for ejectment and the lessor withdraws the amount so deposited, he cannot be said to have assented to the lessee continuing in possession within the meaning of sec. 116—*Panchanan Basak v. Ishanitos Ghatak*, 66 C.W.N. 872.

The assent referred to in this section is the assent of the *lessor* and not that of the *lessee*. The option of giving an assent is one that is conferred on the lessor and not on the lessee—*Meghji v. Dayalji*, 48 Bom. 341 (345), A.I.R. 1924 Bom. 322, 80 I.C. 507, 26 Bom. L.R. 231.

Legal representative :—This expression is not defined in the Act, but it clearly implies a person who occupies the same position as the lessor. It does not include an intermediate lessee who has sublet the land to a sub-lessee—*Durgi Nikarini v. Gobordhan*, 19 C.W.N. 525 (529), 24 I.C. 183.

"Agreement to the contrary" :—The expression "agreement to the contrary" means an agreement as to the terms of the holding over—*Troikukhya v. Sarat Chander*, 32 Cal. 123 (127); *Gobinda v. Dwarka*, 19 C.W.N. 489 (492), 26 I.C. 962; *Dasarathi v. Sarat*, A.I.R. 1934 Cal. 135, 37 C.W.N. 971, 149 I.C. 214. This agreement must be *express*, and not implied. And so where a tenant took the premises for a shop for one year, and the rent was fixed for one year, and then at the end of the year the tenant continued in occupation, but there was no *express* agreement as to the terms of the holding over, it could not be *implied* that if the tenant held over he would hold over from year to year. As it was a non-agricultural tenancy, the tenant must be deemed to hold over from month to month—*Gobinda v. Dwarka*, supra. [In *Matilal v. Darjeeling Municipality*, 17 C.L.J. 167, 18 I.C. 844 (846), it was remarked that the "agreement to the contrary" need not be express but may be *implied*]. Where the lease had expired and the lessee continued in possession under an express agreement to do so till a final decision was reached by the lessee as to the granting of a fresh lease, there was no holding over—*Subodh Gopal v. Province of Bihar*, A.I.R. 1950 Pat. 222, 31 P.L.T. 100. The words "in the absence of an agreement to the contrary" do not refer only to the existence of an agreement to the terms of the holding over but also to the existence of an agreement to the contrary regarding the period of notice provided in sec. 106 for a particular kind of notice. Thus where a lease for manufacturing purposes is held over on the terms of the original lease providing for 3 months' notice, the provision for 6 months' notice in sec. 106 does not apply—*Suiti Devi v. Banarsidas*, A.I.R. 1949 All. 703. If a tenant who originally held under a lease for nine years certain, at a yearly rent, held over after the expiry of nine years, and then the landlord *expressly treated* the tenant as holding on from year to year under the terms of the *original contract* of lease, the presumption of this section would not apply and the tenancy would be a tenancy from year to year and terminable by six months' notice—*Chattar v. Nand Kishore*, 12 A.L.J. 1139, 26 I.C. 107 (108). If in the original lease there is a stipulation for renewal of the lease, and the tenant continues in possession after the expiry of the terms of the original lease, he must be deemed to be in possession under the renewal clause of the lease. The tenant continuing in possession under a stipulation for renewal of the lease stands on a different position from a tenant holding over (under sec. 116) merely by consent of the lessor, but if for any reason his agreement has to be disregarded (e.g., for want of registration of the renewal lease) he can fall back upon the landlord's mere consent and claim his rights under sec. 116—*Bengal National Bank v. Janaki*, 54 Cal. 813, 31 C.W.N. 973, 104 I.C. 484, A.I.R. 1927 Cal 725 (727, 730). If a lessee under a temporary lease granted by the Deputy Commissioner continues in possession after the determination of the lease, and arrears of rent are recovered by certificate proceedings, the lease is renewed from year to year—*Ratnakar Nayak v. Rasananda Sahu*, (1962) 4 Orissa J.D. 31. When during the pendency of an eviction proceeding against a statutory tenant the premises are sold and the tenant attorns to the purchaser no fresh tenancy is created by such attornment—*Munavar Basha v. Narayana*, A.I.R. 1961 Mad. 200.

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after expiry of the lease results in the relation being that of landlord and tenant under a year to year tenancy terminable by 6 months' notice—*Gooderham & Works Ltd. v. Canadian Broadcasting Corpn.*, A.I.R. 1949 P.C. 90. But where a tenant, under an unregistered lease of a shop for manufacturing purposes for one year which fixes only monthly rent, held over, the tenancy was held to be from month to month—*Kishan Lal v. Ram Chander*, A.I.R. 1952 All. 634. It is worthy of note that when a tenant holds over, the lease is renewed not in accordance with the terms of the original grant, but in accordance with the purpose for which the grant had been made—*Matilal v. Darjeeling Municipality*, 17 C.L.J. 167, 18 I.C. 844 (846); *Lalit Mohan Dey v. Satadalbasini Dasi*, 68 C.W.N. 1036. A tenancy created by holding over is a tenancy on the same conditions as those on which the original tenancy was created, subject only to the modification under this section that it would be a tenancy from month to month or from year to year according to the purpose for which the land was let—*Khuda Baksh v. Abid Husain*, 12 O.C. 279. This section lays down that in the absence of a contract to the contrary, the duration of the renewed lease shall be regulated according to the purpose of the lease, *irrespective of the term of the original lease*. Thus, if a lessee, under a lease (for non-agricultural purpose) granted for one year or for a term of years was allowed to hold over after the expiry of the term of the lease, the renewed lease would not be a lease from year to year, but one from month to month under sec. 106, and terminable by 15 days' notice—*Matilal v. Darjeeling Municipality*, *supra*; *Troilokya v. Sarat Chandra*, 32 Cal. 123; *Gobinda v. Dwarka*, 19 C.W.N. 489 (492), 26 I.C. 962. *Durgi Nikarini v. Gobordhan*, 19 C.W.N. 525 (529), 24 I.C. 183; *Meghji Vallabhdas v. Dayali & Co.*, 48 Bom. 341 (344), 80 I.C. 507, A.I.R. 1924 Bom. 322; and this is so, even though after the expiry of the original term the rent was being paid per year and not from month to month—*Secy. of State v. Madhu Sudan*, 36 C.W.N. 918 (920). A tenant of homestead land within a town, holding over after the expiry of a ten years' lease, must be deemed a monthly tenant, and not entitled to six months' notice—*Manmatha v. Peary Mohan*, 23 C.W.N. 596, 52 I.C. 180. Where a tenant took a lease for 10 years from the *mutwali* of a mosque with a covenant for renewal, and it was found that the covenant for renewal was *ultra vires*, the tenant holding over must be deemed to be holding on a monthly tenancy—*Gajendra Nath v. Ashraf Hossain*, 27 C.W.N. 159, A.I.R. 1923 Cal. 130, 69 I.C. 707. If the lease is granted for agricultural purposes, the tenant holding over after the expired lease will be deemed to hold from year to year—*Fakira v. Leakut Hussain*, 18 C.W.N. 858, 23 I.C. 318; *Administrator-General v. Asraf Ali*, 28 Cal. 227; *Ram Prasad v. Debi Prasad*, 49 I.C. 974 (Cal.); *Stonewigg v. Kameshwar*, 11 P.L.T. 444, A.I.R. 1923 Pat. 340, 71 I.C. 1022; *Mahomed Ayejuddin v. Prodyot Kumar*, 25 C.W.N. 13, 61 I.C. 503. So also, if the original lease was for manufacturing purposes, the tenant holding over after the expiry of the lease will be deemed to hold over on a tenancy from year to year, and will be entitled to six months' notice—*Jacks & Co. v. Joosab Mahomed*, 48 Bom. 38 (41), A.I.R. 1924 Bom. 115. Where the tenant continues in possession by virtue of Rent Control Legislation after the expiry of the lease by efflux of time or determination by notice to quit no new tenancy by holding over is created by payment and acceptance of rent and no notice

to quit is required to sue for eviction—*Ganga Dutt v. Kartik Chandra*, A.I.R. 1961 S.C. 1067. There is no recognition of tenancy by holding over if the landlord obtains a decree for recovery of municipal taxes against the tenant in respect of the period subsequent to the expiry of the lease—*Ramesh v. Jajneswar*, 65 C.W.N. 488. If heirs of a tenant continuing in possession after the termination of the tenancy by efflux of time transfer their right, a suit for the eviction of the transferee by the sons of the lessor more than fifty years after the termination of the lease must fail as the transferee from the heirs of the original tenant cannot be regarded as a tenant by holding over—*Sadaram v. Sunderlal*, A.I.R. 1968 All. 363. A tenant continuing in possession after the expiry of the lease as a trespasser is liable to pay mesne profits but not double the rent as in England—*Hindustan Steel Pvt. Ltd. v. Sm. Usha Rani Gupta*, A.I.R. 1969 Delhi 59.

The tenancy created by the "holding over" of a lessee or sub-lessee is a new tenancy in law, even though many of the terms of the old lease might be continued in it by implication, and to bring a new tenancy in existence there must be a bilateral act—*Kai Khushroo v. Bai Jibia*, A.I.R. 1949 F.C. 124 53 C.W.N. (F.R.) 73. But see *Nanda Lal Das v. Monmatha Nath Ghose*, A.I.R. 1962 Cal. 597. See also *Annapurna Seal v. Tincowrie Dutt*, 66 C.W.N. 338.

In all other respects, viz., the rate of rent, rate of interest, etc., the tenant continues to hold on the same stipulations as are mentioned in the original lease—*Kishore v. Administrator-General*, 2 C.W.N. 303. *Krishna Chandra v. Nitya Sundari*, A.I.R. 1926 Cal. 1239; *Allah Bibee v. Joogul*, 25 W.R. 234; *Rangaswami v. Jainabu*, A.I.R. 1942 Mad. 507, (1942) 1 M.L.J. 448, 1942 M.W.N. 232; *Sanjeevi v. Chettibabu*, A.I.R. 1953 Mad. 473, (1953) 1 M.L.J. 260. The stipulation in an expired lease providing a security or creating a charge for the outstanding rent is a term of the lease within the meaning of this section and the landlord can enforce the security or charge during the currency of the lease created by holding over—*Devoki Amma v. Krishna Kammathi*, A.I.R. 1955 Trav.-Co. 146 (F.B.); *Aryam Satti Raju v. Sri Ragha Venkata Mahipali*, 69 Mad. L.W. (Andh.) 156. The stipulation in the original lease that at the expiration of the term, the lessee is to give up possession without notice cannot be imported into the new tenancy by holding over—*Saraswati R. v. Pedapara-ju*, (1967) 1 Andh. L.T. 137. The new tenancy will be deemed to have commenced on the same day of the year as the original lease, and notice to quit shall be given accordingly—Woodfall's *Landlord and Tenant*, 17th Edn., p. 246; *Deo v. Samuel*, 5 Esp. 173. But in some cases governed by the Bengal Tenancy Act, it has been held that although the tenant agreed to pay interest at the rate of 75 per cent. per annum under the original lease (which was created before the Act came into operation), still if the lease expired after the passing of that Act, and that tenant continued to hold over, the landlord was not entitled to recover interest at more than 12½ per cent., that being the maximum rate fixed by the Bengal Tenancy Act (sec. 67)—*Administrator General v. Asraf Ali*, 28 Cal. 227; *Ali Mamud v. Bhagbali*, 2 C.W.N. 525. *Alim v. Satis Chunder*, 24 Cal. 47. On the expiry of a written lease for one year from 7.4.45 there was a monthly tenancy by holding over. Held that the tenancy by holding over was

from the 8th of one month to the 7th of the next month—*Baidyanath v. Nirmala Bala*, A.I.R. 1957 Cal. 649.

Where no privity of estate was created between the mortgagor-lessee and his transferee who held over after expiry of the lease, he was liable for mesne profits for use and occupation—*Sivajnanam v. Mathevan*, A.I.R. 1952 Tr.-Coch. 359.

Where after the expiry of the period fixed in a lease the tenant continues in possession as tenant on the same terms expressed in the lease, he cannot claim adverse possession—*Chandrika v. B. B. & C. I. Ry. Co.*, A.I.R. 1935 P.C. 59 (62), 39 C.W.N. 552, 154 I.C. 945. As to distinction between a tenancy by holding over and a tenancy under a renewal clause, see *Lalit Mohan Dey v. Satadalbasini Dasi*, 68 C.W.N. 1036.

117. None of the provisions of this chapter apply to leases for agricultural purposes, except in so far as the “State Government” * * * may, by notification published in the “Official Gazette”, declare all or any of such provisions to be so applicable in the case of all or any of such leases, together with, or subject to, those of the local law, if any, for the time being in force.

Such notification shall not take effect until the expiry of six months from the date of its publication.

Amendment :—The words “with the previous sanction of the Governor-General in Council” which occurred in this section have been omitted by the Devolution Act (XXXVIII of 1920). By the Government of India (Adaptation of Indian Laws) Order, 1937 the words “Provincial Government” were substituted for “Local Government” and the words “Official Gazette” were substituted for “Local Official Gazette”. Then by A.L.O. 1950 “State Government” was substituted for “Provincial Government”.

Notification.—For Notification issued by the Bombay Government under this section see Bombay Gazette, 1910, Pt. I, p. 59. For Notification as to Sind, see *Ibid*.

617. Agricultural leases :—Before the passing of this Act, there was no distinction between agricultural and non-agricultural tenancies. See *Madhab Chand v. Bejoy Chand*, 4 C.W.N. 574. The distinction is for the first time recognised in this Act. Where a tenancy was granted for residential purposes before the passing of the Bengal Tenancy Act in favour of a non-agriculturist, a suit for recovery of possession of land on which stood a homestead was governed by the T. P. Act and it was not maintainable without service of notice—*Banwari v. Gopal*, A.I.R. 1933 Cal. 643 (644), 37 C.W.N. 471, 146 I.C. 540.

In exempting leases for agricultural purposes from the operation of Ch. V of the Transfer of Property Act, it was probably the intention of the Legislature to retain in force the special provisions contained in the various Rent Acts passed prior to the T. P. Act, in respect of the agricultural leases dealt with in those Acts—*Broucke v. Chhatar Kumari*, 4

Pat. 404, 86 I.C. 597, A.I.R. 1925 Pat. 421. An agricultural lease can be created by a Kabuliyat or even orally—*Mt. Tapesara Kuer v. Kalap Rajcar*, A.I.R. 1957 Pat. 92.

Whether a tenancy is governed by this Act or the Bengal Tenancy Act, depends upon the purpose for which the tenancy was created. User of the land for agricultural purposes, where the tenancy is shown to have been created for residential purposes, does not bring the tenancy under the Bengal Tenancy Act—*Radhanath v. Krishna Chandra*, 40 C.W.N. 722—*per* D. N. Mitra & Patterson, JJ. See also *Raj Kumari v. Mirza Samsuddin*, A.I.R. 1942 Cal. 330, 46 C.W.N. 277, 75 C.L.J. 29. That Act does not apply to a lease for non-agricultural purposes, even though it be a lease of agricultural lands or lands with cultivating tenants thereon. Accordingly, the true test is not to determine whether the lands comprised in it are or are not agricultural lands, but whether or not the letting was for agricultural purposes. Where, therefore, the letting is for collection of rents and there is no question of the lessee being required or expected to bring any land under cultivation, either himself or by members of his family or by servants and labourers or by establishing tenants on the land, there is no lease for an agricultural purpose, although the lands may be agricultural or tenanted by cultivating tenants. Such a case would be governed by the T. P. Act—*Alauddin v. Tomizuddin*, (1938) 41 C.W.N. 1001—*per* Henderson & Biswas, JJ. See also *Maheshwari v. Manrao*, A.I.R. 1944 Pat. 87 (F.B.), 23 Pat. 185; *Budhan v. Ram-anugraha* A.I.R. 1947 Pat. 78, 13 B.R. 332; *Abdul v. Shalimar P. C. & Varnish Co.*, A.I.R. 1947 Cal. 36, 81 C.L.J. 138; *Babu Biswanath Prasad v. Shah Mohammad* A.I.R. 1967 Pat. 142. Where a person has taken settlement of the lands and is in possession of the same by settling them with *bhagdars*, the lease is in respect of agricultural lands—*Giribala v. Dwarka*, A.I.R. 1932 Cal. 715, 55 C.L.J. 312. Where a person holding a lease under a permanent *ijardar* is himself a raiyat, it has been held by Henderson J., that the status of persons holding land under him under a lease granted for residential purposes is that of an under-raiyat—*Ujendra v. Bipin*, A.I.R. 1938 Cal. 429. It may be so, but according to the test laid down by the learned Judge sitting with Mr. Justice Biswas the Transfer of Property Act will apply in such a case—see *Alauddin v. Tomizuddin*, *supra*.

The phrase "agricultural purpose" in this section must be given a narrow and strict interpretation—*Abdul v. Salimar P. C. & Varnish Co.*, *supra*, following *Satya Narayan v. Saraju Bala*, A.I.R. 1930 P.C. 13, 33 C.W.N. 865. But it cannot be held that a sub-tenant to whom land has been let out for the purpose of bringing the lands under cultivation would not be governed by the Bengal Tenancy Act—*Abdul v. Salimar P. C. & Varnish Co.*, *supra*. Before a lease can be saved by this section it must be shown that it is a lease for agricultural purposes. The mere fact that the lease relates to agricultural land does not make it a lease for agricultural purposes, unless the primary object of the lease is cultivation or agriculture—*Noor Md. v. Dherasingh*, A.I.R. 1949 Sind 34. A lease may be an agricultural lease, even if it was granted originally for the purpose of constructing building thereon—*Banamali v. Padmanabha*, A.I.R. 1951 Or. 262. A lease for purposes of reclamation is a lease for

agricultural purposes—*Manindra v. Amiya*, A.I.R. 1951 Cal. 361, 55 C.W.N. 171. Where a lease in respect of agricultural lands comes under the operation of this section, a verbal declaration would be sufficient to prove alteration of rent—*Tarak Nath v. Raghu Nandan*, A.I.R. 1950 Pat. 22, 28 Pat. 844. A valid lease of agricultural land can be made by a registered instrument and delivery of possession is not necessary—*Jangal v. Mukund*, A.I.R. 1948 Pat. 446.

Although agricultural leases are excepted from the operation of section 106 to 116, still the provisions of those sections, being reproduced from the rules of English law, are of general application and rest on principle as well as authority, and therefore they may be applied to agricultural leases as rules of justice, equity and good conscience. The legislature has wisely refrained from making these sections applicable *proprio vigore* to agricultural leases for fear of unnecessarily interfering with settled usages which it is undesirable to disturb. But in the absence of special reasons, there is no ground for applying a different rule in the case of agricultural leases—*Krishna Setti v. Gilbert Pinto*, 42 Mad. 654 (660). See also *Kemalooti v. Muhamed*, 41 Mad. 629 (630); *Saldanha v. Subraya*, 30 Mad. 410; *Gangamma v. Bhomakka*, 33 Mad. 253; *Srinivasa v. Rangaswami*, 1 L.W. 858, 25 I.C. 812; *Narayan v. Krishna Rao*, 14 N.L.R. 188, 43 I.C. 970. See also *Bahadur v. Motichand*, A.I.R. 1925 All. 580 (583), 47 All. 589, 23 A.L.J. 409; *Krishna Shetti v. Pinto*, 42 Mad. 654, 36 M.L.J. 367; *Nanjappa v. Rangaswami*, A.I.R. 1940 Mad. 410, (1940) 1 M.L.J. 200, 1640 M.W.N. 266; *Narayan v. Gokuldas*, A.I.R. 1947 Nag. 48, I.L.R. 1946 Nag. 568; *Kesarbai v. Rajabhan*, A.I.R. 1944 Nag. 94, I.L.R. 1944 Nag. 141. Secs. 106 and 107 specifically apply to agricultural leases; hence an agricultural lease from year to year must be registered—*Hareswar Das v. Nareswari Dasya*, A.I.R. 1967 Assam 99.

It has been held by the Madras High Court that in this section, the word 'agriculture' is used in its more general sense as comprehending the raising of vegetables, fruits and garden products as good for man and beast, though some of them may be regarded in England as products of 'horticulture' as distinguished from 'agriculture'—*Murugesu v. Chinnathambi*, 24 Mad. 421. In *Panadai Pathan v. Ramasami*, 45 Mad. 710 (714), A.I.R. 1922 Mad. 351, 70 I.C. 657, it has been held that the term 'agriculture' should not be taken as limited to the raising of food product but should be interpreted in a wider sense so as to include cultivation of fibrous plants such as cotton, jute and linen and all plants used for dyeing purpose such as indigo, etc., and all timber trees and flowering plants.

In *Seshayya v. Rajah of Pittapur*, 31 M.L.J. 214, 34 I.C. 730, and *Rajah of Venkatagiri v. Ayyapareddi*, 38 Mad. 738, the term 'agriculture' was defined as the raising of annual periodical grain crops through the operation of ploughing, sowing, etc. But this narrow definition was disapproved of in 45 Mad. 710. A lease of land for a thrashing floor is a lease for agricultural purposes—*Bhikary Tripathy v. Kashinath Misra*, I.L.R. (1964) Cut. 289.

A lease for *horticultural purposes* is on the same footing as an agri-

cultural lease and is outside the scope of the T. P. Act and is governed by the Bengal Tenancy Act—See *Gopal Chandra v. Bhutnath*, 42 C.L.J. 520, A.I.R. 1938 Cal. 312 (313). Horticulture, which means the cultivation of gardens or orchards, is a species of agriculture in its primary and more general sense—*Murugesu v. Chinnathambi*, 24 Mad. 421 (423). But the mere fact that in a lease for residential purposes, there is given a right to take fruit from the trees on the land and to plant other fruit trees and take their fruits, does not convert the lease into a lease for horticultural purposes—*Gopal Chandra v. Bhutnath*, supra. So, where a lease expressly stated that it was for residential purposes and the land had always been used for that purpose, the fact that it was described as *bagat* or that damages in respect of the arrears of rent and cesses were claimed, or that it was advertised for sale as a non-transferable occupancy holding, cannot, in the absence of estoppel, be said to have altered the original non-agricultural purpose—*Udaytara v. Habibar Rahaman*, 42 C.W.N. 771—*per* Mukherjea, J. A tenancy created for the purpose of gathering and enjoying fruits from trees standing on the land of the tenancy is governed not by the Bengal Tenancy Act, but by the Transfer of Property Act—*Sailendra v. A. CoCo*, 44 C.W.N. 582.

Rearing tea plants is an agricultural purpose. The lease of a tea estate together with factory and machinery is an agricultural lease; so it is covered by this section, and a notice to quit forthwith is perfectly legal—*Pravat v. Bengal Central Bank*, 42 C.W.N. 701, (1938) Cal. 589—*per* R. C. Mitter & Biswas, JJ.

A lease of lands for growing *casuarina* trees to be used as fuel is a lease for agricultural purposes—*Panadai v. Ramasami*, 45 Mad. 710. Contra—*Devaraja v. Ammani*, 3 L.W. 319, 34 I.C. 539.

A lease of a village or a portion of a village for the purpose of bringing it under cultivation is an agricultural lease—*Banamali v. Nihal Singh*, 48 I.C. 354. A lease of lands on which potatoes, grains, vegetables, etc., are growing is a lease of lands used for agricultural purposes—*King Emperor v. Allan*, 25 Mad. 327. So also, is a lease of land for cultivation of roots under the same category—*Ibid.* So a lease of lands used for pasture; so also a lease of land as a yard for ploughing cattle, or as a habitation for agriculturists, or as a pasture for the ploughing cattle, or for the purpose of storing manure or growing plants to be used as manure for agriculture—*Murugesu v. Chinnathambi*, 21 Mad. 421. A lease of land for the cultivation of betel is, according to the usage and custom of the country, an agricultural lease within the meaning of this section—*Ibid.* A lease of a land for grazing purposes is an agricultural lease, inspite of the fact that portions of the land are still jungle and have not been brought under tillage—*Brojabashi v. Ramsankar*, 23 C.L.J. 638, 29 I.C. 834. A reclamation lease granted expressly for the purpose that the jungle and wild trees might be removed and the land brought under cultivation, is a lease for agricultural purposes within the meaning of this section, and it is immaterial whether the grantee did the work himself by his servants and hired labourers, or by under-tenants whom he settled on the land—*Jagdish v. Lal Mohan*, 13 C.L.J. 318, 7 I.C. 864. The cultivation of indigo is an agricultural purpose, but the manufacture of

indigo cakes out of indigo plants cannot be said to be so—*Surendra v. Hari Mohan*, 31 Cal. 174 (176).

In *Kunhayan v. Haji Mayan*, 17 Mad. 98, it was held that the lease of a coffee-garden was not an agricultural lease; but the decision was held to be wrong by Shephard, J., in *Murugesu v. Chinnathambi*, 24 Mad. 421.

Where an entire village was leased out to the lessee who was put in possession and authorised to let out the land to tenants and make collections, but he was not to cultivate the lands himself; further, the lessee was not entitled to plant groves on the land, and was also to be responsible for the payment of Government revenues and cesses, held that it was impossible to say that the primary object of the transaction was agriculture. The mere fact that it was open to the lessee to cultivate any particular land if he so desired would not make the lease an agricultural one, because agriculture was the secondary and not the primary object—*Ballabha v. Murat Narain*, 48 All. 385, 95 I.C. 1048, A.I.R. 1926 All. 432. Where the land is a homestead land within a Municipality, in which there is a house which the tenant has enjoyed for a long time, the mere fact that in the record-of-rights some portions of the lands are shown as *bagan* lands does not necessarily indicate that the lease is one for agricultural or horticultural purposes, especially where the tenants are not shown to be agriculturists or cultivators—*Safar Ali v. Abdul Mojid*, 31 C.W.N. 282 (284), 100 I.C. 614, A.I.R. 1927 Cal. 279. A lease of land for building purposes and for establishing a coal depot is not a lease for agricultural purposes—*Raniganj Coal Association v. Judoonath*, 19 Cal. 489.

A lease of tank which does not appertain to an agricultural holding but is used only for the preservation and rearing of fish is not an agricultural lease—*Mahananda v. Mongala*, 31 Cal. 937; *Hari v. Wanu*, 11 N.L.R. 122, 31 I.C. 294. But a lease of a tank for rearing fish and of the banks of the tank for stacking grass for cattle and for grazing cattle, granted to persons who are agriculturists and use their cattle in cultivation, is a lease for agricultural purposes. The fact that part of the leased property is a tank to be used for the purpose of catching fish does not make any difference; for the water may be used by the cattle for drinking purposes. The lease is on the whole an agricultural lease—*Surendra v. Chandratara*, 34 C.W.N. 1063 (1066). The true test in such cases is the primary object of the lease—namely, whether it is a lease of the tank or a lease of the surrounding lands for the purposes of agriculture with the tank within it. Thus where the principal parcel of the demise was the tank which was let out for non-agricultural purposes of rearing fish, the grazing of cattle on the banks being only a subsidiary purpose, the lease was governed by the T. P. Act—*Bikram Kishore v. Amanaddin*, 40 C.W.N. 156—*per* R. C. Mitter, J.

Where a lease is executed mainly with the object of making arrangement for collecting rents and not with the object of cultivation, the lease cannot be an agricultural lease—*Shiam Sundar v. Chooby Lal*, A.I.R. 1937 Oudh 151, 12 Luck. 514, 164 I.C. 830.

A patni lease is not a lease for agricultural purposes, as a patni lease

is generally granted to a middleman with a view to his subletting which he generally does, and it is not the patnidar but his tenants who use the land for agricultural purposes—*Promotho v. Kali Prosanna*, 28 Cal. 744 (746). An *ijara* for the realisation of rent from the *cultivating tenants* is not a lease for agricultural purposes—*Satyaniranjan v. Sarajubala*, 33 C.W.N. 865 (870); affirmed 33 C.W.N. at p. 872 (P.C.).

A lease of the right to receive the collections of a village is not a lease for agricultural purposes—*Jang Bahadur v. Eshan*, 5 O.C. 122.

In cases governed by this Act no suit for settlement of rent lies, for the Court has no power to make a contract for the parties in such cases. An aggrieved landlord's remedy against a trespasser in possession is by way of ejectment—*Kripa Sankar v. Janki Prasad*, A.I.R. 1942 Pat. 86 (87).

If a raiyati holding is surrendered and thereafter the land of the holding is leased out for non-agricultural purposes the lease will be governed by the T. P. Act—*Orient Paper Mills v. Sitaram Agarwalla*, A.I.R. 1957 Orissa 276. Where a sub-lease is created for non agricultural purpose it will be governed by the Transfer of Property Act even though the head lease is governed by the Bihar Tenancy Act and vice versa—*Suhdir v. Nirsi Dhobin*, A.I.R. 1961 Pat. 321 (F.B.).

CHAPTER VI.

OF EXCHANGES.

118. When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange".

"Exchange defined.

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

618. Exchange and sale :—The difference between a sale and an exchange is this, that in the former the price is paid in money, while in the latter it is paid in another property by way of barter—*Samaratmal v. Govind*, 25 Bom. 696. See also *Kama v. Krishna*, A.I.R. 1954 Or. 105. Sale is always for *price* which means money or the current coin of the realm; but no price is paid in an exchange, but one specific property is transferred for another. But payment of price may be made in *addition* to the transfer of property, by way of equality of exchange, and such payment does not make the exchange lose its character as such—*Turner v. Edgell*, 6 L.J. (N.S.) Ch. 201. In other words, in a transaction of exchange, money may be added to the property or goods to equalise the consideration. Thus, where an owner of a property transfers it partly in exchange for another property and partly for cash, the transaction is an exchange—*Nathu Mal v. Har Dial*, 97 P.R. 1900; *Qazi v. Sharfa*, 199 P.L.R. 1913, 19 I.C. 301 (302); *Bepu v. Maruti*, 3 N.L.R. 138; *Ismail Shah v. Saleh Muhammad*, A.I.R. 1925 Lah. 326, 86 I.C. 266; *Randhir v. Randhir*, A.I.R. 1937 All. 665 (667), (1937) A.L.J. 743, 171 I.C. 577.

Fateh Singh v. Prithi Singh, A.I.R. 1930 All. 426 (427), (1930) A.L.J. 1312, 124 I.C. 557, *P. R. Srinivasan v. The Corporation of the City of Bangalore*, I.L.R. (1957) Mys. 167. No hard and fast rule can, however, be laid down as to when transactions amount to a sale or to an exchange. If the consideration is not paid in cash, but is paid by the transfer of ownership of some property, it would be an exchange and not a sale. The mere fact that the value of the property transferred has been fixed does not convert the transaction into one of sale. It is not the name or form of the transaction, but the nature of the consideration paid for the transfer which determines the nature of the transfer itself—*Ram Badan v. Kumwar Singh*, A.I.R. 1938 All. 229 (230, 231), (1938) A.L.J. 52, 175 I.C. 618. Where one of the parties has failed to execute the document of exchange, the mere fact of exchange of possession is not sufficient to the passing of title in favour of each other, especially when the properties are each worth more than Rs. 100—*Kama v. Krishna*, supra.

Subject to these differences, the Legislature has put an exchange on the same footing as a sale in almost every respect, as shown by the provisions of sec. 118 (para 2) and sec. 120.

Exchange and partition :—A partition of joint property is not an exchange within the meaning of this section—*Satya Kumar v. Satya Kripal*, 10 C.L.J. 503, 3 I.C. 247. An exchange is a transfer of ownership while in a partition there is no *transfer* but a mutual arrangement between the parties. Therefore, where certain co-owners possessing an undivided share in several properties took by arrangement some specific properties instead of their shares in all the properties, the transaction was not an exchange but only a partition. It was a transaction by which the parties held in severalty the lands which had been previously held in common. It was not an exchange but a partition, and not require to be effected by a registered instrument—*Gyannessa v. Mobarakannessa*, 25 Cal. 210 (213). In other words, an exchange is a transaction by which a party acquires a property in which he had *no interest before*; but in a partition the parties who *already* possess definite interests in the property, make a convenient arrangement between themselves for enjoyment of the property. Thus, where plaintiff and defendants were the joint owners of a certain property. A, and plaintiff alone was the owner of another property B, and by an oral agreement plaintiff got the former property A in its entirety, and gave to the defendants his share in the other property B, held that the transaction was an exchange, in as much as the defendants acquired a property in which they had no share before, and was invalid not being in writing registered—*Raj Narain v. Khobdari*, 5 C.W.N. 725.

619. Transfer of ownership :—An exchange is a completed transfer and does not imply the contract to make a transfer. The Law Commissioners remark: "We should define exchange not as an agreement but as the fulfilment of an agreement by mutual transfer a dominion"—Law Commissioners' Report, 1879.

The mutual *transfer* of two things is an essential element in exchange. Thus, where the plaintiff and the defendant having obtained decrees

against each other settled their differences by a compromise by which the former gave up certain *jotes* to the latter, and the decrees obtained by the plaintiff were set off against the decrees obtained by the defendant, and the parties gave up their claims under their respective decrees, it was held that the transaction was not one of exchange, since there was *no transfer* of the decrees but only mutual set off of cross-decrees, and the fact that to equalise the difference between the two decrees the plaintiff gave up some *jotes* to the defendant would not make any difference in the nature of the transaction—*Deno Nath v. Motimala*, 11 C.W.N. 342.

Where a tenant voluntarily surrendered certain lease-hold rights and took from the landlord the lease-hold rights of some other property, the transaction was not an exchange, because there was no mutual transfer of ownership between the two parties—*Waliul Hussan v. Gopal*, 6 C.W.N. 905 (911).

Where a husband transfers a land to his wife for her use during her lifetime and the wife gives up her right to future maintenance, the transaction is not an exchange, because the husband does not transfer the ownership of the land (but simply gives a life-interest in the property) and the wife also does not transfer the ownership of anything. She does not purport to transfer anything nor had she anything which she could transfer within the meaning of this section—*Madam Pillai v. Badrakali*, 45 Mad. 612 (618) (F.B.).

For validating an exchange, the delivery must be physical and not constructive. Hence no exchange of intangible property can be made by delivery of possession—*Debi Prasad v. Jaldhar*, A.I.R. 1946 All. 125, 1945 A.L.J. 537.

A family arrangement is not a transfer of ownership, and does not therefore come within the definition of exchange under this section—*Ram Gopal v. Tulshi*, 51 All. 79 (F.B.), 116 I.C. 861, A.I.R. 1928 All. 641 (643).

620. Instances of exchange :—Money may be exchanged for money. The change of currency notes for money is merely an exchange of money in one form for money in another form—*Empress v. Joggeshur*, 3 Cal. 379. A transfer of a Court-fee stamp on promise of a stamp of equal value being returned is not a sale (but an exchange)—*Kedar Nath v. Emperor*, 30 Cal. 921. Where a person assigned his equity of redemption in consideration of the assignee transferring to him the proprietary rights over certain other lands, *held* that the equity of redemption was not a "price" within the meaning of sec. 54, but was a "thing" under this section and the transaction was an exchange, not a sale. The word "thing" in this section does not include tangible things only, but intangible things as well, such as an equity of redemption—*Lachhman v. Fida Husain*, 18 O.C. 109, 30 I.C. 232 (233). Where a mortgagor who has mortgaged his properties A and B, sells the property A to the mortgagee in discharge of the whole debt, in consideration of the latter freeing the property B from the mortgage-lien, *held* that the transaction is a transfer of property in consideration of a discharge of debt and may be a sale or an exchange—*Ariyaputhira v. Muthukumaraswami*, 37 Mad. 423, 15 I.C. 343. If a house worth Rs. 1,500 is exchanged for land worth Rs. 500 and cash Rs. 500.

the transaction is an exchange and not a sale—*Ismail v. Saleh Muhammad*, 7 Lah.L.J. 18, 86 I.C. 266, A.I.R. 1925 Lah. 326.

But where the consideration for a transfer of property is the forbearance on the part of the transferee to take certain legal proceedings, the transaction is not an exchange, because a right to sue or to take legal proceedings cannot be the subject of ownership—*Venkata Jagannadha v. Venkata Kumara*, 54 Mad. 163, 60 M.L.J. 56, A.I.R. 1931 Mad. 140 (143).

621. Exchange, how made :—“An exchange of immoveable property of Rs. 100 or upwards can only be effected by means of a registered instrument—*Chidambara v. Vaidilinga*, 38 Mad. 519 (521), 30 I.C. 408; *Shams Shah v. Hussain*, 145 P.W.R. 1909, 4 I.C. 1004; *Susheelamma v. Polla Bucha Reddy*, (1969) 1 Andh. L.T. 150.

Non-registration of document cured by part performance :—Under sec. 53A (newly inserted by the T. P. Amendment Act, 1929), if two persons exchange property worth Rs. 100 or upwards between each other, under a written document, but that document is not registered and the parties take possession of each other's property in pursuance of the exchange, neither party will be afterwards entitled to eject the other on the ground that the document has not been registered and has not passed any title. The non-registration of the deed of exchange will be cured by the doctrine of part performance, *i.e.*, by the act and conduct of the parties in delivering possession to each other. The principle of law has been thus stated: Though a transaction has been clothed imperfectly with legal formalities (*e.g.*, has not been registered), still equity will support the transaction if it has been acted upon by the parties, and it will then be effectually binding on the parties in spite of the fact that secs. 118 and 54 were not strictly complied with—*Salamat v. Masa Allah*, 40 All. 187, 43 I.C. 645 (following *Mahomed Musa v. Aghore Kumar*, 42 Cal. 801 (P.C.)). See also *Dada v. Bahiru*, 29 Bom. L.R. 1419, A.I.R. 1927 Bom. 627 (628). In such a case the conditions laid down in sec. 53A must however be fulfilled.

It should be noted that sec. 53A applies to those cases in which there is a *document in writing* (though it is unregistered) and not to cases in which there is no document at all. In 29 Bom. L.R. 1419 and 40 All. 187 there was no written document at all; the exchange took place by parol agreement. Nevertheless the doctrine of part-performance was applied. These cases were decided prior to the enactment of sec. 53A. Henceforth, the doctrine will not be applied unless there is a written document. In *Chidambara v. Vaidilinga*, 38 Mad. 519 (521), the Court refused to apply the doctrine of part-performance, because the exchange was made by *oral* transfer.

In *Ramanathan v. Ranganathan*, 40 Mad. 1134 (1164, 1165), the exchange was made in *writing* which was unregistered, but the Court strictly followed the provisions as to registration, and refused to give effect to the doctrine of part-performance. This ruling is no longer correct in view of sec. 53A.

But it is clear that the estoppel arising out of the equitable doctrine of part-performance will not create title in the plaintiff, and if he seeks to recover possession on the strength of his *title*, he cannot succeed when there has been no transfer by a registered deed such as is necessary under this

section read with sec. 54—*Kalipada v. Fort Gloster Jute Co. Ltd.*, 31 C.W.N. 348, A.I.R. 1927 Cal. 365 (370), 100 I.C. 866. See Notes under sec. 53A *ante*.

Even if the deed of exchange which is unregistered does not confer a legal title to the lands covered by the exchange, a party to the exchange acquires full title to the property by continuous possession for over 12 years openly and adversely to the other party to the exchanges—*Kashi Nath v. Makchhed*, A.I.R. 1939 All. 504, 1939 A.L.J. 384, 184 I.C. 233.

119. In the absence of a contract to the contrary, the party deprived of the thing or part thereof he has received in exchange, by reason of any defect in the title of the other party, is entitled at his option, to compensation, or to the return of the thing transferred by him.

Right of party deprived of thing received in exchange.

119. If any party to an exchange or any person claiming through or under such party is by reason of any defect in the title of the other party deprived of the thing or any part of the thing received by him in exchange, then, unless a contrary intention appears from the terms of the exchange, such other party is liable to him or any person claiming through or under him for loss caused thereby, or at the option of the person so deprived, for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration.

Right of party deprived of thing received in exchange.

Amendment :—This section has been redrafted by section 59 of the T. P. Amendment Act (XX of 1929) but no substantial change has been made.

Not retrospective :—This section as amended by the Act of 1929 does not apply to transfers effected before 1st April 1930. Where the exchange is made before that date and dispossession takes place subsequent to the said date, the governing date will not be the date of dispossession but the date of the exchange—*Chidambara v. Swaminatha*, A.I.R. 1940 Mad. 426, (1940) M.L.J. 248, 1940 M.W.N. 290.

Before amendment :—This section, before the amendment, related only to the rights of the parties *inter se* and it was not intended to relate to a third person not bound by the exchange to which he was not a party. The original section assumed a case in which the parties to the exchange had retained the properties exchanged and were in a position to restore them ; therefore, the principle of that section did not apply to an innocent transferee for value from one of the parties to the exchange—*Ganga Singh v. Ragho Ram*, A.I.R. 1934 Lah. 934. But it appears that a transferee for

value is protected under the amended section also. See however *Chidambara v. Swaminatha*, *infra*.

Scope :—Under the amended section the right to the return of the thing transferred in exchange is limited to the three classes of persons mentioned therein and so long as they were in possession of the same. Where A is deprived of a portion of the property got by him in exchange from B, but the property transferred has passed into the possession of a trespasser, A is not entitled to the return of the property under this section. His only remedy is to claim compensation from B—*Sitaramiah v. Kanakaiah*, A.I.R. 1952 Mad. 602. The statutory right of buyer and seller created by sec. 55 (2) was outside the scope of sec. 119. Sec. 120 could not be to confer on an assignee of the “party” within the meaning of sec. 119, rights which this section conferred upon that party—*Narayanaswamy v. Muthraithnam*, A.I.R. 1949 Mad. 715, (1949) 1 M.L.J. 620.

622. This section affirms in distinct terms that each party warrants his title to the things which he transfers. This rule is based on equity and good conscience and may apply to exchanges effected prior to this Act—*Balusa Veeraraghavalu v. Boppanna*, 31 M.L.J. 380, 35 I.C. 92..

Contrary intention :—The provisions of this section do not apply if there is a contrary intention in the terms of the exchange. Thus, a deed of exchange recited as follows:—“If any claim or dispute arises, I hereby bind himself to settle it. If I do not so get the dispute settled, I bind myself to pay an amount not exceeding Rs. 401-8-6, at the rate of Re. 1-4-0 per kuli of land for lands going out of your possession,” and the plaintiff being ousted from the land he received by reason of defendant’s want of title, he sued to recover the land which he had given in exchange, *held* that the operation of this section was excluded by the express covenant in the document mentioned above, and that the defendant having expressly covenanted to compensate for the plaintiff’s ouster, all that the plaintiff was entitled to was compensation up to the amount specified in the document. The suit for recovery of possession must fail—*Subramania v. Saminatha*, 21 Mad. 69.

But a covenant saying that “neither party has after to-day any claim against the other contrary to the exchange, and whatever proprietary rights each had in his own land will be owned by the other party” is not a contract to the contrary. It is rather a recital of the legal incidents of an exchange, and does not exclude the operation of this section—*Salabat v. Abdul Rahaman*, 51 P.R. 1917, 41 I.C. 248.

623. Effect of defect in title :—The remedy provided by this section is available to a party, whether he loses the whole or a portion of the property obtained in exchange, through defect of title of the other party. And if the party loses a *portion* of the property, he must repudiate the *whole* transaction and claim to be placed in the position he was in before the exchange, *i.e.*, he must claim to recover the whole thing; he cannot seek to recover an equivalent portion of the lands he gave—*Veera Pillai v. Poonnambala*, 9 M.L.J. 137; *Salabat v. Abdul Rahaman*, 51 P.R. 1917, 41 I.C. 248.

Under this section it is not open to a transferee from one of the parties

to the exchange deed to set up the plea of a *bona fide* purchase for value, as the transferee can get no better title than that which his transferor had. Although the section does not explicitly say that a party to the exchange is entitled to the return even when the property has passed into the hands of an innocent purchaser, there is nothing in the section which rules out such a contingency—*Chidambara v. Swaminatha*, A.I.R. 1940 Mad. 426, (1940) 1 M.L.J. 248, 1940 M.W.N. 290.

But this section does not exclude the operation of sec. 43 ; so that if the party having a defective title afterwards acquires full title, the other party will be entitled to its benefit. Thus, A obtained a certain property from B in exchange. B at the time of exchange had only a half share in the property but he subsequently acquired the other half. *Held* that as soon as the title to the whole was perfected, the benefit thereof accrued to A. Though the assignment was of a defective title yet as the assignor afterwards acquired good title, the Court would make that good title available to make the assignment effectual—*Bhairab v. Jiban*, 33 C.L.J. 184, 60 I.C. 810.

120. Save as otherwise provided in this Chapter, each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes.

Rights and liabilities of parties.

625. Rights and liabilities :—The rights and liabilities of the buyer and seller, so far as immovable property is concerned, are set forth in sec. 55. If the property is moveable, the case will be governed by the Sale of Goods Act, III of 1930.

The plaintiff, a cotton-dealer of Tuticorin, delivered certain quantity of cotton to the defendants, the owners of a cotton press, and according to the custom prevailing in Tuticorin the defendants were bound to give the plaintiff in exchange cleaned cotton of the like quality and quantity. The cotton was accidentally destroyed by fire. *Held* that since by delivery the ownership of the cotton had vested in the defendants, the loss would fall on them, and not upon the plaintiff—*Volkart v. Vettivela*, 11 Mad. 459.

This section implies the exchange of one property for another *property* and not for *money*. Having regard to the definition given in sec. 118, no question of money is involved in a transaction of exchange. Even if there be a stipulation to pay money in addition in order to make up the deficiency of the property, and that money remains unpaid, the other party cannot have any charge on the exchanged property for the money remaining unpaid, on the principle of sec. 55 (4) (b). He will only get a simple money-decree—*Krishna Nair v. Kundu Nair*, 1912 M.W.N. 535, 16 I.C. 109. So also, if the exchange-transaction turns out to be invalid, no charge can arise as under sec. 55 (6) (b) for the value of land exchanged—*Chidambara v. Vaidilinga*, 38 Mad. 519 (522), 30 I.C. 408. The effect of a decree directing the "return of the thing transferred" is not to declare that the exchange was void from the outset. The effect of such a decree is to divest the title of one of the parties to the exchange and to vest it in the original

owner. It follows that till the date of the directing the return of the property, the title thereto remains with the person to whom the same was given in exchange. It is therefore manifest that the exchange holds good till the date of the decree—*Alimulla v. Md. Khalil*, A.I.R. 1940 All. 478, 1940 A.L.J. 569, 191 I.C. 385.

A right of pre-emption can be exercised only in a case of *sale* and not where the transaction amounts to an *exchange*—*Lachhman v. Fida Hussain*, 18 O.C. 109, 30 I.C. 232 (234). Where A has transferred land to B in exchange of B's land by which transfer B has become co-sharer, the fact that after a suit of pre-emption by a third party A had obtained a decree for return of the land under sec. 119 would not give the pre-emptor any right of pre-emption—*Alimulla v. Md. Khalil*, supra relying on *Tara Chand v. Radha Sami*, 56 All. 668 (F.B.). Where a *wajib-ul-arz* of a village contained a provision for pre-emption in case of a *sale* of any land in the village, *held* that the provisions of the *wajib-ul-arz* would not apply to an *exchange*, and therefore if S gave a land to A in exchange for a land given by A to S, the co-shares of A were not entitled to use to pre-empt the land given by A to S. Section 120, T. P. Act lays down that each party to an exchange has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes. But these rights and liabilities are enforceable between the parties to the exchange *inter se*. Third person cannot be substituted in the place of either of them, because they cannot give what does not belong to them—*Samar Bahadur v. Jit Lal*, 46 All. 359 (360), 76 I.C. 495, A.I.R. 1924 All. 390 (dissenting from *Bhagwan Singh v. Kharag Sing*, 4 A.L.J. 756). But where the language of the *wajib-ul-arz* was more general, and gave a right of pre-emption in case of transfer of *any* kind, the right of pre-emption was allowed in the case of an exchange—*Niamat Ali v. Asmat Bibi*, 7 All. 626 (F.B.). See also *Daryao v. Jahan Singh*, 31 All. 539.

121. On an exchange of money, each party thereby warrants the genuineness of the money given by him.

Exchange of money.

626. This section is based on the principle that payment of spurious money is no payment at all; and it applies only to spurious money and not to money depreciated by use and wear.

The aggrieved party is entitled to recover the money paid by him as upon a failure of consideration. Thus, if a man pays money for bank-notes which afterwards turn out to be forged, he is entitled to recover back the money—*Leeds and Country Bank v. Walker*, 11 Q.B.D. 84; *Jones v. Ryde*, 5 Taunt. 487; *Eicholtz v. Bainster*, 17 C.B. (N.S.) 708.

CHAPTER VII.

OF GIFTS.

122. "Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person,

"Gift defined"

called the donor, to another, called the donee, and accepted by or on behalf of the donee.

Acceptance when to be made. Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void.

627. Gift :—Construction :—The question whether a document is a gift or a will depends not merely upon its form, but the intention gathered from the words used. The usual tests are, the name of the document, its registration, reservation of the power to revoke and the use of the present or future tense. One or two of these tests are not alone sufficient—*Khushalchand v. Trimbak*, A.I.R. 1947 Bom. 49, I.L.R. 1946 Bom. 984; *Esakkimadan v. Esakki Amma*, A.I.R. 1953 Tr.-Coch. 336. In construing a document the subsequent conduct of the parties should not be taken into consideration when there is no ambiguity in the words used—*Khushalchand v. Trimbak*, supra.

Essentials of gift :—No condition afterwards—To a gift divesting the donor of all his interest in certain property, a condition cannot afterwards be attached. The general rule of law is that a gift to which an immoral condition is attached remains a good gift while the condition is void—*Ram Sarup v. Bela*, 6 All. 313 (P.C.). See *Istak v. Ranchod*, A.I.R. 1947 Bom. 198, 48 Bom. L.R. 775. An unqualified gift will not be cut down by subsequent words unless they clearly have that effect—*Tripurari v. Jagat Tarini*, 40 I.A. 87. Where a gift of immovable property is made under the Mahomedan law, the donee gets title to it, the condition against alienation being repugnant to the gift is void—*State v. Memon Haji*, A.I.R. 1953 Sau. 180.

Transfer :—A gift is a *transfer* of ownership; and therefore where the owner of certain Government promissory notes endorsed them to his son but reserved to himself the right of enjoying the interest during his lifetime, and in his will treated them as his own, charging the income thereof with certain bequests to be paid after his death, *held* that it was really a *benami* transaction and that no gift was intended—*Nawab Ibrahim Ali Khan v. Ummat-ul-Zohra*, 19 All. 267 (P.C.). But where the plaintiff purchased a property for and in the name of the defendant who had rendered some service to him, and the defendant was thenceforth in possession of the property and received the rents and profits, *held* that the right inference from the facts was that the property was not held by the defendant *benami* for the plaintiff, but belonged to the defendant, it being intended as a gift to him for his services—*Ram Narain v. Muhammad*, 26 Cal. 227 (230, 231) (P.C.). See also *Ismail v. Hafiz*, 33 Cal. 773 (784, 785) (P.C.). Where a taluqdar executed a deed of gift, in favour of his minor son, of the whole of his estate reciting in it that the estate was heavily indebted and that he desired to put it under the superintendence of the Court of Wards to liquidate those debts, such recital was not inconsistent with the genuineness of the gift and could not make the deed of gift a fictitious one—*Ram Bharose v. Rameshwar*, A.I.R. 1938 Oudh 26 (29), 171 I.C. 481.

The question whether what is transferred has in truth been gifted or not depends upon the actual intention of the parties and the facts of the particular case—*Istak v. Ranchod*, supra. Where there has been a clear intention to make an out-and-out gift, but the intention has failed for want of transfer or any other cause, the Courts will not convert what was meant to be an out-and-out gift into a trust, and the donor will not be deemed a trustee of the property for the intended donee. The gift will fail—*Manchershaw v. Ardeshir*, 10 Bom. L.R. 1209; *Natha Gulab & Co. v. Scheller*, 25 Bom. L.R. 599, A.I.R. 1924 Bom. 88.

Where one pays a sum of money to his brother, it does not amount to a gift, if the money is paid in consideration of the latter giving up his claim, however imaginary, to the property of the former—*Abdul v. Vishwanathan*, A.I.R. 1950 Mys. 33 (F.B.). Where the husband deposited certain ornaments with a bank for safe custody in the joint names of himself and his wife, with direction to be delivered to be either or survivor, it did not amount to a gift, as the husband retained dominion over the property—*Chandramani v. Rama Shankar*, A.I.R. 1951 All. 529, 1950 A.L.J. 932. Where a purchase has been made in the name of a concubine with the funds of her paramour, it is for the concubine to prove that it was made for her, as the doctrine of advancement does not apply in India—*Shiva Kumari v. Udeya Partap*, A.I.R. 1947 All. 314, 1947 A.L.J. 144. See also *Chandramani v. Rama Shankar*, supra. Where a person keeps money in fixed deposit in the name of his niece, brought up and given in marriage by him, there is an inference of gift in favour of the niece—*Raghuraj Kishore v. Uttam Devi*, I.L.R. (1966) 1 All. 111.

Consideration should not be confused with motive. Where the motive behind the deed of gift was unequivocal to give the transferee a title which would act as a safeguard against any claim for pre-emption the transaction for that reason cannot be called a sale—*Hari Singh v. Kallu*, A.I.R. 1952 All. 149. Where the owner stated: "Now I have gifted the above mentioned land with all rights appurtenant thereto (*mae jumla haq haqooq*): held that the wording was sufficient to divest the donor of all rights which he possessed including the right to *shamiliat*—*Bhim Singh v. Chandgi*, A.I.R. 1953 Punj. 135. Where the dispositive words are clear that an absolute estate is given, the fact that the purpose of the gift is stated to be for maintenance of the donee, it does not follow that a life estate is given—*Yadeorao v. Vithal Shamji*, A.I.R. 1952 Nag. 55. As to the meaning of "choli bangdi" or "haldi Kumkuni", see the last cited case.

A mere contract to convey immoveable property by way of gift does not create an interest in the property in favour of the intended donee—*Dhyabhai v. Maharaj Bahadur Singh*, 1 P.L.J. 238 (245), 34 I.C. 482. But where a person settles an annuity upon his alleged wife, the settlement cannot be construed to be a contract for consideration of love and affection, but is a gift pure and simple—*Gopal Saran v. Sita Devi*, A.I.R. 1932 P.C. 34 (35), 36 C.W.N. 392, 55 C.L.J. 66, 135 I.C. 753.

The creation or imposition of an easement is not a transfer of property, and does not amount to a gift—*Sital Chandra v. Delanney*, 20 C.W.N. 1158 (1163, 1164), 34 I.C. 450.

The transmission of the Kyaungdike effected by the 'nomination' or 'appointment' by the Kyaungtagas though may be a 'transfer' does not amount to a gift—*U. Thita v. Areseinna*, A.I.R. 1939 Rang. 76, (1938) R.L.R. 678, 179 I.C. 903.

Property:—This chapter deals only with gifts of *tangible* property; and so a release of a security without consideration does not fall under this chapter: because, though the release of the security may be said to be a gift, still the gift is not one of tangible property—*Mohim Chnadra v. Ram Dayal*, 42 C.L.J. 582, A.I.R. 1926 Cal. 170.

This Chapter applies to both *moveable and immoveable property*.

'Existing property':—The subject of gift must be actually in existence at the time of the gift. A donation cannot be made of anything to be produced *in future* (e.g., future revenues of a property)—*Amtulnissa v. Mir Nurudin*, 22 Bom. 489. See sec. 124.

'Voluntarily':—In this section the word "voluntarily" bears its ordinary popular meaning denoting the exercise of the unfettered free will, and not its technical meaning of without consideration—*U. Thita v. Areseinna*, supra relying on *A. G. v. Ellis*, (1895) 2 Q.B. 466; *In re Wilkinson*, (1926) Ch. 842; *Art Union v. Overseers of the Savoy*, (1894) 2 Q.B. 609; and *Churchwardens of Birmingham v. Shaw*, (1849) 10 Q.B. 868. When a gift is made, it must satisfactorily appear that the donor knew what he was doing and understood the contents of the instrument and its effect, and also that undue influence or pressure was not exercised upon him by the party in whose favour the gift is made—*Phul Chand v. Lakkhu*, 25 All. 358; *Sarba Mohan v. Manmohan*, 37 C.W.N. 149 (150). But where a gift which has been found to be not unconscionable is impeached as being procured by the use of undue influence, it is for the person attacking the gift to prove that the donee did use his position to obtain an unfair advantage over the donor—*Forman Ali v. Uzir Ali*, A.I.R. 1938 Cal. 157 (159), 42 C.W.N. 14, 66 C.L.J. 125, 175 I.C. 712, following *Poosathurai v. Kannappa*, 43 Mad. 546, 47 I.A. 1, 55 I.C. 447. In case of a gift tainted by undue influence and imposition, even an innocent third party cannot retain the benefit, if he is a mere volunteer. But if he is a *bona fide* purchaser for value without notice, there is no obligation for restitution on his part; and the mere fact that such a purchaser is a co-villager of the donor will not raise a presumption of his having notice of the undue influence—*Forman Ali v. Uzir Ali*, supra, at p. 160. If the parties stand in a confidential relation to each other, a gift cannot be supported unless it can be shown to the satisfaction of the Court that the parties were substantially 'at arm's length', i.e., that the donor had competent and independent advice, and was in a position to exercise a free unfettered judgment with full knowledge of what he was doing. In such a case, the law throws the burden of proving good faith on the donee—*Phul Chand v. Lakkhu*, 25 All. 358. Where a person donates an amount to the Government for a specific purpose, which fails, the donor is entitled to the refund of the amount—*State of U. P. v. Shamsundar Ramcharan*, A.I.R. 1961 All. 418.

If gifts are made by a pardanashin lady, the strongest and most satisfactory evidence ought to be given by the party who claims under

the deed that the transaction was a real and *bona fide* one, and was understood by the lady, that she had opportunity to take independent advice and that she was a free agent and executed the deed of her own free will—*Mahomed Bakhsh v. Hosseini Bibi*, 15 Cal. 584 (P.C.); *Wazid Khan v. Ewaz Ali Khan*, 18 Cal. 545 (P.C.); *Khatija v. Ismail*, 12 Mad. 380; *Mariam Bibi v. Sakina*, 14 All. 8; *Hakim Muhammad v. Najiban*, 20 All. 447 (P.C.). See also Note 69 under sec. 7.

If the donor be an old and infirm woman, the burden will lie very heavily upon the donee to show that the deed of gift was voluntarily executed by her with the full knowledge of its contents, and that she did so without any pressure or solicitations which might amount to an exercise of undue influence on her—*Rajaram v. Khandu*, 14 Bom. L.R. 340, 15 I.C. 529. The law as to undue influence is the same in the case of a gift as in the case of a contract; *Subhas Chandra v. Gangu Prosad*, A.I.R. 1967 S.C. 878. But where it was found that the donor was fully able to manage her own business and transacted all her business herself, and even went to the Court and to the Registration Office in connection with litigation and registration of deeds, the mere fact that she was a very old woman with the natural infirmity incident to her age ought not to raise any presumption of undue influence in respect of a deed of gift executed by her—*Ismail Mussajee v. Hafiz*, 33 Cal. 773 (783) (P.C.).

Without consideration :—“The first condition of a gift, as distinguished from other alienations, is that it should be an act of mere liberality on the giver’s part, in this sense that whatever may be his motive, the act is not done in obedience to any legal obligation, nor with the purpose of placing the donee under any legal obligation. It is an act therefore which imports a clear gain to the donee, an accession to his property which he could not have demanded and for which he cannot be compelled to make a return.”—Shephard and Brown, 7th Edn., p. 444.

A gift is a transfer without consideration, and if there is any consideration in any shape, there is no gift. A promise to discharge the debts of the transferor is a good and valid consideration, and if a property is transferred in consideration of the transferee undertaking to discharge the debts of the transferor, the transaction cannot be treated as a gift—*Anrudh v. Lachhmi*, 50 All. 818, 26 A.L.J. 753, 117 I.C. 351, A.I.R. 1928 All. 500 (503); *Kulasekaraperumal v. Pathakully Thalevanar*, A.I.R. 1961 Mad. 405. But consideration of love and affection or spiritual or moral benefit is not contemplated by this section. The word ‘consideration’ means valuable consideration, *i.e.*, consideration either of money or money’s worth. A gift in lieu of conferring spiritual benefit to the donor is not a transfer with consideration, but is to be treated as a gift—*Debi Saran v. Nandalal*, A.I.R. 1929 Pat. 591 (593). A transfer of some lands to the transferee for services rendered by him during the illness of the transferor is a gift: see *Hiralal Gaurishankar*, 30 Bom. L.R. 451, 109 I.C. 149, A.I.R. 1928 Bom. 250 (251).

Where a gift of a life-estate is made to a person, the donee has disposing power over the rents and profits which accrued due but were not realized during his lifetime—*Mohini Mohan v. Rash Behari*, 41 C.W.N. 495.

628. **Who can be a donee** :—The word “donee” in this section means

an ascertained or ascertainable person or persons by whom or on whose behalf a gift can be accepted or refused. This section has no application to a gift to an unascertained number of persons, e.g., the public—*Palayya v. Ramavadhanulu*, 13 M.L.J. 364. A gift may be made to an idol, because according to Hindu Law an idol is regarded as a juridical person capable of holding property, though it is only in an ideal sense that the property is so held—*Jagadindra v. Hemanta Kumari*, 32 Cal. 129 (P.C.); *Bhupati Nath Smrititirthu v. Ramlal*, 37 Cal. 128 (F.B.). A math like an idol is a juridical person capable of holding property—*Babajirao v. Lakshmandas*, I.L.R. 28 Bom. 215. But see *Ram Kumar Ram Chandra & Co. v. Com. I. T., U. P.*, A.I.R. 1966 All. 100, where it has been laid down that a dedication to a deity is not governed by the T. P. Act.

A gift to a *dharma* is not valid, as the word 'dharma' is too vague and indefinite for the Court to enforce the gift—*Devshunkur v. Motiram*, 18 Bom. 136; *Morarji v. Nenbai*, 17 Bom. 351; *Runchorda v. Parbati*, 23 Bom. 725 (P.C.). A pious Hindu ordinarily dedicates property to a deity by renouncing his right in a particular property in favour of the idol. That can be done orally, but if there is any document in writing it is registrable—Vide *The Hindu Law of Religious & Charitable Trust*, by Bijan Kumar Mukherjea, p. 122 (3rd Edn.). An endowment can validly be created in favour of an idol or temple without the performance of any particular ceremonies provided the settlor has clearly expressed his intention in that behalf—*Shanti Sarup v. Radhaswami Satsang Sabha*, A.I.R. 1969 All. 248. When a Satsangi makes a gift of money to Radha Swami Dayal, a non-juristic person, the gift is in substance for the benefit of the Agra Satsangis, a registered society, and hence valid, because it is in the nature of a gift to an idol or temple to which T. P. Act does not apply—*Ibid.*

629. Acceptance :—The gift must be *accepted* by the donee or by some one on his behalf. An offer without acceptance by the donee cannot complete the gift, though the donor may in fact believe that it was accepted—*Pudmanand v. Hayes*, 28 Cal. 720 (P.C.). Acceptance may be inferred from acts prior to the execution of the deed of gift—*Jalakanti Krishnamurthi v. Appalarajugari*, A.I.R. 1958 Andh. Pra. 213.

What the law requires is acceptance of the gift after its execution, though the deed may not be registered. Anterior negotiations or talks about the gift would not amount to acceptance. The acceptance may be implied, but the facts relied on must be acts of positive conduct of the donee or persons acting on his behalf and not merely passive acquiescence such as standing by when the deed was executed or registered—*Venkatasubamma v. Narayanaswami*, A.I.R. 1954 Mad. 215. Acceptance must be made before the death of the donor—*Kesava Kurup v. Thomas Idichla*, A.I.R. 1969 Ker. 21.

There must be something shewn to indicate an acceptance on the part of the donee; and as to whether there has been an acceptance and what constitutes acceptance depends upon the circumstances of each case. The acceptance may be signified by an overt act such as the actual taking possession of the property, or such acts by the donee as would in law amount to taking possession of the property where the property is not

capable of physical possession. In the case of the donee being incapable of signifying his acceptance by reason of age or of his being an impersonal being, recognised by law as capable of being a donee, such as a Deity, the acceptance required by this section may be made on his behalf by somebody else competent to act as an agent—*Deosaran v. Deoki*, 3 Pat. 842 (848), 80 I.C. 980, A.I.R. 1924 Pat. 657. See also *Gangadhar v. Kulathu*, A.I.R. 1952 Tr.-Coch. 47. Acceptance does not mean *express* acceptance; it may be implied: but the rule of implied acceptance ought not to be extended so far as to hold (as under the English law) that the acceptance will be presumed unless dissent is shown. Such a construction is not permissible in view of the last line of the section which says that if the donee dies before acceptance the gift is void. This provision makes it impossible to hold that there is a presumption of acceptance immediately upon the gift, whether the gift is known or unknown to the donee—*Anandi v. Mohan Lal*, 54 All. 534, 137 I.C. 156, A.I.R. 1932 All. 444 (445). Acceptance will be presumed if there is possession, actual or constructive by the donee. In case of Zemindary property, mutation of names means delivery of possession, and this is undoubtedly proof of acceptance—*Ibid.* In case of gift by husband to wife, the husband's act of taking steps to get mutation in the name of his wife amounts to delivery of possession to the wife, which means acceptance by the wife. The fact that the husband performed certain acts in respect of the property after the mutation did not show that the husband retained ownership in himself, because those acts must be presumed to be acts done by the husband *on behalf* of his wife—*Ibid.* Where the donee received the deed of gift from the donor after its due execution and presented it for registration, these were sufficient indications of his acceptance of the gift—*Esukkimadan v. Esakki Amma*, A.I.R. 1953 Tr.Coch. 336.

Where the instrument of gift, duly executed and attested is handed over to the donee, and the donee accepts the same, it may constitute a sufficient acceptance of the gift within the meaning of this section—*Kalyanasundaram v. Karuppa*, 50 Mad. 193 (P.C.), 31 C.W.N. 509, 100 I.C. 105, A.I.R. 1927 P.C. 42, followed in *Venkat Subba v. Subba Rama*, 52 Bom. 313 (P.C.), 30 Bom. L.R. 827, 108 I.C. 367, A.I.R. 1928 P.C. 86; *Adhikari Narayanamma v. Adhikari Thabitinaidu*, A.I.R. 1964 Orissa 212. Failure to stamp a document does not affect the validity of the transaction: it merely renders the document inadmissible in evidence. Therefore where the deed is delivered over to the donee immediately after execution, it would be sufficient acceptance of the transfer by the donee under this section and the deed becomes effectual from the very moment of its execution subject to its being stamped and registered as required by law—*Purna Chandra v. Kalipada*, A.I.R. 1942 Cal. 386, 46 C.W.N. 477.

Under this section, the acceptance may be made while the donor is still capable of giving, and during his lifetime. It is therefore unnecessary that the acceptance should take place immediately.

The acceptance may be made either by the donee himself or by any one on his behalf. A guardian may accept a gift on behalf of his ward. The father is competent to accept a gift made to his minor son. Where the donee is incapable of signifying his acceptance to a gift by reason of age or of his being an impersonal being such as a deity, the acceptance

can be made on his behalf by somebody else competent to act as an agent, and acceptance will be presumed after his possession, actual or constructive, by the donee—*Ram Bharose v. Rameshwar*, A.I.R. 1938 Oudh. 26 (31), 171 I.C. 481. Thus, where the donor is the father and his minor son the donee, and the father applies for mutation of names in favour of the donee and continues to act in dealing with the gifted property on behalf on the minor as his guardian, there is a sufficient acceptance of the gift on behalf of the minor—*Ibid.* Where a minor's uncle, by a registered deed, made gift of certain property to the minor, which was already in the possession of the minor's father, held that the gift to the minor was valid, as the possession of the father was the only mode in which the minor son could accept or exercise possession—*Joitaram v. Ramkrishna*, 27 Bom. 31 (40). In a Nagpur case it has been held that an acceptance of a gift may be made personally by a minor donee without the intervention of a guardian—*Ganeshdas v. Suryabhan*, 13 N.L.R. 18, 39 I.C. 46. A gift made to an idol may be accepted by the priest or the manager of the temple—*Jagadindra v. Hemanta*, 32 Cal. 129 (P.C.); *Deosaran v. Deoki*, 3 Pat. 842 (848), 80 I.C. 980, A.I.R. 1924 Pat. 657. Where a gift of a house was made to two minors, which was accepted by the donees' guardians, and since then the donees have been living in the house for 11 years, the mere fact that the donor retained the custody of the deed and kept the house in his name in the Municipal records and paid the taxes, does not show that the donor did not intend the gift to be acted upon—*Venkataramayya v. Nagamma*, 35 L.W. 233, 136 I.C. 343, A.I.R. 1932 Mad. 272 (275). Where a gift in favour of the wife and daughters is accepted by the wife, but the donees get their names mutated in pursuance of the deed and retain custody of the deed there is acceptance by all the donees—*Tara Sahuani v. Raghunath Sahu*, A.I.R. 1963 Orissa 50.

The mere custody by the donor of the deed of gift does not lead to any adverse conclusion against the donee, especially where the entire conduct of the donee shows that he accepted the gift and the document was kept in the family-box to which the donee also had access—*Ankamma v. Narasayya*, A.I.R. 1947 Mad. 127, (1946) 2 M.L.J. 357. The acceptance of a gift can be inferred not from the donee's present possession of the deed of gift, but from the fact of the deed having been handed over to him by the donor and his having accepted the same. Where the donee was living as an inmate of the donor's family being in league with the donor's daughter, it is quite possible for him to take hold of the deed of gift without the donor's knowledge and intention—*Ram Chander v. Sital Prasad*, A.I.R. 1948 Pat. 130.

Registration of deed after donor's death :—This section only requires that the gift should be *accepted* during the life-time of the donor; it does not require that the gift should also be *registered* during his life-time. Therefore, a gift of immoveable property is not invalid merely because registration of the deed of gift may have taken place after the death of the donor—*Hardei v. Ramlal*, 11 All. 319 (F.B.); *Nand Kishore v. Suraj Prasad*, 20 All. 392; *Khashaba v. Chandrabhagabai*, 32 Bom. 441. See Note 634 under sec. 123.

123. For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

Transfer how effected.

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

For limitation of the territorial operation of this section see sec. 1, *ante*. Sec. 123 extends to every cantonment in British India—Section 287 of the Cantonment Act II of 1924.

By Notification No. 183-st. dated 27-4-1935 under section 1 of this Act, the present section was extended to all Municipal Committees of the Punjab. So thereafter for the purpose of a valid gift, a written instrument signed by or on behalf of the donor attested by two witnesses and registered is necessary—*Prakash Vati v. Maya Devi*, A.I.R. 1953 Punj. 304.

630. Scope of section :—The Allahabad High Court has laid down that this section applies to *religious gifts*, and in the absence of a registered deed of gift, the dedication of property to an idol is invalid—*Mannu Lal v. Radha Kishenji*, 36 I.C. 989 (All.). See also *Shaukat Begam v. Thakurji*, A.I.R. 1931 Oudh 14, 131 I.C. 442, where it has been held that the provisions of this section apply to gifts direct as well as to gifts through the intervention of a trust, and title, therefore, in an endowment, properly passes on to the idol (who must be treated as a juridical person) on the execution of a deed of endowment by the donor. "Their Lordships cannot adopt such a narrow construction of the term 'gift' as would exclude any gift where the donor's bounty passes to his intended beneficiary through the medium of a trust so that while a gift by A to C direct would be governed by the Mahomedan law, a gift by A to B in trust for C would be governed by some other law. So to hold would, they think, defeat the plain purpose and object of this section of the statute"—*Sadik Husain v. Hashim Ali*, 38 All. 627 (645) (P.C.). The Patna High Court likewise holds that the Hindu law in the case of gifts has been expressly abrogated by sec. 129, and a gift under the Hindu law must be made in accordance with sec. 123 by a registered document—*Debi Saran v. Nandalal*, A.I.R. 1929 Pat. 591 (593). But the Madras High Court holds that the Chapter relating to gifts can have no application to gifts by dedication, because a dedication to an idol is not a gift to a sentient being, but to God. Consequently, a dedication to a temple or idol of a small portion of the property on the occasion of a marriage or *sradh* ceremony need not be in writing registered, but may be made orally. But if it is made in writing it must be registered. If the dedication is made by giving the property to the trustees of the temple, it must be in writing registered—*Ramalinga v. Sivachidambara*, 42 Mad. 440 (442, 444). And it has been ruled by the Privy Council that a dedication of a portion of the family property (including the immoveable property) for the purpose of a religious charity (e.g., for erecting a choultry or charity

house for Brahmans) may, according to Hindu law, be validly made without any instrument in writing—*Gangi Reddi v. Tammi Reddi*, 50 Mad. 421 (P.C.), 52 M.L.J. 524, 31 C.W.N. 799, A.I.R. 1927 P.C. 80 (82), 101 I.C. 79. But this decision was given without any reference to the T. P. Act. The law is therefore unsettled on this subject. It should also be noticed that since the Transfer of Property Act contemplates only a transfer from one living person to another *living* person (sec. 5), a gift to an idol does not fall under this Act (and need not be in writing registered), because an idol, though recognised in law as a juristic person, is not strictly speaking a living person—*Narasimhaswami v. Vekatalingam*, 50 Mad. 687 (F.B.), 53 M.L.J. 203, 103 I.C. 302, A.I.R. 1927 Mad. 636 (638); *Harihar v. Guru Granth Saheb*, 11 P.L.T. 658, 128 I.C. 791, A.I.R. 1930 Pat. 610 (612). See also *Birendra v. Bahuria*, A.I.R. 1924 Pat. 612 (614), 13 Pat. 356. Moreover, the new definition of 'living person' as given in sec. 5 does not include an idol.

This section does not apply to a grant of easement, because a grant or imposition of an easement does not amount to a transfer—*Sital Chandra v. Delaney*, 20 C.W.N. 1158 (1163, 1164), 34 I.C. 450.

This section does not apply to *partition*, for partition is not a gift, and no writing or registration is necessary to effect it—*Laxman v. Tayya*, 51 I.C. 93, 15 N.L.R. 93; *Ma Sein v. Maun U.*, 25 I.C. 498. At a partition between the members of a joint Hindu family consisting of a father and his sons, they purported to include the second defendant who was admittedly not a member of the joint family, and to allot to him a proportionate share of the joint properties. There was, however, no registered instrument though the property allotted was over Rs. 100 in value. *Held* that the transaction, by which a portion of the property was given to a person who was not a member of the family, was a gift and not a partition, and not being made by a registered instrument, was invalid. The parties cannot evade the formal requirements of the Transfer of Property Act by calling a transaction by a different name—*Mare Gouda v. Chenne Gouda*, 49 M.L.J. 150, A.I.R. 1925 Mad. 1174, 90 I.C. 131. A deed of release may operate as a deed of gift—A.I.R. 1967 S.C. 1395.

This section does not affect the essential ingredients of a complete gift set forth in section 122 (*viz.*, voluntary giving by the donor and acceptance by the donee) but only provides a further safeguard by requiring a gift of immoveable properties to be effected by a registered instrument. The provision in sec. 123 does not purport to legislate that the registration of a deed of gift in respect of an immoveable property is a sufficient transfer of the property. And so, it must be proved in each case, apart from the registration of the document, that there was complete *divesting of ownership*, *i.e.*, that the donor had voluntarily and without consideration transferred the property to the donee, and that there was an *acceptance* on the part of the donee. Therefore, the registration of a deed of gift is not sufficient to constitute a gift where it is found that in spite of the registration the donor continued to be in possession of the property—*Deosaran v. Deoki Bharathi*, 3 Pat. 842 (849), 80 I.C. 980, A.I.R. 1924 Pat. 657. Therefore, if, in spite of the registration and delivery of the deed of gift, it appears that the donor *never intended* to give effect to the deed and had not done all he could do to complete the gift, but had

remained in possession, to which the donee never objected, and the donor subsequently sold the property to other persons, *held* that the gift was not complete in spite of registration of the deed—*Lakshimoni v. Nit-tayananda*, 20 Col. 464.

The effect of a registered instrument of gift duly executed and attested and accepted and acted upon by the donee is that the title legally passes from the donor to the donee. Any mental reservation or secret intention on the part of the donor to the contrary is ineffective—*Bhagabai v. Ghanshamdas*, A.I.R. 1948 Nag. 328, I.L.R. 1948 Nag. 824.

631. Hindu Law :—Although the Hindu Law requires delivery of possession to complete a gift of immoveable property, that law has been abrogated by sec. 123 of this Act. This section clearly seems to have the effect of rendering unnecessary the delivery of possession, substituting, as it does, registration for delivery of possession—*Phul Chand v. Lakkhu*, 25 All. 358; *Pahlwan Singh v. Ram Bharose*, 27 All. 169; *Lallu Singh v. Gur Narain*, 45 All. 115 (F.B.), A.I.R. 1922 All. 467, 68 I.C. 798; *Balmakund v. Bhagwan*, 16 All. 185; *Kali Das v. Kanhaiyalal*, 11 Cal. 121 (P.C.). *Dharmodas v. Nistarini*, 14 Cal. 446; *Balbhadra v. Bhowani*, 34 Cal. 853 (858); *Madhab Rao v. Kasi Bai*, 34 Bom. 287; *Bai Ram-bai v. Bai Moni*, 23 Bom. 234; *Alabai Koya v. Mussa Koya*, 24 Mad. 513 (522); *Debi Singh v. Bansidhar*, 66 I.C. 480, A.I.R. 1922 All. 44; *Bhagwan v. Hari Singh*, 22 N.L.R. 124, A.I.R. 1925 Nag. 199, 83 I.C. 41; *Nandra v. Chandi*, 5 O.C. 98; *Haripada v. Elokeshi*, 44 C.W.N. 357, 71 C.L.J. 144, A.I.R. 1940 Cal. 254. So also, a gift, of moveable property may be made simply by a registered instrument without delivery of property—*Dharmodas v. Nistarini*, 14 Cal. 446.

Since delivery of possession is not necessary, it follows that if a Hindu executes a gift *in presenti* of three villages by means of a duly registered instrument but reserves possession of the villages in order to enjoy the usufruct during his life-time, and at the same time provides that he would not alienate the property to anybody else, the gift is perfectly valid—*Lalu Singh v. Gur Narain*, 45 All. 115 (F.B.), A.I.R. 1922 All. 467, 20 A.L.J. 744; and if the donee dies during the life-time of the donor, the ownership of the properties (though not the immediate possession thereof) would pass to the donee's heirs—*Ibid*.

A transaction by which a Hindu father makes a division of his self-acquired property between his sons does not amount to a gift and therefore does not require registration—*Kisansingh v. Vishnu*, A.I.R. 1951 Bom. 4, I.L.R. 1951 Bom. 148.

This Act was not applied to Berar until 1907. So a gift of immoveable property made prior to that date was governed by the Hindu law and delivery of possession was essential to make a gift valid. A gift by a registered deed without delivery of possession in such a case was invalid and did not convey a valid title to the donee—*Chandrabhaga v. Anandrao*, A.I.R. 1938 Nag. 142, 173 I.C. 85.

Where a deed of gift was duly made, registered and accepted, the mere fact that the deed of gift remained with the donor did not make the gift any the less complete—*Anrithammal v. Ponnusami*, 17 M.L.J. 386;

Ankamma v. Narasayya, A.I.R. 1947 Mad. 129 (1946) 2 M.L.J. 357. A dedication of property to a Hindu deity is not a gift—*Ram Kumar Ramchandra & Co. v. Commissioner of Incometax*, A.I.R. 1966 All. 100.

632. Mahomedan law :—Under the Mahomedan law, the essentials of a gift are, a declaration of gift by the donor, an acceptance of the gift by the donee, and delivery of possession such as the subject of the gift is susceptible of. This rule of Muhammadan law is unaffected by the provisions of sec. 123, T. P. Act (see sec. 129, *infra*), and consequently a registered instrument is not necessary to validate a gift of immoveable property—*Ali Bakhsh v. Ghurai*, 18 O.C. 122, 28 I.C. 180 (181); *Mahomed Kasim v. Controller of Estate Duty*, A.I.R. 1967 Ker. 130.

Delivery of possession being essential to the validity of a gift, it follows that if there is no delivery of possession, there is no valid gift—*Sadik Hussain Khan v. Nawab Syed Hasim Ali*, 38 All. 627 (645, 647, 657) (P.C.); *Chaudhri Mehdi Hasan v. Mahomed Hasan*, 28 All. 439 (P.C.); Even a registered deed of gift is not effectual under the Mahomedan law, if it is not accompanied by delivery of possession—*Mogulsha v. Mahomed Saheb*, 11 Bom. 517; *Ismail v. Ramji*, 23 Bom. 682; *Vahazulla v. Boyapati*, 30 Mad. 519; *Mohinuddin v. Manchershaw* 6 Bom. 650; *Meherali v. Tajuddin*, 13 Bom. 156; *Nizamuddin v. Abdul Gaffur*, 13 Bom. 264; *Rahim Baksh v. Sajjad Ahmad*, 19 C.W.N. 1311, 26 I.C. 466; *Rahimjan v. Imanjan*, 17 C.L.J. 173, 15 I.C. 698 (700). When the donee is the minor child of the donor actual transfer of possession is not necessary, and when the donee is the grand child acceptance by the father is sufficient—*Qhamarunnissa Begum v. Fatima Begum*, A.I.R. 1968 Mad. 367.

Under the Mahomedan law, a valid gift can be effected by delivery of possession, and if there is delivery of possession, the mere fact that there is also an unregistered deed of gift does not make the gift invalid. The gift was complete as soon as there was delivery of possession, and the unregistered instrument of gift should be left out of consideration—*Nasib Ali v. Wajed Ali*, 44 C.L.J. 490, 100 I.C. 296, A.I.R. 1927, Cal. 197 (198); *Ali Bakhsh v. Ghurai*, 18 O.C. 122, 28 I.C. 180 (182). So also, if a gift takes place by delivery of possession, and there is also a deed of gift but that deed is not duly attested, the gift is nevertheless valid. The gift is complete by delivery of possession. It is immaterial that there is an instrument in writing and that it has not been properly attested. The provisions of this section as to execution of a deed of gift and attestation do not apply to Mahomedans—*Karam Ilahi v. Sharfuddin*, 38 All. 212 (213), 35 I.C. 114.

An entry in column 11 of the *sesha* (marriage certificate) which relates to the amount of dower was as follows; "Rs. 500 of the current coin as prompt dower in lieu of which a house is given". Held that as the house was given in lieu of *mehar*, the transaction was a simple gift and not a transfer in consideration of the relinquishment of the *mehar* by the proposed bride. The unilateral act was not a sale— *Md. Hashim v. Amcnabi*, A.I.R. 1952 Hyd. 3.

There is no real analogy, between a wakf and a gift. In the case of a wakf delivery of possession is not essential, and an intention to

divest oneself *in presenti* of the ownership of the property is sufficient—*Zainab Bi v. Jamalkhan*, A.I.R. 1951 Nag. 428, I.L.R. 1949 Nag. 426.

Gift by a Mahomedan to a Hindu :—Under the Mahomedan law, a Mahomedan can make a valid gift to a Hindu, and such a gift is governed by the rule of Mahomedan law, and not by the Hindu law. Sec. 123 does not apply to the case, and consequently, an oral gift immoveable property made by a Mahomedan to a Hindu, if made simply by delivery of possession, is valid. No registered deed is necessary—*Tabera v. Ajodhya*, A.I.R. 1929 Pat. 417 (419).

633. Buddhist law :—It has been held that although the rule of Buddhist law requires delivery of possession as essential to the validity of a gift, such rule is abrogated by the provisions of the Transfer of Property Act, just as this Act has abrogated the rule of Hindu law as to the necessity of delivery of possession—*U. Pandwan v. U. Sandima*, 2 Rang. 131 (134), 83 I.C. 557, A.I.R. 1924 Rang. 309; *Mi Hla Zan v. Pa Pa Ye*, 3 Bur. L.J. 111, A.I.R. 1924 Rang. 353; *Ma Thin v. Maing Gyi*, A.I.R. 1924 Rang. 13 (14), 75 I.C. 166.

Under the Buddhist law, delivery of possession is necessary to the validity of a *donatio mortis causa*—*Maung Ba v. Maung Pyu*, 40 I.C. 854.

633A. Immoveable property :—Future rent is a benefit to arise out of land within the meaning of sec. 3 (25) of the General Clauses Act X of 1897, and therefore is immoveable property within the meaning of this section—*Bhudeb v. Bhikshakar*, A.I.R. 1942 Pat. 120 (125), 196 I.C. 837. See Note 17, *ante*.

634. Registration :—Where the subject-matter of a gift is immoveable property it must be registered under the provision of this section—*Lim Charlie v. Official Receiver*, A.I.R. 1934 P.C. 67, 12 Rang. 238, 59 C.L.J. 91, 147 I.C. 328; otherwise the gift is invalid—*Ibid*; *Varada v. Jeevarthummal*, 43 Mad. 244 (P.C.). Recital contained in a petition to the Collector for an order for transferring the villages to the donee's name cannot be used as evidence of the gift but can be referred to as explaining the nature and character of the possession thenceforth held by the donee—*Ibid*.

Where there was a gift of Sarvottam's right to assessment of the *dhara*, such a right was a *nibandha* in Hindu law and is immoveable property. So the instrument of gift required registration—*Madhav Rao v. Kashibai*, 34 Bom. 287.

The compliance with secs. 34, 35, 58 and 59 of the Registration Act constitutes registration of the document and not the presence of certificate under sec. 60 of that Act—*Sobhnath v. Pirthipal*, A.I.R. 1948 Oudh 223. In this case it was held that the document must be deemed to have been duly registered though there were some defects in the formalities of registration.

Registration after donor's death :—It is not necessary for the validity of a deed of gift that it should be registered by the donor himself. Where a Hindu executed a deed of gift in favour of his wife and died, and the deed was subsequently registered at the instance of the widow, *held* that

it was a valid deed of gift within the provisions of this section—*Bhabotosh v. Soleiman*, 33 Cal. 584. Nor is it necessary that the registration should take place during the lifetime of the donor. A gift of immoveable property is not invalid merely because the deed of gift may have been registered after the death of the donor—*Hardei v. Ramlal*, 11 All. 319; *Nand Kishore v. Surja Prosad*, 20 All. 392; *Kashaba v. Chandrabhagabai*, 32 Bom. 441. The *post mortem* registration of a deed of gift by the legal representative of the donor has the same effect as its registration by the donor himself during his life-time—*Meiyyalu v. Anjalay*, 25 Mad. 672; *Kashaba v. Chandrabhagabai*, 32 Bom. 441. If the donor dies after executing the deed of gift, and the donee does not take any steps to register the deed, the gift fails. See *Hiralal v. Gaurishankar*, 30 Bom. L.R. 451, A.I.R. 1928 Bom. 250.

A deed of gift registered *against the wishes of the donor is valid*. And so, where the donor executed a deed of gift and handed over the deed to the donee, and the latter proceeded to register the deed, the donor could not bring a suit for injunction against the donee to restrain him from registering the deed. Once a deed is executed and handed over to the donee, the gift is complete—*Venkat Subba v. Subba Rama*, 52 Bom. 313 (P.C.), 32 C.W.N. 708, 108 I.C. 367, A.I.R. 1928 P.C. 86 (87). The defendants induced the plaintiff to execute a deed of sale but they got a deed of gift written, and the plaintiff on knowing that it was a deed of gift refused to have it registered, whereupon the defendants applied to the Registering Officer, and procured its registration by order of that Officer against the wishes of the donor. *Held* (leaving aside the question of fraud in getting a deed of gift executed instead of a deed of sale, for which the plaintiff had a separate remedy) that a "gift duly made and accepted is not invalid merely because it was registered afterwards against the wishes of the donor. Registration is not an act of the donor, but the act of the officer appointed by law to register documents. A document need not even be presented for registration by the executant. Consent to the registration of the deed is not a part of the gift. The term *registered instrument* does not necessarily mean an instrument registered at the instance of, or with the consent of, the donor"—*per* *Chamier, J.*, in *Parbati v. Baijnath*, 9 A.L.J. 300, 14 I.C. 61, upheld on appeal in *Parbati v. Baijnath*, 35 All. 3, 16 I.C. 406. In Madras, it was once held that a deed of gift registered against the wishes of the donor was not valid, and not sufficient to complete the gift—*Ramamirtha v. Gopala*, 19 Mad. 433 (435); it was further held that a deed of gift registered after the death of the donor against the wishes of the legal representatives of the deceased donor was ineffective and did not pass the property—*Dasi Svarnam v. Deivanayagam*, 28 M.L.J. 378, 28 I.C. 271; but both these cases have been overruled by a Full Bench which has decided that there is nothing in sec. 123 which requires the donor to have the deed registered; all that is required is that he should have signed the instrument, and once it is duly executed, the Registration Act allows it to be registered even though *the donor may not agree* to its registration, and upon registration it would take effect from the date of execution. Consequently, a deed of gift can be registered by the donee after the death of the donor *without the consent of the legal representative* of the donor—*Venkati Rama Reddi v. Pillati Rama Reddi*, 40 Mad. 204 (211) (F.B.).

The law on this subject has been thus stated by their Lordships of the Judicial Committee: "When the instrument of gift has been handed over by the donor to the donee and accepted by him, the former has done everything in his power to complete the donation and to make it effective. Registration does not depend upon his consent, but is the act of an officer appointed for the purpose, who if the deed is executed by or on behalf of the donor and is attested by at least two witnesses, must register it if it is presented by a person having the necessary interest within the prescribed period. Neither death nor the express revocation by the donor is a ground for refusing registration, if the other conditions are complied with"—*Kalyanasundaram v. Karuppa*, 50 Mad. 193 (P.C.), 52 M.L.J. 346, 100 I.C. 105, 31 C.W.N. 509, A.I.R. 1927 P.C. 42; *Venkat Subba v. Subba Rama*, 52 Bom. 313 (P.C.), 30 Bom. L.R. 827, 32 C.W.N. 708, 108 I.C. 367, A.I.R. 1928 P.C. 86 (87); see also *Sudhir v. Tarangini*, 41 C.W.N. 1201.

A deed of gift of immoveable property executed in accordance with the terms of sec. 123, but *never communicated* to the intended donee and remaining in the possession of the donor undelivered, would not come within the ruling of the Full Bench in 40 Mad. 204, and cannot be compulsorily registered at the instance of the donee—*Kalyana Sundaram v. Karuppa*, *supra*.

Where there is a gift of immoveables and moveables, but the former fails for want of registration, the latter may be held good if it was not conditional on the validity of the former—*Perumal v. Perumal*, 44 Mad. 196.

635. Oral gift or unregistered deed of gift:—According to the Allahabad High Court, the provisions of this section are mandatory and imperative, and no gift of immoveable property can be made except by means of a registered instrument. An oral gift (*e.g.*, a gift by way of *sankalpa* at the time of nuptials) cannot operate as a valid gift of immoveable property. It cannot divest the donor of his proprietary rights in the property or clothe the donee with any title to the same. The donor must be taken, in the eye of the law, to continue to remain the owner of the property—*Hira Mani v. Anmol*, 26 A.L.J. 944, A.I.R. 1928 All. 699 (702), 117 I.C. 351; *Allam Gangadhara Rao v. Gollapalli Gangarao*, A.I.R. 1968 Andh. Pra. 291. See also *Samar v. Dinanath*, A.I.R. 1953 Ass. 19. Where the plaintiff consented to make a gift of land to the defendant (a municipality) but there was no registered deed of gift, the Bombay High Court held that the oral gift was not complete in law, and the fact that the municipality occupied the land and constructed a road on it, did not give validity to the transaction—*Kuverji v. Municipality of Lonavela*, 45 Bom. 164, 58 I.C. 403, 22 Bom. L.R. 654. An oral gift is not valid, even if the donee executes a document in favour of the donor acknowledging the oral gift—*Girija Prasad v. Purshottam*, 28 Bom. L.R. 421, A.I.R. 1926 Bom. 261, 94 I.C. 609. If there is an oral gift, followed by delivery of possession, and then the donor executes a deed of gift but dies before he can register it, *held* that there is no valid gift—*Hiralal v. Gaurishankar*, 30 Bom. L.R. 451, A.I.R. 1928 Bom. 250 (251), 109 I.C. 149. The Madras High Court similarly holds that where there was no deed of gift, but the donor merely presented to the Collector a petition reciting that he had given certain villages to the donee and praying that an order be made

transferring the villages to the donee's name, and on the same date the donee also presented a petition to the Collector reciting the gift of the villages and asked for the transfer of them to his name on the register, *held* that as there was no deed of gift in writing registered, the mere recitals in the petition could not be used as evidence of the gift—*Varada Pillai v. Jeevarathnammal*, 43 Mad. 244 (249) (P.C.) But the Rangoon and Calcutta High Courts lay down a more equitable principle. Thus, the Rangoon High Court is of opinion that where an immoveable property was transferred with possession orally as a gift and the donor allowed the donees in possession to deal with it as their absolute property (*e.g.*, to mortgage it, to re-mortgage it, to purchase other properties with the proceeds of the mortgages), the donor would not be allowed to take advantage of the non-registration of the gift and to take back the property. To allow the donor to do so would be to permit this Act to be used to perpetrate a fraud in a manner which could not be recognised—*Ma Htay v. U Tha Hline*, 2 Rang. 649 (652, 653), 88 I.C. 66, A.I.R. 1925 Rang. 184. Where the donor made an oral gift of certain lands, and reported to the revenue authorities for effecting a mutation in the name of the donee, and the donee was in possession since the date of the gift, *held* that though the gift did not convey any title to the donee, by reason of not being made by a registered deed, still as the donor had clearly divested himself of the ownership of these lands, neither the donor nor any person claiming through him was entitled to bring a suit to take back the properties, and the donee could resist the suit on the ground of estoppel—*M. P. L. M. P. Chetty v. Ma Ngwe Sin*, 1 Rang. 665, 79 I.C. 485, A.I.R. 1924 Rang. 200 (201); *Ma Shin v. Maung Hman*, 1 Rang. 651, A.I.R. 1924 Rang. 102 (103), 79 I.C. 579. Similarly, where in pursuance of an ante-nuptial agreement, a father made a gift of his house to his daughter and put her in possession, under an unregistered deed, and she held such possession for a number of years, and the donor afterwards sued for recovery of possession of the house, *held* that the donor was estopped from bringing the suit—*Pran Mohan v. Hari Mohan*, 52 Cal. 425, 29 C.W.N. 889 (891), A.I.R. 1925 Cal. 856 (following *Mahomed Musa v. Aghore Kumar*, 42 Cal. 801 (P.C.)). It is apprehended by the present editor that the above cases of the Rangoon and the Calcutta High Courts are no longer good law in view of the decision of the Judicial Committee in *Ariff v. Jadunath*, 58 I.A. 91, 58 Cal. 1235, 35 C.W.N. 550, A.I.R. 1931 P.C. 79.

If, under the oral gift, the donee remains in possession for *more than 12 years*, his title will be perfected by adverse possession, and it will not be in the power of the donor to take back the property—*Varada Pillai v. Jeevarathnammal*, 43 Mad. 244 (250) (P.C.).

Part-performance:—The doctrine of part-performance applies only when the agreement is capable of specific enforcement. An agreement to make a gift is not capable of specific performance, and the above doctrine has no application. Therefore, where there is an oral gift followed by delivery of possession, the donee cannot rely on the doctrine of part-performance in order to resist a suit for recovery of possession brought by the donor or his representatives—*Hiralal v. Gourishankar*, 30 Bom. L.R. 451, 109 I.C. 149, A.I.R. 1928 Bom. 250 (252); *Hira Mani v. Anmol*, 26 A.L.J. 944, A.I.R. 1928 All. 699 (703), 117 I.C. 351. The positive enactment of

this section as regards registration cannot be ignored or overridden by any rule of equity (e.g., the rule of part-performance)—*Hira Mani v. Anmol*, supra. It should also be noted that the rule of part-performance enunciated in the new section 53A does not apply to a gift, because that section applies only to a transfer *for consideration*.

635A. Non-delivery of possession :—Though delivery of possession is not essential to the validity of a gift of immoveable property, still the withholding of possession may, under the circumstances of the case, lead the Courts to presume that the gift was merely a colourable transaction and that there was no intention to pass title. Thus, where a deed of gift of immoveable property was secretly executed by a person in favour of his wife at a time when the failure of the firm of which the donor was a partner was in sight, if not actually imminent, and the gift was kept secret till the firm had been declared insolvent, and it was found that the donee never obtained possession of the property, *held* that the title did not pass from the donor to the donee—*Official Assignee v. Bidyasundari*, 24 C.W.N. 145, 54 I.C. 700.

Signed :—The deed of gift must be signed either by the donor himself or by someone on his behalf. As to what is or is not a valid signature, see the analogous cases of mortgage cited in Note 350 under sec. 59.

636. Attestation :—See the new definition of 'attested' in sec. 3 added by the T. P. Amendment Act XXVII of 1926. Prior to this definition it was held that the attesting witness must see the executant sign the deed of gift; if the attesting witnesses did not see the execution but merely heard from the executant in acknowledgment that he had executed the deed, there was no valid attestation—*Sahda v. Raja Ram*, 11 A.L.J. 757, 21 I.C. 83; *In re Velavapalatti Peda*, 9 M.L.T. 57, 8 I.C. 887; *Baijnath v. Biraj Koer*, 2 Pat. 52 (61). *Amarappa v. Raghu*, 44 Bom. 231. These decisions are no longer of any authority in view of the new definition of 'attested' in sec. 3. See Note 18A, under sec. 3 and compare Note 353 under sec. 59.

The Calcutta and Allahabad High Courts as well as the Oudh Chief Court are of opinion that an attesting witness, if he is illiterate, can put his mark to the instrument, and this would be sufficient attestation. See *Sashi Bhushan v. Chandra*, 33 Cal. 861; *Lal Bahadur v. Rameshwar*, 3 Luck. 113, A.I.R. 1927 Oudh 510 (511); *Chirangi Lal v. Purna*, 12 A.L.J. 1114, 26 I.C. 84. But the Madras High Court is of opinion that under the new definition of 'attested' in sec. 3, which is taken from sec. 63 (old sec. 50) of the Indian Succession Act, attestation by mark is not a valid attestation. This definition enables the executant to "sign or affix his mark" to the instrument, but uses no such alternative expression in the case of witnesses but simply speaks of their having "signed" the instrument. The conclusion is that the attesting witness must sign the document, and a person who cannot sign his name is not competent to attest a document by means of a mark—*Venkataramayya v. Nagamma*, 35 L.W. 233, 136 I.C. 343, A.I.R. 1932 Mad. 272 (274). See also *Nityagopal v. Nagendra*, 11 Cal. 429 (relating to a will). Contra—*Nagamma v. Venkataramayya*, A.I.R. 1935 Mad. 178, 58 Mad. 220, 154 I.C. 777.

The scribe may be attesting witness; and it is not necessary that he

should add the word 'witness' after his signature. Though *prima facie* the scribe's signature on a deed is not that of an attesting witness, still if there is sufficient evidence to show that he signed not as a writer but as an attesting witness after the execution of the document, there is no reason why he should not be considered as one of the attesting witnesses—*Ma Kin v. Maung Kya*, 10 Bur. L.T. 106, 35 I.C. 275. This subject is elaborately discussed in Note 352 under sec. 59.

It is unnecessary to prove due attestation where validity of the deed of gift is not specifically denied on the ground that it has not been attested in the manner required by law—*Mt. Azizunnissa v. Siraj Hussain*, A.I.R. 1934 All. 507 (514), 152 I.C. 146.

Since this section does not apply to Mahomedans, a deed of gift executed by a Mahomedan would be valid even if it be not validly attested according to the requirements of this section—*Karam Ilahi v. Sharfuddin*, 38 All. 212 (213), 35 I.C. 114. But of course there should be delivery of possession.

637. Gift of moveable property :—A gift of moveable property may be effected either by a registered deed or by delivery of the property: and before the thing is actually delivered or a deed of gift executed and registered, the property does not vest in the donee. Where therefore a bonus was granted by a Railway Company to a certain person, and before it was paid to him it was attached in execution of a decree obtained against him, *held* that the property was not yet at the disposal of the donee and could not be attached in execution of the decree against him—*Janki Das v. E. I. Ry. Co.*, 6 All. 634; *Natha Gulab v. Sheller*, 25 Bom. L.R. 599, 87 I.C. 312, A.I.R. 1924 Bom. 88. Similarly, where the proprietor of a company got certain entries made in the company's account books crediting his wife with certain items after debiting them to his capital account, it was held that the entries did not complete the gift and what the law required for completion was never carried out, *e.g.*, a registered deed or delivery of possession although the wife was actually paid interest on the amounts—*Chambers v. Chambers*, A.I.R. 1941 Mad. 154, (1940) 2 M.L.J. 963, 1940 M.W.N. 1185.

The original gift of jewels to a woman on her first marriage being subject to the customary incident that there should be a reverter of the property to the husband's family on her remarriage, the woman had no absolute property in the jewels within sec. 123—*Sanyasi v. Guruvolu*, A.I.R. 1950 Mad. 271, (1949) 2 M.L.J. 738.

Where a gift of a certain sum of money was made by the father to his daughter by a pro-note which was registered, the gift could not be objected to on the ground of non-delivery, as gifts of moveable property can be validly made by a registered instrument only—*Krishan v. Lakshmi*, A.I.R. 1950 Tr.-Coch. 73. If a person, not being a banker, makes entries in his own accounts crediting a certain sum in the account of his grandson and debiting his account by the same amount the transaction does not operate as a gift as there is no delivery of possession—*Com. of Income-tax, U. P. v. Smt. Shyamo Bibi*, A.I.R. 1967 All. 82.

If the subject of gift is already in the possession of the donee, formal

delivery of possession is not possible. The donor may make a declaration of gift in his favour, leaving him in possession of the thing, and such declaration is sufficient delivery—*Bai Kushal v. Lakshmana*, 7 Bom. 452. "The delivery need not be made at the time of the gift. Delivery first and gift afterwards is as effectual as gift first and delivery afterwards. Therefore, where a chattel of one person is already in the possession of another, though not for the purpose of an intended gift, an effectual verbal gift of it to the latter may be made without any further delivery to him"—*Halsbury's Laws of England*, Vol. 15, p. 412. Where the thing is in the hands of a third person, the donor's request to such person to deliver is the only delivery possible.

An oral gift must be established by satisfactory evidence—*Rameshwar v. Ruknath Koeri*, *infra*.

If both moveable and immoveable properties are made the subject of gift, and the gift is invalid in respect of the immoveable properties (*e.g.*, for want of a registered deed) it would not be a ground for dismissing the claim as regards the moveables, because the gift of the latter was not conditional on the gift of the former—*Perumal v. Perumal*, 44 Mad. 196 (204), 40 M.L.J. 25, 61 I.C. 461.

Under the third para, the delivery of moveable property may be made in the same manner as goods may be delivered—*Rameshwar v. Ruknath Koeri*, A.I.R. 1923 Pat. 165 (170), 67 I.C. 451. As to how delivery of goods may be made, see section 33 of the Sale of Goods Act (III of 1930) which runs as follows: "Delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf." In England, the law is thus stated: "Actual manual delivery by the donor to the donee is not however essential to complete the gift thereof. It is sufficient if the donee be put by the donor in possession of the chattels. Where chattels cannot be actually delivered owing to their bulk, they can be constructively delivered, *e.g.*, by delivery of the key of the warehouse in which they are stored."—*Halsbury's Laws of England*, Vol. 15, p. 412.

Under the English law, if money is deposited in a Bank by the husband in the name of his wife, it is presumed that the deposit is intended for her advancement. But this rule does not hold good in India, and such a deposit would not amount to a gift of the money to the wife, because there is no *delivery* of the money to her—*Paul v. Nathaniel*, 1931 A.L.J. 417, 132 I.C. 573, A.I.R. 1931 All. 596. But if a current account in the sole name of J is converted into joint, either or survivor account, in names of J and F, then on the death of J, F will be entitled to the amount standing to the credit of the joint account—*Arris Fitzalan v. Imperial Bank of India*, A.I.R. 1956 Mad. 56.

The making of the gift of a fixed deposit in a bank is not a gift of moveable property, but of an actionable claim. The handing over of the fixed deposit receipt would not be enough, and a document in writing signed by the transferor under sec. 130 would be necessary—*Rajeshwari v. Mohan Bikram*, A.I.R. 1945 All. 409. But the document

need not be executed in any particular form—*Brahmayya v. K. P. Thangavelu Nadar*, A.I.R. 1956 Mad. 570.

638. Gift when takes effect :—A gift takes effect from the date of execution of the deed of gift and not from the date of its registration—*Venkata Subba v. Subba Rama* 52 Bom. 313 (P.C.), 30 Bom. L.R. 827, A.I.R. 1928 P.C. 86 (87), 108 I.C. 367. Thus, where a person executed a deed of gift in favour of a charity on the 9th September, adopted a son on the 10th and registered the deed on the 15th, *held* that the gift was complete on the 9th, and the adopted son had no claim to the properties comprised in the gift, though the deed was registered subsequent to his adoption—*Kalyansundaram v. Krishnaswami*, 11 L.W. 187, 62 I.C. 280; *Kalyanasundaram v. Karuppa*, 17 L.W. 232, 73 I.C. 206, A.I.R. 1923 Mad. 282; *Kalyanasundaram v. Karuppa*, 50 Mad. 193 (P.C.), 52 M.L.J. 346, 100 I.C. 105, 31 C.W.N. 509, A.I.R. 1927 P.C. 42. In other words, a gift takes effect, as soon as the instrument of gift, duly executed and attested, is handed over to the donee, and the gift has been accepted by the donee. The view once taken by the Madras High Court in *Ramamirtha v. Gopala*, 19 Mad. 433 (434) that a gift is not complete until it has been registered and that it operates only upon registration, has been overruled by *Venkati Rama Reddi v. Pillati Rama Reddi*, 40 Mad. 204 (211) (F.B.), where it is distinctly laid down that upon registration the gift takes effect from the date of its execution.

Imperfect gift—Trust :—Where there has been a clear intention to make a gift, but on account of an omission to comply with the requirements of this section or through any other cause, the gift has failed, the Court will not convert what was intended to be an out-and-out gift into a trust. The gift will fail altogether—*Manchershaw v. Ardeshir*, 10 Bom. L.R. 1206. Thus, a Railway Company sanctioned a gratuity of Rs. 7700 to the defendant, a retired employee, but before the money was remitted to him, the plaintiff in execution of a money-decree against the defendant attached the sum. *Held* that the money not having been delivered to the defendant at the date of attachment, there was no complete gift of the amount to the defendant, and the attachment of the money as the property of the defendant was inoperative. Even the incomplete transfer would not constitute the donor a trustee of the property for the intended donee; in other words, the imperfect gift will not be construed as a declaration of trust—*Natha Gulab & Co. v. Scheller*, 25 Bom. L.R. 599, A.I.R. 1924 Bom. 88, 87 I.C. 312.

124. A gift comprising both existing and future property is void as to the latter.

Gift of existing and future property.

639. This section is an explanation of sec. 122 which lays down that a gift is a transfer of an *existing* moveable or immoveable property. There can be no alienation of a thing not in existence. Thus, where a gift was made of "all my present and future personalty," it was held that the transfer was good as to the property of the transfer existing at the date of execution of the deed, but bad as to the after-acquired property—*Belding v. Read*, 3 H. & C. 955; *Holroyd v. Marshall*, 10 H.L.C. 199; *Tadman v. Epineuil*, 20 Ch. D. 758.

A gift of future property is a mere promise which cannot be enforced and is therefore void. When a gift rests merely in promise or unfulfilled intention, it is incomplete and imperfect, and the Court will not compel the intending donor or those claiming under him to complete and perfect it—*Forrest v. Forrest*, (1865) 11 L.T. 763. Where there was a transfer by way of gift of future income of a property before it had accrued, it was inoperative under this section—*Brindaban v. Oudh Behari*, A.I.R. 1947 All. 179, I.L.R. 1947 All. 8.

125. A gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted.

Gift to several of whom one does not accept.

640. When a gift is made to two or more persons, this section intends that the donees would take the property as tenants-in-common, each donee getting a distinct share in the property, and the non-acceptance by one of the donees would make the gift void only in respect of his intended share. This section lays down that a gift is personal to the donee, and therefore if a gift is made to two persons jointly and one of them does not accept it, the other cannot take the whole. The English law, however, lays down a contrary rule: "If an estate is limited to two persons jointly, the one capable of taking and the other not, he who is capable of taking shall take the whole"—*per* Lord Hardwicke in *Humphrey v. Tayleur*, (1752) 1 Amb. 138.

The above rule of English law was applied by the Privy Council in a case of gift executed prior to the passing of this Act. Thus, where a gift was made by a widow to her daughter and the daughter's husband jointly, and the gift was invalid as to the husband (owing to a custom of the village as to the right of inheritance) *held* that the daughter took the whole estate—*Nandi Singh v. Sita Ram*, 16 Cal. 677 (682). (P.C.).

126. The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked ; but a gift which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in part, as the case may be.

When gift may be suspended or revoked.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

Illustrations.

(a) A gives a field to B, reserving to himself with B's assent, the right to take back the field in case B and his descendants die before A. B dies without descendants in A's lifetime. A may take back the field.

(b) A gives a lakh of rupees to B, reserving to himself, with B's assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000, but is void as to Rs. 10,000, which continue to belong to A.

Scope :—So that the provisions of this section may be attracted the following conditions are to be fulfilled: (1) that the donor and the donee must have agreed that the gift shall be suspended or revoked on the happening of a specified event. (2) such event must be one which does not depend upon the donor's will; (3) the donor and the donee must have agreed to the condition at the time of accepting the gift, and (4) the condition should not be illegal, or immoral and should not be repugnant to the estate created under the gift—*Subramanian v. Kannu Ammal*, A.I.R. 1953 Tr.-Coch. 115.

641. Revocation :—The first para lays down the conditions under which a gift may be revoked under an agreement between the donor and the donee; and the second para lays down under what circumstances a gift may be revoked without any previous agreement.

The first para enumerates the broad general rule that there is no gift at all when a person purports to give and at the same time retains the liberty of revoking the gift at his pleasure. See *Moss v. Ma Nyein*, A.I.R. 1933 Rang. 418. But this rule is subject to an exception, viz., that a power of revocation would be valid if the event on the happening of which the gift can be revoked does not depend upon the will of the donor.

Where the donor has the power of revocation of a gift and validly revokes it, he becomes the absolute owner of the property intended to be gifted. If he has no such power he ceases to have any interest or right in the property gifted away, in which case there is no question of the donor continuing to be an ostensible owner within sec. 41—*Ankamma v. Narasayya*, A.I.R. 1947 Mad. 127, (1946) 2 M.L.J. 357. A donor can revoke the gift if the donee agreeing to maintain the donor till death fails to do so—*Sirwartin v. Baiyu*, 1965 M.P.L.J. (Notes) 59. But see—*Tila Bewa v. Mana Bewa*, A.I.R. 1962 Orissa 130, where a contrary view has been taken. Where an old lady executes a deed of gift of her entire property in favour of one, not a member of the family, and the latter on the same day executes another deed accepting the gift and agreeing to maintain the lady till death, the gift can be revoked if the donee neglects to maintain the donor—*Purnima Kumari v. Manindra Nath Mahanti*, A.I.R. 1968 Assam 50.

The clause of reverter in an insurance policy, in case the assignee predeceases the assignor before the policy matures is valid under this section; and if the assignee predeceases the assured, the policy and the benefits thereunder would revert to the assured and form part of his estate. Section 11 does not apply to the case—*Soma Sekharrao v. Mishra*, A.I.R. 1944 Nag. 185, I.L.R. 1944 Nag. 871.

Who can revoke :—The right of a person to avoid a voidable gift under the second para of this section is one personal to himself, and cannot be transferred, because the right to revoke a gift is in the nature of a right to sue, which is not transferable under sec. 6 (e) of this Act—

Bajinath v. Biraj Koer, 2 Pat. 52 (64), 4 P.L.T. 239, A.I.R. 1922 Pat. 514; see also *Mt. Azizunnissa v. Siraj Hussain*, A.I.R. 1934 All. 507, 152 I.C. 146.

But the right survives to the heirs of the donor—*Ghumma v. Ram Chandra*, 47 All. 619, 83 I.C. 411, A.I.R. 1925 All. 437. Contra, *Mt. Azizunnissa v. Siraj Hussain*, supra. A right to have a gift set aside for fraud or undue influence does not cease on the death of the donor, but passes to his legal representatives and executors—*Allcard v. Skinner*, (1887) 36 Ch. D. 145 (*per* Lord Lindley); *Morley v. Loughman*, [1893] 1 Ch. 736.

Revocation by agreement:—The agreement referred to in the first para of this section must be entered into at the time of the gift, for a gift which is complete and absolute at the time it is made cannot be modified by a condition subsequently added—*Ram Sarup v. Bela*, 6 All. 313 (P.C.).

D executed a deed of gift in favour of J which was registered. On the same date the donee executed an unregistered agreement which provided that the donee would maintain the donor till his death and that if he failed to do so, the donor might revoke the deed of gift or in the alternative obtain maintenance allowance: *Held* that the two documents formed part of the same transaction which read as a whole fell within the perview of secs. 31 and 126. The failure to make payment by the donee would constitute the happening of the specified event mentioned in sec. 126 and sec. 31. The arrangement as to the condition upon which the donor could revoke the gift did not require registration. The donor was therefore entitled to revoke the deed of gift on the donee's failure to maintain him—*Jagat Singh v. Dungar Singh*, A.I.R. 1951 All. 599. But a gift subject to the condition that the donee should maintain the donor cannot be revoked for failure to maintain in the absence of a provision for revocation on such failure—A.I.R. 1956 Andhra 195.

"Event which does not depend on the will of the donor":—A gift cannot be revoked at the mere will of the donor. And if the parties agree that the gift shall be revocable at the will of the donor, it is really no gift at all and is void—*Nawab Ibrahim v. Ummatul*, 19 All. 267 (P.C.). This section recognises the validity of a power of revocation in the case of a gift, provided the event on the happening of which the gift can be revoked does not depend on the will of the donor. Thus, where the defendants made a gift of certain property to the plaintiff, on condition that the land would be liable to be taken back in the event of the plaintiff's transferring it, it was held that as the event on which the power of revocation was to be exercised did not depend upon the will of the donor, the condition of revocation was therefore valid—*Makund v. Rajrup*, 4 A.L.J. 708. Similarly, where a person executed a deed of gift to the donee, and on the same day the donee executed another registered deed by which he agreed not to transfer the property without the consent of the donor, and that if he did so he would return the property to the donor, *held* that this agreement was valid under the first para of this section, because the donee agreed that the gift would be revocable on the happening of an event (transfer of the property by the donee) which did not depend upon the will of the donor—*Ma Yin v. Ma Chit*, 7 Rang. 306, A.I.R. 1929 Rang. 226 (227), 119 I.C. 737.

On the same principle, a grant of land subject to the rendering of services can be resumed on the grantee refusing to perform the services—*Forbes v. Mir Mohammed*, 5 B.L.R. 529 (P.C.); *Hurrogobind v. Ramrutno*, 4 Cal. 67; but so long as the grantees are willing and able to perform the services, the grantor has no right to put an end to the tenure—*Venkata Narasimha v. Sobhanadri*, 29 Mad. 52 (P.C.).

641A. Revocation before registration :—It was once held by the Bombay High Court that this section, dealing with the revocation of a gift, referred only to a *complete* gift and not to an *inchoate* gift; an inchoate gift could be revoked under all circumstances and its revocation was not restricted by the limitations imposed by this section. Therefore, if a deed of gift was handed over to the donee but not registered, the gift was incomplete, and the donor was entitled to revoke the gift before the donee got the document registered, and to file a suit to restrain the donee from completing the gift by getting it registered—*Subba Rama v. Venkat Subba*, 48 Bom. 435 (440), 26 Bom. L.R. 427, 80 I.C. 477, A.I.R. 1924 Bom. 434. But this decision has been reversed by the Privy Council in *Venkat Subba v. Subba Rama*, 52 Bom. 313 (P.C.), 30 Bom. L.R. 827, 32 C.W.N. 708, 108 I.C. 367, A.I.R. 1928 P.C. 86 (87), where their Lordships have authoritatively laid down that once a deed is executed and delivered to the donee, the gift is complete, and the donor cannot revoke the gift even before registration, on the ground that the gift is not completed until it is registered. Consequently if the donee refuses to give back the document, the donor cannot obtain an injunction from the Court restraining the donee from proceeding to register the document. So also, in the Full Bench case of *Atmaram v. Vaman*, 49 Bom. 388 (F.B.), 27 Bom. L.R. 290, 87 I.C. 490, A.I.R. 1925 Bom. 210, the majority of the Judges laid down that where the donor of immoveable property handed over to the donee an instrument of gift duly executed and attested, and the gift was accepted by the donee, it was not competent to the donor to revoke the gift of the property even before registration and to file a suit to recover possession of the property from the donee. And this view has been confirmed by their Lordships of the Judicial Committee in *Kalyanasundaram v. Karuppa*, 50 Mad. 193 (P.C.), 31 C.W.N. 509, 100 I.C. 105, A.I.R. 1927 P.C. 42. See also *Venkalasubbamma v. Narayanaswami*, A.I.R. 1954 Mad. 215.

642. Para 2 : Gift when can be revoked :—Para 2 of this section lays down that a gift may generally be rescinded on the same grounds *mutatis mutandis* as a contract, and the circumstances under which a contract may be rescinded are laid down in sec. 19 of the Indian Contract Act: "When consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so obtained."

The words in brackets "save want or failure of consideration" are used because a gift is itself a transfer without consideration.

Thus, the grounds on which a gift may ordinarily be set aside are coercion, undue influence, fraud, mistake or misrepresentation—*Bcharilal v. Sindhubala*, 45 Cal. 434, 22 C.W.N. 210 (212), 41 I.C. 878, and the onus of proving that the gift is revocable on any of the above grounds

lies on the party who wants to get the gift set aside. "The law is that anybody of full age and sound mind who has executed a voluntary deed by which he has denuded himself of his own property, is bound by his own act, and if he himself comes to have the deed set aside, especially if he comes a long time afterwards, he must prove some substantial reason why the deed should be set aside"—per Kay J. in *Henry v. Armstrong*, (1881) 18 Ch. D. 668; *Mastanamma v. G. Adinarayana*, (1964) 2 Andh. L.T. 405. A mere mistake of law would not however be sufficient to revoke a deed of gift—*Narasingh v. Radhakant*, A.I.R. 1951 Or. 132, I.L.R. 1950 Cut. 374.

But where the donor is an old and infirm woman, the burden lies heavily on the donee to show that the donor executed the deed with full knowledge of its contents, and that she did so willingly and without any pressure or solicitation, which might amount to exercise of undue influence—*Rajaram v. Khandu*, 14 Bom. L.R. 340, 15 I.C. 529. So also, if gifts are made by a *paradanashin* lady, the strongest and most satisfactory evidence ought to be given, by the person who claims under the gift from her, that the transaction was real and *bona fide* and was fully understood by the lady whose property is dealt with—*Thakurdeen v. Ali Hossein*, 13 B.L.R. 427 (P.C.); *Wazid Khan v. Ewaz Ali Khan*, 18 Cal. 545 (P.C.). Similarly, if the person in whose favour the gift is executed stood at the time in a position of active confidence to the donor, e.g., an agent, the law throws the burden of proving the good faith of the transaction on the donee—*Phulchand v. Lakkhu*, 25 All. 358. A gift by a person to his lawyer's wife is not liable to be set aside if the gift is spontaneous—*Bireswar Sen v. Ashalata Ghose*, A.I.R. 1969 Cal. 111. When the donor who was a man of weak health settled the bulk of his property on the defendant who was his family priest and who had a considerable influence over the mind of the donor, the burden of proving that the settlor understood the legal effect of the settlement (*viz.*, that it was irrevocable) was on the defendant; and the defendant having failed to do so, the deed must be set aside—*Bai Manigavri v. Narondas*, 15 Bom. 549. The donee was in illicit connection with the donor's only daughter and was residing with the donor and his daughter: *Held* (1) the daughter and her paramour, the donee, have been in a position to dominate the donor's will; (2) the gift of the entire property to the donee ignoring the daughter and her daughter made the transaction unconscionable, and (3) the above two circumstances conjointly raised the presumption that the gift deed was brought about by undue influence—*Ram Chander v. Sital Prasad*, A.I.R. 1948 Pat. 130, 1947 P.W.N. 42.

The donor is entitled to revoke a deed of gift on the ground of fraud, undue influence or misrepresentation even *before* the deed is registered. The rule in 52 Bom. 313 (P.C.) (cited in Note 641A above) would not apply to such a case. The donor is entitled, after the execution of the deed of gift and before its registration, to retract from the gift on the ground of undue influence, and in such a case the donee is not entitled to have the document compulsorily registered—*Padmavati v. Shrinivasa*, 7 L.W. 339, 44 I.C. 483. There cannot be any acquiescence in, or confirmation of a gift until the donor knows his right and is free from the influence of the donee—*Bhola Ram v. Peari Devi*, A.I.R. 1962 Pat. 168.

This para presupposes that the gift is voidable and not void *ab initio*. If it is void *ab initio*, it is not necessary to have it set aside by a suit—*Ghumna v. Ram Chandra*, 47 All. 619, A.I.R. 1925 All. 437 (438); *Baij Nath v. Biraj Kuer*, 2 Pat. 52 (65).

643. What are not grounds of revocation :—The only circumstances under which a gift may be revoked are specified in paras 1 and 2. The third para lays down that a gift is not revocable otherwise. And so, a gift cannot be revoked at the mere will of the donor. A gift once made cannot be capriciously recalled by the donor, for a transfer by gift is as complete and binding on the parties when once completed, as any other form of transfer—*Rajaram v. Ganesh*, 23 Bom. 131. The donor cannot set aside the gift once made on the plea that he had made a mistake or that he had supposed that the donee could perform his funeral rites—*Abhachari v. Ramchandrayya*, 1 M.H.C.R. 393. "Courts of Equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of the donors. The Courts have already repudiated any such jurisdiction. It would obviously be to encourage folly, recklessness, extravagance and vice, if persons could get back property which they foolishly made away with, whether by giving it to a charitable institution or by bestowing it on less worthy objects"—*Allcard v. Skinner*, 36 Ch. D. 145 (183). So also, ignorance of the result of deliberate choice is no ground for equitable relief—*Ibid*. So also, the fact that the donor's feelings towards the donee changed after the deed of gift was executed is not a ground for revoking the deed—*Venkatasubba v. Subba Rama*, 52 Bom. 313 (P.C.), A.I.R. 1928 P.C. 886 108 I.C. 367. "The law of this Court is very strict on the subject of voluntary deeds The mere alteration of intention is not sufficient to induce this Court to interfere and cancel an instrument which was fully understood and deliberately executed by the grantor. That I believe to be the case here, and being so, I cannot interfere merely because the feelings of the plaintiff towards the defendant are now no longer what they were at the time when the gift was made"—*Toker v. Toker*, (1862) 31 Beav. 629, 9 Jur. (N.S.) 370. So also, where a woman executed a deed of gift by which she conveyed all her property to her nephew, and she executed the deed with full possession of her senses and without the exercise of any fraud, misrepresentation or undue influence on her, and she fully understood its contents and the effect it would have of divesting her of her property: *held* that the deed was binding on her and could not be set aside, and the mere fact that the donor's feelings towards the donee subsequently underwent a change was not sufficient to set aside the gift—*Rajaram v. Khandu*, 14 Bom. L.R. 340, 15 I.C. 529. A gift of a non-transferable occupancy holding cannot be revoked by the donor on the ground that it is non-transferable. It is binding as between the donor and the donee. It cannot be impeached by the donor himself, though the landlord may possibly refuse to recognise the transfer—*Beharilal v. Sindhubala*, 45 Cal. 434, 22 C.W.N. 210 (213), 41 I.C. 878.

Even if a donor might have made a gift under undue influence, yet if he had subsequently acquiesced in it, he cannot afterwards impeach it—*Seetharamaraja v. Bayanna*, 17 Mad. 275.

644. Hindu and Muhammadan law :—The rules of Hindu law as to

revocation of gifts are substantially the same as that contained in the second para of this section. A Hindu may revoke a gift made in wrath or excessive joy or through inadvertence or during disease, minority or madness, or under the influence of terror or under intoxication. Since the rule under this section does not substantially affect the above rule of Hindu law, this section may be justly applied to Hindus. An incomplete gift can be revoked at any time. Where the true intention of the donor was to effect a transfer *in presenti* but with a reservation of the right to enjoy the usufruct during the donor's lifetime, there was an immediate gift of the property and the enjoyment by the donee of its profits is postponed till after the donor's death. A gift of this nature is recognized as valid under the Hindu law—*Gangadhara v. Kulathu*, A.I.R. 1952 Tr.-Coch. 47. In such a case the gift having become complete cannot be revoked unless there is an express reservation to that effect in the deed of gift itself—*ibid*.

But the rules of Muhammadan law as regards revocation of gifts are entirely different, and this section therefore ought not to be applied to them. A Mahomedan can revoke a gift even after delivery of possession except in the following cases: (1) when the gift is made by a husband to his wife or by a wife to her husband. (2) when the donee is related to the donor within the prohibited degrees; (3) when the gift is *Sadaka* (i.e., made to a charity or for any religious purpose); (4) when the donee is dead; (5) when the thing given has passed out of the donee's possession by sale, gift or otherwise; (6) when the thing given is lost or destroyed; (7) when the thing given has increased in value, whatever be the cause of the increased; (8) when the thing given is so changed that it cannot be identified, as when wheat is converted into flour by grinding; (9) when the donor has received something in exchange for the gift—*Hedaya*, 485; Baillie, 524-548; Mulla's *Mohomedan Law*, 7th Ed., pp. 121—122. Except in those cases, a gift may be revoked at the mere will of the donor, whether he has or has not reserved to himself the power to revoke it, but the revocation must be by decree of Court.

127. Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Onerous gift.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if, after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound.

Onerous gift to disqualified person.

Illustrations.

(a) A has shares in X, a prosperous joint-stock company, and also shares in Y, a joint-stock company, in difficulties. Heavy calls are expected in respect of the shares in Y. A gives B all his shares in joint-stock companies. B refuses to accept the shares in Y. He cannot take the shares in X.

(b) A having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to B the lease, and also, as a separate and independent transaction, a sum of money. B refuses to accept the lease. He does not by this refusal forfeit the money.

645. Principle :—The principle of the first para of this section is that he who accepts the benefit of a transaction must also accept the burden of the same: *Qui sentit commodum sentire debet et onus*. And so it was observed in an English case (which related to a will) that "no man shall claim any benefit under a will without conforming so far as he is able and giving effect to every thing contained in it whereby any disposition is made shewing an intention that such a thing shall take place"—*Whistler v. Webster*, 2 Ves. 367. This section lays down a rule of election that where a gift consists of several things some of which are burdened with an obligation, he is put to his election either to accept the whole gift or not to accept anything at all. He cannot pick up the benefits of the transaction and reject the burdens. This rule applies only where the donor has by one *inseparable* transaction made the gift and burdened it with an obligation. But where a gift is in the form of two or more separate and independent transfers, some of which are so burdened, no question of election arises, and the donee is at liberty to accept any or all of them.

This section, being an embodiment of a rule of equity, applies equally to Hindus and Mahomedans—*Abdul Sattar v. Satyabhushan*, 35 Cal. 767.

Where the donor executed a pro-note in favour of the plaintiff and subject to the payment of the amount due thereunder made a gift of his entire property in favour of the defendant, the latter could not retain the benefit and at the same time repudiate the burden. Further, the defendant being the universal donee was on the principle embodied in the next section liable to pay the debts out of the estate in his hands—*Ram Sarup v. Shiv Dayal*, A.I.R. 1940 Lah. 285, 42 P.L.R. 307, 190 I.C. 463.

Where a mortgagor makes a gift of a part of a property mortgaged by him and charges the said part with a portion of the mortgage-debt and orders that till the payment of the said portion the transferee is to pay interest to the mortgagee on the amount of the proportionate charge from year to year, the transferee takes the gift burdened with the liability for interest—*Nisar v. Manjur*, A.I.R. 1936 Oudh 47 (48), 159 I.C. 54.

A gift by a person to his children on condition that they should allow him to continue in the enjoyment of the income of the property until his death is not invalid—*Ma Shin v. Ma Then*, A.I.R. 1934 Rang. 129 (131), 150 I.C. 966.

In the case of an out and out transfer by gift followed by a direction

to the donee to maintain the donor, the direction is only a pious wish. On the other hand, if the gift deed starts with a statement that it is made with the object of providing for maintenance of the donor and it is followed by the operative clause, the gift is subject to the liability to maintain the donor—*Gangadhara v. Kulathu*, A.I.R. 1952 Tr.-Coch. 47.

For acceptance of an onerous gift, acceptance of the gift itself is sufficient; there need not be any separate and express acceptance of the onerous condition also at the same time. The acceptance of the gift will carry with it the acceptance of the onerous condition also, even though at the time of the gift the donee was not aware of such condition, specially where the onerous condition is of a trifling nature (payment of Rs. 5 as monthly maintenance to a certain person for life)—*Sarba Mohan v. Manmohan*, 37 C.W.N. 149 (152), 143 I.C. 757, A.I.R. 1933 Cal. 438.

Disqualified donee :—If an onerous gift is made to a disqualified person, e.g. a minor, and that person accepts it, he is not bound by his acceptance but can make his choice upon attaining majority either to accept the gift burdened with the obligation or to return it. But so far as the donor is concerned the gift is complete as against him, and he cannot claim back the property unless the donee returns it after attaining majority (if he so chooses). And if therefore the donee dies in his infancy, the donor cannot resile from his gift and resume the property treating the gift as inchoate or revocable. The property will in such a case pass to the heirs of the donee—*Subramania v. Lakshmi*, 20 Mad. 147.

128. Subject to the provisions of section 127, where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by *and liabilities of* the donor at the time of the gift to the extent of the property comprised therein.

Universal donee.

Amendment :—The words "and liabilities of" have been added by sec. 60 of the T. P. Amendment Act (XX of 1929).

646. Universal donee :—The essential condition to constitute a universal donee is that the gift must consist of the donor's *whole* property. If any portion of the donor's property, no matter whether it is moveable or immoveable, is excluded from the operation of the gift or the endowment, the donee is not a universal donee. The creditor is entitled to the benefit of this section against a person who is a universal donee and nothing short of a universal donee—*Shyam Behari v. Maha Prasad*, 1930 A.L.J. 99, A.I.R. 1930 All. 180 (182), 123 I.C. 324. Where at the date of the gift-deed the donor owns the equity of redemption in certain mortgaged property and has not included in the deed of gift, the donor cannot be said to have transferred his whole property within the meaning of this section and the donee cannot be said to be the universal donee—*Ram Raj v. Lal Chandra*, A.I.R. 1941 Oudh 205, 1941 O.W.N. 56. But where for all practical purposes the donee holds the entire property of the donor, he must be deemed to be a universal donee, even though a small portion of the gifted land is held by the donor on rent—*Shahzad v. Madan*, A.I.R. 1933 All. 146, 140 I.C. 120. Thus the mere fact that some insignificant part of the property, was retained by the donor

for herself did not derogate from the universal nature of the donees—*Bapurao v. Bulakidas*, A.I.R. 1944 Nag. 225, I.L.R. 1945 Nag. 191. A universal donee is liable only to the extent of the property received by him under the gift, not duly applied by him towards payment of the debts—*Ibid.* If a person makes a gift of all his immoveable properties, but not of all the *moveable* properties, the donee cannot be called a universal donee—*Anrudh v. Lachmi*, 50 All. 818, 26 A.L.J. 753, A.I.R. 1928 All. 500 (502), 115 I.C. 114. Where a Mahomedan made a gift of the whole of his estate to his son and directed him to pay his debts, the son was a universal donee and he was liable to pay all the debts of the donor. There is no rule of Mahomedan law which conflicts with the provisions of this section—*Abid Husain v. Ram Nidh*, 7 O.W.N. 532, A.I.R. 1930 Oudh 268. Where a widow owns two sets of properties, in one of which she has only a widow's estate and in other she has an absolute interest (being her stridhan) a surrender deed in favour of her daughter of the properties can operate to transfer her stridhan but not the widow's estate, and the daughter cannot be regarded as a universal donee so as to make her liable for the debts of her mother—*Thiruccikedaswami Mudaliar v. Palani Ammal*, A.I.R. 1961 Mad. 291.

The position of the universal donee and the universal legatee is practically the same. In the case of the former it was necessary to provide for his liability under this section, as otherwise in case of personal liabilities the donor being alive the donee would escape all liability. It was not necessary to make similar provisions in the Succession Act where the estate of the deceased must be deemed to be the balance after all liabilities were paid off—*Joti Prasad v. Bahal Singh*, A.I.R. 1945 All. 433, 1945 A.L.J. 347.

The creditor's right to follow the properties in the hands of a universal donee has to be exercised by a suit and not merely by levying execution against the properties in their hands under a decree obtained against the donor—*Muhamathu v. Muhamathu*, A.I.R. 1952 Tr.-Coch. 23.

If a donor has two properties P and K, of which P is mortgaged to another, and the donor makes a gift of property K only, the donee is not a universal donee. So long as the property P has not been foreclosed by the mortgagee, the donor is still the owner of it: consequently if it is not included in the gift, it cannot be said that the gift consists of the donor's *whole* property—*Brij Raj v. Ram Dayal*, 7 Luck. 411, 135 I.C. 369, A.I.R. 1932 Oudh. 40 (43).

Under this section the reversioners, in whose favour the holders of the Hindu widow's estate relinquished their interest by a family arrangement as donees, would be liable for the debts of their donors—*Sudhamoyee v. Bhujendra*, A.I.R. 1937 Cal. 226 (228, 229) 172 I.C. 121.

The rule enacted in this section is independent of sec. 53. Therefore a creditor is not bound to get the gift set aside under that section in order to get himself paid, but can proceed against the donee under this section. Further, sec. 53 speaks of *fraudulent* transfers of *immoveable* property, whereas the present section applies to both moveables and immoveables and the gift under this section is not necessarily fraudulent. If the gift is fraudulent and the property immoveable, sec. 53 applies; if it is honest,

remedy may be had under this section. And so the Law Commissioners observe :—"Gifts of one's whole property to a relation or friend are not uncommon before an execution or in anticipation of insolvency. For such cases of fraud, sec. 53 *supra* provides, when the property is land. But an universal gift may conceivably be honest and comprise moveable property. Section 128 therefore specially provides for such gifts."

The rule in this section is different from that in England. Under the English law, a universal donee is not bound to discharge the donor's debt except on the latter's death or insolvency or when the transfer has been made with intent to defraud creditors.

Where the donor had contracted secured as well as unsecured debts from the same person, the creditor can tack the unsecured debts to the secured ones, and claim that the universal donee will not be allowed to redeem the mortgage alone without paying off the unsecured debts as well, although the original mortgagor (the donor) could have redeemed the mortgage without paying off the unsecured debts—*Ragho Govind v. Balvan*, 7 Bom. 101.

Trustee :—The case of a gift is different from that of a trust created by the debtor for payment of his debts in which the trustees get no benefit for themselves, and even if the deed of trust comprises all the property of a debtor, the author of the trust, the trustees would not be personally liable for any debt due from the author of the trust—*Matinuzzaman v. Hunter*, 14 Luck. 548, A.I.R. 1939 Oudh 161 (174), (1939) O.W.N. 420.

129. Nothing in this Chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan Law. * * * *

Saving of donations *mortis causa* and Muhammadan Law.

Amendment :—The words "or save as provided by section 123, any rule of Hindu or Buddhist Law" have been omitted by sec. 61 of the T. P. Amendment Act (XX of 1929).

This section, as it stood before the amendment, kept the rules of Hindu law unaffected by anything contained in this Chapter—*Forman Ali v. Uzir Ali*, A.I.R. 1938 Cal. 157 (159), 42 C.W.N. 14, 66 C.L.J. 125, 175 I.C. 712.

Extension to the Province of Delhi :—This section has been extended to the following areas in the Province of Delhi, namely :—(a) Area within the jurisdiction of the Delhi Municipal Committee; (b) area within the jurisdiction of the New Delhi Municipal Committee; (c) area within the jurisdiction of the Notified Area Committee, Civil Lines; and (d) area within the jurisdiction of the Notified Area Committee, Fort—See *Gazette of India, Part I, dated 23rd November, 1940, Home Dept. No. 61/40—Judicial*.

Scope :—This section exempts donations *mortis causa* of moveable property from the operation of this chapter; the reason is, that such gifts are in the nature of wills, and have been provided for by sec. 191 of the Indian Succession Act, 1925. It should be noted that gifts of only *moveable* property made in contemplation of death are excepted here; a similar gift of *immoveable* property must be made according to the rule under

this chapter. Further, it provides that the provisions of this chapter shall not affect the rules of Muhammadan Law.

647. *Donatio mortis causa* :—"A gift is said to be made in contemplation of death when a man who is ill and expects to die shortly of illness delivers to another the possession of any moveable property to keep as a gift in case the donor shall die of that illness. Such a gift may be resumed by the giver and shall not take effect if he recovers from the illness during which it was made, nor if he survives the person to whom it was made."—Section 191, Indian Succession Act, 1925.

The distinction between a gift and a *donatio mortis causa* is that the former takes effect immediately, while the latter takes effect only on the death of the donor; the latter is revocable at the will of the donor, but the former is not.

A gift made in contemplation of suicide is not a valid *donatio mortis causa*, as that would be against public policy—*Agnew v. Belfast Banking Co.*, (1896), 2 Ir. R. 204.

Before a gift can be repudiated as void in Hindu law on the ground that it was made during illness, the donor must be proved to have been in very great physical distress brought on by illness which makes him incapable of thinking and acting properly or of forming a rational estimate as regards the consequences of his action. The man must be overwhelmed with the disease in the sense that his mind must be unsettled by it—*Forman Ali v. Uzir Ali*, supra. When the deceased donor was suffering from a wasting disease, but at the time of the gift, far from being in extreme bodily pain, he was freely moving about attending to his normal work, it could not be said that it was the disease which impaired his judgment; so the gift was not void on that account—*Ibid*.

Where the deceased, a few hours before his death, and in contemplation of death, caused certain Government papers to be fetched and himself gave them into the hands of the plaintiff with the intention of passing the property to him, but could not make the endorsement because he was too weak to do so, held that under the circumstances the gift amounted to a valid *donatio mortis causa*—*Kumar Upendra Krishna v. Nabin Krishna*, 3 B.L.R. O.C. 113.

648. "Shall not affect" :—This section does not mean that the provisions of this Chapter shall not at all apply to Mahomedans, but it only lays down that its provisions shall not affect any rule of Mahomedan Law. In other words, whenever the provisions of this Chapter shall conflict with those of Mahomedan law, the latter shall prevail. Thus, under the Mahomedan law, a gift of immoveable property may be made orally by simple delivery of possession, but this Chapter lays down that such a gift must be made by a registered instrument. Hence there is a conflict; and the Mahomedan law must therefore prevail. So again, the rules of Mahomedan law as to revocation of gifts are entirely different from the rule enacted in sec. 126, and therefore the Mahomedan law shall prevail. See Note 632 under sec. 123 and Note 644 under sec. 126.

But in so far as the rules of this Chapter are founded upon equity and reason, they do not conflict with any rule of Mahomedan law. Thus,

sec. 127 being an embodiment of a principle of equity has been held to be equally applicable to Hindus and Mahomedans; see *Abdul Sattar v. Satyabhusan*, 35 Cal. 767; also 7 O.W.N. 532 in Note 646 under sec. 127.

Gift under Mahomedan law :—"For a valid gift *inter vivos* under the Mahomedan law," observe their Lordships of the Privy Council, "three conditions are necessary—(a) manifestation of the wish to give on the part of the donor, (b) the acceptance of the donee, and (c) the taking of possession of the subject-matter of the gift by the donee, either actually or constructively." The taking of possession of any part of a Zemindary property is constructively a taking possession of the whole—*Md. Abdul v. Fakhr Jahan Begum*, 49 I.A. 195 (209—10); *Amjad v. Ashraf*, A.I.R. 1929 P.C. 149 (151), 4 Luck. 305, 56 I.A. 213, 33 C.W.N. 753, 116 I.C. 405. No transaction of which the above are not the ingredients is or is to be treated as a gift under the Mahomedan law. A gift may be *heba* simple or *heba-bil-ewaz* (gift for an exchange or a return gift) or a *heba-ba-shart-ul-ewz* (a gift with a stipulation for an exchange or a return gift); but in each case and of every variation of a gift the transaction is a *heba* under the Mahomedan law—*Sharifuddin v. Mahiuddin*, A.I.R. 1927 Cal. 808 (814), 54 Cal. 754, 31 C.W.N. 1068, 105 I.C. 67. For an explanation of the different kinds of *heba* and the doctrine of *musha* see this case.

Where at the time of marriage a piece of land was assigned by the bridegroom to the bride in lieu of *mahr*, the assignment was a simple gift (*hiba*) and neither a sale nor a *hiba-bil-ewaz*. No writing was necessary, as this section exempts a gift by a Mahomedan. But such a gift is subject to the doctrine of *Musha* and the gift would not be complete and valid without delivery of such possession as the subject of the gift is capable of—*Jaitunbai v. Fatrubhai*, A.I.R. 1948 Bom. 114, I.L.R. 1947 Bom. 372.

Under the Shia law a gift is a contract between two parties. The elements of proposal and acceptance are the essential constituents of a contract of gift. Seisin is also an essential element of a gift. A gift in favour of a person who has not come into existence must fail for the absence of acceptance and the presence of contingency or futurity—*Strij v. Mushaf*, A.I.R. 1922 Oudh 93, 65 I.C. 132.

Oral gift by a Mahomedan in favour of his wife in lieu of her dower-debt is *hiba-bil-ewaz* which is pure gift and not sale. Being a valid gift under the Mahomedan law the provisions of Chapter VII of this Act are not applicable, and such gift can be made orally and without registration—*Mt. Kulsum v. Shiam Sundar*, A.I.R. 1936 All. 600 (605), 164 I.C. 515. But see *Mt. Amina v. Lachmi Chand*, A.I.R. 1934 Lah. 705 (707) where it has been held that the provisions of the Mahomedan law applicable to gifts do not apply to a so-called gift made in lieu of dower-debt, that is *hiba-bil-ewaz* which is really of the nature of a sale. A gift by a Mahomedan to a Hindu is governed by Mahomedan law—*Someshwar v. Barkat Ullah*, A.I.R. 1963 All. 469.

According to Mahomedan law an oral gift is complete as soon as a declaration of gift and a delivery of possession is given by the donor to the donee. When these essential conditions are complied with the gift becomes perfectly valid; and if a written deed is executed afterwards,

the deed may not be admissible in evidence for want of registration, but the oral gift would be valid notwithstanding—*Mt. Kulsam v. Shiam Sundar*, supra, and *Nasib Ali v. Wajed Ali*, A.I.R. 1927 Cal. 197, 41 C.L.J. 490, 100 I.C. 296. If a gift is reduced to writing it requires to be registered—*S. Chinna Budha Saheb v. Raja Subbamma*, (1954) 2 M.L.J. (Andh.) 113. A gift is not complete in the absence of delivery of possession or relinquishment of control over the property by the donor—*Musa Miya v. Kader Bux*, A.I.R. 1938 P.C. 108, 32 C.W.N. 733, 55 I.A. 171, 52 Bom. 316, 169 I.C. 31; *Sadik Hussain v. Hashim Ali*, 38 All. 627 (P.C.). *Gani Mia v. Wajed Ali*, 39 C.W.N. 882. "According to Mahomedan law" observe their Lordships of the Privy Council, "a holder of property may in his life-time give away the whole or part of it if he complies with certain forms, but it is incumbent on those who seek to set up such a transaction to prove that those forms have been complied with, and this will be so whether the gift be made with or without consideration. If the latter, then unless it be accompanied by delivery of the thing given, so far as it is capable of delivery, it will be invalid. If the former, delivery of possession is not necessary, but actual payment of the consideration must be proved, and the *bona fide* intention of the donor to divest himself *in presenti* of the property and to confer it upon the donee must also be proved [*Mehdi Hasan v. Hd. Hasan*, 28 All. 439 (449), 33 I.A. 68 (76)]. The case of *Ranee Khajooroonessa v. Rowshan Jehan*, 3 I.A. 294 (305) supports this statement of the law"—*Sadik Hussain v. Hashim Ali*, supra, at pp. 645-46.

Where a debtor who owes a certain amount (dower-debt) to a creditor makes a gift to him of an amount either equal to or greater than the amount of the debt, the question whether such payment is towards satisfaction of the debt is a question of fact. The rule of English law in this respect is applicable to India—*Sultan v. Salamar Bibi*, A.I.R. 1938 Mad. 25 (26), 46 M.L.W. 617, relying on *Md. Sadiq Ali v. Fakr Jahan*, A.I.R. 1932 P.C. 13, 6 Luck. 556, 59 I.A. 1, 136 I.C. 385.

Areeat under the Mahomedan law for a fixed period being valid, it follows that the gift of the usufruct of the property for the life-time of the donee is valid as *areeat*, though it would not be included in the term *hiba*—*Naziruddin v. Khairat Ali*, A.I.R. 1938 Oudh 51 (53, 54), 172 I.C. 384.

The Local Government in the exercise of the powers conferred on them by sec. 1 of this Act has extended sec. 123 of this Act to Burma. This must mean that the Local Government has extended sec. 129 also, because the power conferred by sec. 1 to extend "the whole or any part of this Act" does not authorise the Local Government to extend any particular section of the Act so as to give that section a different operation from that which it has in the Act itself read as a whole, and thus to abrogate in the area to which the extension is made the existing rule of Mahomedan law as to delivery of possession regarding gifts as to which the Legislature has expressly provided that it should remain unaffected by this Act. So in Burma, the rule of Mahomedan law, viz., that a gift is perfected by delivery of possession, applies; see *Ma Mi v. Kallander Ammal*, 5 Rang. 7 (P.C.), 31 C.W.N. 625, 100 I.C. 33, A.I.R. 1927 P.C. 22. A recent Full Bench of the Rangoon High Court have held that a

gift of immoveable property in Burma by one Mahomedan to another is invalid if not made by a registered instrument. It is not rendered good by virtue of sec. 129 which only enacts that if there is any rule of Mahomedan law, e.g., delivery of possession, it shall not be affected by anything contained in Chapter VII—*Ma Asha v. B. K. Haldar*, A.I.R. 1936 Rang. 430 (F.B.), 14 Rang. 439, 164 I.C. 984.

Rules of Mahomedan law have no application to a gift of an actionable claim. Such a gift by a Mahomedan in favour of his son is valid if the requirements of sec. 130 are fulfilled—*H. H. Iqbal Mahomad Khan Nawab v. Controller of Estate duty*, *Gujrat*, 53 I.T.R. (E.D.) 51. A transfer of a part of an actionable claim is permissible—*Ibid.* S. 130 applies to an assignment of a decretal debt by a Mahomedan, hence oral gift is void—*Ahmad Hossain v. Bibi Naeman*, A.I.R. 1963 Pat. 30.

CHAPTER VIII.

OF TRANSFERS OF ACTIONABLE CLAIMS.

130. (1) The transfer of an actionable claim *whether*
Transfer of actionable claim. *with or without consideration* shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent * * * shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not :

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings and without making him a party thereof.

Exception.—Nothing in this section applies to the transfer of a marine or fire policy of insurance "or affects the provisions of section 38 of the Insurance Act, 1938".

Illustrations.

(i) A owes money to B, who transfers the debt to C. B then demands the debt from A, who, not having received notice of the transfer as

prescribed in section 131, pays B. The payment is valid, and C cannot sue A for the debt.

(ii) A effects a policy on his own life with an Insurance Company and assigns it to a Bank for securing the payment of an existing or future debt. If A dies the Bank is entitled to receive the amount of the policy and to sue on it without the concurrence of A's executor, subject to the proviso in sub-section (1) of section 130 and to the provisions of section 132.

Amendment :—By section 62 of the T. P. Amendment Act (XX of 1929), the words "*and whether with or without consideration*" have been added and the words "*notwithstanding anything contained in sec. 123*" have been omitted.

The result is that a gift of an actionable claim even by a Muhammadan must be made in writing.

In the Exception of this section the last few words within inverted commas were added by the Insurance Act IV of 1938, s. 121.

648A. Actionable claim :—The definition of actionable claim is contained in sec. 3. This definition has been substituted by the Transfer of Property Amendment Act (II of 1900) for the old definition which ran thus :—"A claim which the Civil Courts recognise as affording grounds for relief is actionable, whether a suit for its enforcement is or is not actually pending or likely to become necessary." But this definition was too wide and covered every claim for which an action would lie in Courts, so as to include claims arising out of sales, gifts, mortgages or leases of immoveable property or exchanges or gifts of moveable property within its provisions. It was subjected to different interpretations by different High Courts, and they were at hopeless variance with one another as to whether a mortgage-debt was included in the term "actionable claim." This conflict has now been set at rest by the Amendment Act of 1900, and the definition has been narrowed down to that given in section 3, from which a mortgage-debt has been expressly excluded.

A gift of a fixed deposit in a bank is not a gift of moveable property, but is the gift of an actionable claim. The handing over of the fixed deposit receipt is not enough and a document in writing signed by the transferor is necessary—*Rajeshwari v. Mohan Bikram*, A.I.R. 1945 All. 409. A right to recover insurance money on the death of the assured or on expiry of the endowment period is an actionable claim. Its transfer may be absolute or conditional on the assignee surviving the assured—*Soma Sekharrao v. Mishra*, A.I.R. 1944 Nag. 185, I.L.R. 1944 Nag. 871.

Actionable claims can be validly transferred by execution of a trust deed in favour of trustees—*Official Trustee v. Cheppendali*, A.I.R. 1944 Cal. 335, 47 C.W.N. 441. Provident fund amount payable after retirement can be a subject-matter of trust. It is an actionable claim. Trust of such fund though not registered is valid though the precise amount is not ascertainable on the date of trust—*ibid*.

As to what are and what are not actionable claims, see Note 21 under sec. 3.

649. Scope of section :—This section implies that every actionable claim is transferable and the section points out how it may be transferred—*Abu Mahomed v. S. C. Chunder*, 36 Cal. 345 (351).

Under the English law there is a distinction between an absolute transfer of a chose in action and a transfer by way of a charge. This section makes no such distinction and the provisions hereof apply to both—*Santuram v. Trust of India Assurance Co.*, A.I.R. 1945 Bom. 11, 46 Bom. L.R. 752. The word 'transfer' means not only an absolute transfer, but also covers transfer of actionable claims by way of mortgage—*Mulraj v. Viswanath*, 37 Bom. 198 (P.C.), 17 C.W.N. 209, 17 I.C. 627; *Muthu Krishna v. Veeraraghava*, 38 Mad. 297, 21 I.C. 316; *Venkatachalam v. Subramanya*, 14 I.C. 144, 1912 M.W.N. 461; *Kali Mohan v. Empire of India Life Assurance Co.*, 44 C.W.N. 593; *Official Assignee v. Hukum Chand*, A.I.R. 1941 Mad. 147, (1940) 2 M.L.J. 891, 1940 M.W.N. 1290. Section 134 provides for the transfer of a debt by way of mortgage. Where a person hypothecates all his book-debts, present and future, as security for the balance of his account, the hypothecation creates a valid charge on, or to use the term familiar in English law, assignment of, the future book-debts of the debtor. But nothing passes under such an assignment until the property comes into present existence—*Balthazar & Son, Ltd. v. Official Assignee*, A.I.R. 1938 Rang. 426, (1938) R.L.R. 480...

An agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order directing such person to pay such funds to the creditor, operates as an equitable assignment of that part of the debt or funds to which the agreement or order refers—*Thakur Das v. Malek Chand*, A.I.R. 1933 Lah. 102 (103), 14 Lah. 325, 144 I.C. 6; *Official Liquidator, Travancore, N. B. S. Co. v. Official Liquidator, Travancore N. & Q. Bank*, A.I.R. 1940 Mad. 258, 1939 M.W.N. 1054; *P. Venkata Rao v. M. China Venkatapathy*, A.I.R. 1965 Andh. Pra. 410. But the assignee is under an obligation to refund to the assignor any surplus that may remain after discharge of the liability—*Ibid.* So far as the Indian Courts are concerned regarding the creation of equitable charges in respect of property which may come into being in future, the Courts are bound to follow the strict requirements of the Indian statute, and under the provisions of the present Act such an equitable assignment or equitable charge can only be created by a document in writing as provided by this section—*B. N. Railway Employees' Urban Bank v. Seager*, A.I.R. 1942 Pat. 307, 23 P.L.T. 135.

A right to recover back the price paid under a contract of sale on the vendor's failure to make over possession to the purchaser can be transferred under this section—*Damodhar v. Allabux*, A.I.R. 1943 Nag. 332, I.L.R. 1943 Nag. 762. Where a Hindu widow embraces a civil death on her re-marriage, the next reversioner succeeding to the estate can enforce an actionable claim in respect of land settled on bhag cultivation by the widow. No question of transfer of an actionable claim by a written instrument arises in such a case—*Hari v. Jugal*, A.I.R. 1954 Pat. 32.

It is within the competence of the holder of a life policy to make a

conditional assignment of each of his policies, whether an endowment or an ordinary life policy, providing therein that in the event of the death of the assignee, the benefits of the policy would revert to him and the assignee is alone entitled to receive the sum assured in case of the death of the insured before the day named—*Shamdas v. Sabitribai*, A.I.R. 1937 Sind 181, 170 I.C. 225. The hypothecation of a life policy can only be made by an instrument in writing which need not be in terms an absolute transfer, but it must be clear from the instrument that the deposit of the life policy is being made with the intention of creating a title in the person with whom the deposit is made—*Kali Mohan v. Empire of India Life Assurance Co.*, supra; *Official Assignee v. Hukum Chand*, supra. But a mere intention to create a pledge does not amount to a pledge within the meaning of this section—*Ibid.* An instrument evidencing a pledge and nothing more cannot be read as an assignment and therefore does not satisfy the requirements of this section—*Ibid.* Although the pledge has a special interest in the property as the holder of security, he is not a transferee—*Ibid.*

In a Madras case it was held, following the English law, that the transfer of a debt must be of the *whole* debt, and that a transfer of a *portion* of a debt is not recognised—*Doraisami v. Doraisami*, 48 M.L.J. 432, A.I.R. 1925 Mad. 753 (756), following *Durham v. Robertson*, (1895) 1 Q.B. 765. But in a subsequent case of the same High Court it has been ruled that although a transfer of a part of a debt was not recognised in English Common Law, the assignment of a part of a debt has always been held to be good in Equity, and is deemed to pass the property in that portion of the debt. In enforcing such claim it would be necessary to implead the owner of the other portion of the debt, but apart from that there is no objection in equity to the enforcement of a claim for part payment of a debt—*Rajamier v. Subramaniam*, A.I.R. 1928 Mad. 1201 (1207), following *In re Steel Wing Co.*, [1921] 1 Ch. 349, and virtually dissenting from *Doraisami v. Doraisami*, supra; *Rajamier v. Subramaniam*, has been followed in *Official Liquidator, Travancore N. B. S. Co. v. Official Liquidator, Travancore N. & Q. Bank*, supra. Relying upon the earlier Madras case, the Calcutta High Court has held that an assignment of a debt to be valid must be of the whole debt. Where partners in a firm became insolvent and there was also a minor partner, the assignment by the Official Assignee of debt due to the firm could not be said to be of the whole debt, because the minor's interest in the partnership could not be assigned—*Ghisulal v. Gumbhirmull*, A.I.R. 1938 Cal. 377 (381), 62 Cal. 510, 89 C.W.N. 606, 164 I.C. 111. Following this case it has been held that where the debt is a joint debt, an assignment by one of the joint creditors would not enable the assignee to enforce the payment of the whole debt—*In re A. K. Fazlul Huq*, A.I.R. 1937 Cal. 532. In *Bibi Haliman v. Bibi Umadatunnissa*, A.I.R. 1939 Pat. 506 (508), 181 I.C. 37, Wort, J. of the Patna High Court has held (obiter) that a part of a debt or part of a chose in action is not assignable. But in a later case Harris, C.J. and Fazl Ali, J. of the same High Court have held that the T. P. Act does not recognize any distinction between the whole debt and part of a debt. Both may be transferred under the Act if they come under the category of "actionable claim", as an actionable claim is property. Or. 2, r. 2, C. P. Code being a rule of procedure does not affect the right

of transfer. It does, however, bar the right of suit in certain cases and it may prevent the transferee of a part of a debt enforcing his claim and thereby make the transfer nugatory, as under Or. 2, r. 2, C. P. Code a single cause of action cannot be allowed to be spilt up into several causes of action—*Durgi Singh v. Kesho Lal*, 18 Pat. 839, A.I.R. 1940 Pat. 170; 185 I.C. 514. The same view has been taken by the Lahore High Court in *Ram Kishen v. Gurdial*, A.I.R. 1941 Lah. 337, where it has been further held that an action can be maintained for a part of a debt transferred provided the transferee makes the transferor and the other transferees concerned parties to the suit. Such a suit cannot fail merely because on the objection of the debtor the other assignees were struck off the record—*Ibid.*

A as sole proprietor, of A and sons, made a contract with B. A then as karta of the joint Hindu family firm of A and sons assigned the benefit of the said contract to C. This assignment does not affect B's liability to pay A and in law to pay his assignee C. The apprehension of B that by paying the assignee he would not get a complete discharge is baseless because the coparceners having no privity of contract with him cannot sue B under the contract—*Jethalal v. Municipal Corporation*, A.I.R. 1954 Bom. 167.

A transfer of an actionable claim is to be distinguished from a *novation of a contract*, which does not require any writing. Thus, where there is a debt due by A to B, and another debt due by C to A, and the three parties meet and agree that instead of A paying B, and C paying A, C shall pay B. The result of such an arrangement is to destroy the old debts which A owed to B, and which C owed to A, and to substitute a new debt by C to B. This is something different from a mere transfer of the debt—*Jivraj v. Lalchand*, 56 Bom. 462, 34 Bom. L.R. 837, 139 I.C. 582, A.I.R. 1932 Bom. 446 (447); see also *Kadusao v. Surajmal*, A.I.R. 1936 Nag. 37 (38, 40), 161 I.C. 787.

A *dedication* is not a *transfer*; consequently, a dedication of an actionable claim to a temple is not a transfer of an actionable claim, and is not governed by section 130, but may be made *orally*—*Bhopatrao v. Sri Ramchandra*, A.I.R. 1926 Nag. 469, 96 I.C. 1004.

As this Act is not in force in the Punjab, the technical rule requiring an assignment of an actionable claim to be made in writing is not applicable to that province. Consequently, an oral assignment of a promissory note is valid—*Locha Ram v. Hem Raj*, 33 P.L.R. 120, 134 I.C. 121. Section 130 can, however, be invoked to justify the assignment of a debt as an actionable claim, as the principles of the Act as distinct from its technicalities should be applied to the Punjab—*Ram Kishen v. Gurdial*, *supra*. In provinces where the Act does not apply, a *hundi* can be assigned orally subject to all equities as a chose in action independent of the Negotiable Instruments Act XXXVI of 1881, so as to give the assignee *locus standi* to sue thereon—*Kalu Ram v. Feroze Shah*, A.I.R. 1941 Pesh. 45; *Ram Rattan v. Gobind Ram*, A.I.R. 1939 Lah. 501, 185 I.C. 426.

Effect of clause (1):—The effect of cl. (1) in the cases which it covers is to confer without notice to the debtor a legal title on the transferee as opposed to an equitable title only. But it cannot be too strongly em-

phased that its purpose and effect is merely to confer a title and to enable the assignee to sue in his own name and has nothing to do with possession—*In re Stephens*, A.I.R. 1938 Rang. 1 (5), 175 I.C. 786.

650. Transfers how effected:—A transfer of an actionable claim can be effected simply by the execution of an instrument in writing. Nothing more is necessary. The provisions of secs 54, 59 and 123 regarding sales, mortgages and gifts do not apply to a sale, mortgage or gift of an actionable claim. A gift of an actionable claim may therefore be made without a *registered* instrument as required by sec. 123—*Syed Yacoob v. Pancha Bibi*, 4 L.W. 339, 38 I.C. 248. This is now made clear by the amendment made in 1929 by which the words “whether with or without consideration” have been newly added in this section. See Notes under heading “Amendment” above. The view expressed by Duckworth, J., in *K. V. v. Chettiar*, 5 Bur. L.T. 179, A.I.R. 1927 Rang. 39, that a transfer of an actionable claim can be made only by a *registered* instrument, is erroneous.

The transfer can only be made in writing—*Velayutham v. Pillaiyar*, 9 M.L.T. 102, 9 I.C. 287; an oral transfer is not valid—*Raman Chetty v. Nagaratna*, 11 M.L.T. 246, 15 I.C. 880. The rent in arrear and current due can only be transferred “by the execution of an instrument in writing signed by the transferor or his duly authorized agent”—*Rameshwar v. Ruknath Kori*, A.I.R. 1923 Pat. 165 (166), 67 I.C. 451. Even a gift of an actionable claim by a Mahomedan must be in writing—*Mt. Alimunnissa v. Abdul Aziz*, A.I.R. 1936 Pat. 527 (529, 530), 165 I.C. 298. See “Amendment”, *ante*. The mere *delivery* of a promissory note without any endorsement or written transfer is not sufficient to effect a transfer—*Akhoy Kumar v. Hari Das*, 18 C.W.N. 494, 22 I.C. 510. So again, the mere deposit of a policy of life insurance does not effect a transfer (mortgage) of the policy in favour of the deposittee—*Mulraj v. Viswanath*, 37 Bom. 198 (P.C.), 17 I.C. 627; *Official Assignee v. Thompson*, 8 Bur. L.T. 157, 30 I.C. 602. See also *Official Assignee v. Hukumchand*, A.I.R. 1941 Mad. 147, (1940) 2 M.L.J. 891, 1940 M.W.N. 1290 and *Kali Mohan v. Empire of India Life Assurance Co.*, 44 C.W.N. 593. A life policy may be validly assigned by an instrument in writing signed by the transferor. It is immaterial if such instrument is written on a separate piece of paper or is endorsed on the policy itself. Though an endowment policy creates a contingent interest, it is assignable under sec. 130 read with sec. 21—*Shamdas v. Sabitribai*, A.I.R. 1937 Sind 181, 170 I.C. 225. When A had effected a policy of insurance upon his own life and it was expressed to be for the benefit of his wife, *held* that in the absence of an assignment in writing, the beneficial interest under the policy would not pass to A's widow upon his death—*Shankar v. Umabai*, 37 Bom. 471, 19 I.C. 736. In this case, sec. 6 of the Married Women's Property Act (III of 1874) could not be applied, because that section was held to be inapplicable to a policy of insurance effected by a Hindu for the benefit of his wife and children. But this ruling (37 Bom. 471) is no longer good law in view of the enactment of the Married Women's Property Amendment Act (XIII of 1928), which makes the provisions of sec. 6 of the Married Women's Property Act, 1874 applicable to policies effected by Hindus, Muhammadans, etc., after the 1st April 1923. See also *Krishnan v. Velayu*, I.L.R. (1938) Mad. 909 (F.B.).

The validity of an assignment of an actionable claim involving a foreign element is to be determined by the proper law of the assignment—*Rabindra N. Maitra v. Life Insurance Corporation of India*, A.I.R. 1964 Cal. 141. No written instrument is necessary for the assignment of a joint promissory note in partition—*Asuram v. Niranjandass*, I.L.R. (1963) 13 Raj. 963.

An arrangement made by the partners on dissolution of a partnership that the remaining partners are to be entitled to the debt due to the firm is an arrangement amounting to a transfer of an actionable claim and as such can only be made by a writing signed by the other partners—*Virbhandas v. Dasumal*, A.I.R. 1939 Sind 288 (289), I.L.R. 1939 Kar. 344, 185 I.C. 28; see also *Mulchand v. Shamdas*, A.I.R. 1941 Sind 73. But see *Bharat Prasad v. Paras Singh*, A.I.R. 1964 All. 15.

The words “duly” as used in this section means “lawfully”, and where the law requires a person to be lawfully authorized, the ratification of assignment by an agent will have retrospective effect and cure a defect in his authority—*Govardhandas v. Friedmans Diamond Trading Co.*, A.I.R. 1939 Mad. 543, 1939 M.W.N. 290, 49 M.L.W. 375.

An assignment of an actionable claim must conform strictly to the provisions of this section, and there must be words of transfer in the instrument—*Balaram v. Gopinath*, A.I.R. 1954 Or. 44; *Alkash Ali v. Nath Bank Ltd.*, infra. Where a letter written by an insurance agent did not show that he was transferring his interest in the commission and it was not addressed to the chief agent, it was held that the letter did not effect an assignment of the commission—*ibid.* See in this connection *Union of India v. Bank of the East*, A.I.R. 1954 Ass. 23. This section does not, however, require that the assignment of an actionable claim should be in any particular form or that there should be consideration for it. No particular words are necessary if the intention to transfer is clear from the language used—*Ramaswami v. Manickam*, A.I.R. 1938 Mad. 236 (238), 47 M.L.W. 118; *Alkash Ali v. Nath Bank Ltd.*, A.I.R. 1951 Ass. 56, (1951) 3 Ass. 1. A power of attorney executed by a contractor in favour of a bank embodying an arrangement that the bank would advance money to the contractor on the security of the bills that were to accrue due, and it gave the bank the necessary authority for collection of the bills: Held that it served the purpose of a writing required under this section—*ibid.* An endorsement on the bond containing a direction to pay the amount due on the bond to the plaintiff, coupled with the delivery of the instrument so endorsed to the plaintiff, amount to a valid transfer of the instrument so as to enable the plaintiff to sue upon it—*Rama Iyer v. Venkatachellam*, 30 Mad. 75; *Kissen Gopal v. Bavin*, 42 C.L.J. 43, 89 I.C. 735, A.I.R. 1926 Cal. 447. There is no transfer of an actionable claim when a contractor gives sole power of attorney in favour of a bank advancing him money on overdrafts and surrenders all rights to receive payment of bills; and sec. 130 is not attracted—*Bank of East v. State of Assam*, A.I.R. 1958 Assam 22; *Madan Monohar v. Narayan Sadashio*, 1958 Nag. L.J. 279. A non-negotiable promissory note may be assigned by a separate deed without any endorsement on the note itself and the assignee will be entitled to sue upon it—*Sugappa v. Govindappa*, 12 M.L.J. 351. It would also be sufficient if the transfer is evidenced by a partition list; for the

partition list is a writing and therefore satisfies the requirements of this section—*Venkatadri v. Lakshminarasimha*, 21 M.L.J. 80, 8 I.C. 83. An assignment made in a statement of accounts by way of an entry in an account book is an assignment in writing within the meaning of this section—*Seetharama v. Narayanaswami*, 47 I.C. 749. If a bond is delivered by the creditor to the transferee without any endorsement on it, and the creditor also gives a letter to the transferee in which he requests the debtor to pay the money to the transferee, the letter constitutes a valid assignment under this section—*Konjeti Veerasawmy v. Varada Veerasawmy*, 13 M.L.T. 77, 16 I.C. 708. Whether certain bales of cotton held as security by one creditor were transferred in favour of another to be held by him as security, and the next day the debtor wrote to the latter a letter which after stating the total amount of indebtedness continued: "As against the said amount our bales which are lying with (previous creditor) and are got transferred to your name," held that the writing amounted to a valid transfer—*Jivraj v. Lalchand*, 56 Bom. 462, 139 I.C. 582, A.I.R. 1932 Bom. 446 (448). A deposit receipt of a Bank may be validly assigned by an endorsement on the receipt together with a letter given to the transferee in which the transferor directs the Bank to pay the money to the bearer—*Sethna v. Hemingway*, 38 Bom. 618, 16 Bom. L.R. 534, 28 I.C. 144. The right to enforce the reserve liability of a shareholder is an actionable claim. Where a company has completely assigned its right to receive uncalled share capital to another Corporation by way of an English mortgage, the uncalled money can be recovered only by the transferee Corporation and not by the liquidator of the transferor company—*Narayan Chettiar, In re*, A.I.R. 1958 Mad. 34.

The instrument in writing by which the actionable claim is transferred must be an instrument of *transfer*. A deed of *relinquishment* is not an instrument of transfer, and therefore where a partner of a partnership business executed a deed of release by which he gave up his claim to the business and declared that henceforth the business should be conducted by H and D, held that there was no transfer in favour of H and D, and no title passed to them—*Dharam Chand v. Mouji*, 16 C.L.J. 436, 16 I.C. 440. If on the dissolution of a joint family firm a promissory note in favour of the firm is allotted to the share of one of the partners without any indorsement or written instrument the allottee get a good title as the transaction is not hit by sec. 130—*Asuram v. Niranjandass*, I.L.R. (1963) 13 Raj. 963.

There must be words of transfer in the instrument of transfer. A mere *notice* to the debtor asking him to pay the debt to the assignee, does not amount to a transfer of the debt; thus, where the assignment of a debt consisted of a letter from the assignor to the assignee and another letter by the assignor to the debtor intended to be a notice under sec. 130, T. P. Act, and the letter of assignment (which was not proved to be stamped) was lost, held that the second letter, which was merely a notice to the debtor not containing any words of transfer nor referring to the transfer, was not sufficient to operate as an instrument of transfer. An instrument of transfer should, except in special cases, be in favour of the assignee, whereas a notice is addressed to the debtor—*Doraisami v. Doraisami*, 48 M.L.J. 432, 87 I.C. 382, A.I.R. 1925 Mad. 753 (754). So

also, a mere direction for payment of money to a certain person does not amount to an assignment of the money to that person. Thus, a company sold and delivered to Kilburn & Co., a lathe for a certain sum. One G claimed to be entitled to the sum by virtue of an assignment alleged to have been made by the company. The assignment on the back of the bill against Kilburn & Co., was in these terms: "Messrs. Kilburn & Co., kindly remit to G who will collect on our behalf." Held that the above words did not amount to an assignment of the debt due to the company, but to a mere order for payment of the money due from Kilburn & Co.—*Kissen Gopal v. Bavin*, 89 I.C. 735, 42 C.L.J. 43, A.I.R. 1926 Cal. 447 (449). See also *B. N. Railway Employees' Urban Bank v. Seager*, A.I.R. 1942 Pat. 307, 23 P.L.T. 35. But see *Prokash Chandra v. Kays Construction Co.*, A.I.R. 1962 Cal. 654.

This section does not apply to assignments of negotiable instruments (sec. 137); such instruments can be assigned according to the provisions of the Negotiable Instruments Act—*Venkatadri v. Lakshminarasimha*, 21 M.L.J. 80, 8 I.C. 33. But an assignment of a non-negotiable instrument must be made according to the rules under this section. Thus, a deposit receipt is not a negotiable instrument which can pass either by delivery or by endorsement under the Negotiable Instruments Act. It must be assigned according to the provisions of this section—*Sethina v. Hemingway*, 38 Bom. 618, 28 I.C. 114; *Anantaraman v. Perrie*, A.I.R. 1940 Mad. 157, 1939 M.W.N. 1096, 187 I.C. 531.

In a joint Hindu family business the members can, on retirement, relinquish their interest in favour of the continuing co-parceners and no instrument in writing is necessary for transferring their claim under this section—*Brijmohan v. Mahabir*, 40 C.W.N. 808.

651. Notice :—The validity of the transfer does not depend upon the giving of notice to the debtor, although it may be necessary for the transferee to give notice to prevent the debtor from dealing with the debt to the prejudice of the transferee—*Viswanath v. Mulraj*, 13 Bom. L.R. 590, 11 I.C. 964; *Kalka Prashad v. Chandan*, 10 All. 20. Notice of transfer is not essential to perfect the title of the assignee of an actionable claim, but until the debtor receives notice of the assignment, his dealings with the original creditor will be protected. In other words, if the debtor pays the debt to the original creditor without having any notice of the transfer, he will not be bound to pay it over again to the assignee—*Gopala Krishna v. Gopala Krishna*, 33 Mad. 123; *Basant Singh v. Burma Railways Co.* 8 L.B.R. 288; *Balkhazar & Son Ltd., v. Official Assignee*, A.I.R. 1938 Rang. 426, (1938) R.L.R. 480. But any payment by the debtor to the original creditor, after notice of the transfer, is made at the risk of the debtor and will not absolve him from liability to the transferee—*Gopala Krishna v. Gopala Krishna*, 33 Mad. 123. This subject has been thus elaborately explained in a Calcutta case:—"It is well settled according to English law that it is not necessary to the validity of an assignment of a debt as between the assignor and assignee that notice should be given to the debtor. The assignment, therefore, is perfectly valid though no notice is given. But the title of the assignee as against third persons is not complete until he has given notice, and the reason is this: As between the debtor and assignor the liability on the part of the debtor is still

subsisting, and the debtor may pay the assignor, or the assignor may afterwards assign to a third party who gives notice and thereby acquires priority. Notice, therefore, ought to be given by the assignee to protect himself, and for this purpose only. It is immaterial to the debtor whether he pays his money to the original creditor or to some third person claiming through such creditor, so long as he gets a discharge for his debt. If he pays the assignor, having no notice of the assignment he is protected. The assignment does not in any way affect the liability of the debtor to discharge his debt, but the assignee should take care to let the debtor know that it is he and not the original creditor who is entitled to be paid. It is therefore only for the protection of the assignee that notice ought to be given"—per Mitter and Agnew, J.J. in *Lala Jagdeo v. Brij Behari*, 12 Cal. 505 (509, 510). The assignment is not however valid as against the debtor until he in fact has notice of the assignment and therefore any payment by the debtor of the debt due from him to his original creditor is valid as against the assignee until notice of the assignment is given—*Tata Iron & Steel Co. v. Baidyanath*, A.I.R. 1924 Pat. 118 (119), 2 Pat. 754, 76 I.C. 55. A debtor cannot after notice of the assignment pay a portion of the debt, even under the Court's order in a case to which the assignee was not a party, so as to protect him from paying it over again to the assignee—*Burmah Shell Oil Storage & Co. v. Official Receiver*, A.I.R. 1943 Mad. 244, (1942) 2 M.L.J. 661. It is not incumbent upon the assignee of a promissory note to issue notice to the promisor forthwith after the assignment. Where therefore the assignee issued such notice nearly a year after the assignment, there was no negligence on the part of the assignee—*Krishaiiah v. Manikyaraw*, A.I.R. 1948 Mad. 171, (1947) 2 M.L.J. 196. Where after the notice of assignment of a debt to the debtor by the heirs of a deceased creditor, the assignors obtained succession certificate and recovered the debt from the debtor by virtue thereof, the debtor obtains a valid discharge of the debt—*Keshavji v. Nanji*, A.I.R. 1950 Kutch 49 (1).

As to the endorsement "refused" made by postal servant and the value thereof in respect of a notice sent by post, see *Kanraj v. Vijai Singh*, A.I.R. 1951 Raj. 74. Delivery of a copy of the plaint in a suit for recovery of the debt by the transferee of an actionable claim along with the summons served on the debtor, cannot be deemed to be a notice of the transfer of the debt—*ibid.*

Where there are two transferees, the transferee who first gives notice to the debtor does not acquire any priority over the other transferee, but the transferees take in the order of the date of transfer—*Vishwanath v. Mulraj*, 13 Bom. L.R. 590, 11 I.C. 964.

As to the essentials of notice see next section.

Effect of transfer :—A transfer of an actionable claim takes effect immediately from the date of the transfer, and not from the date of notice which the transferor or transferee may or may not give to the debtor—*Kanraj v. Vijai Singh*, A.I.R. 1951 Raj. 74; *Santuram v. Trust of India Assurance Co.*, A.I.R. 1945 Bom. 11, 46 Bom. L.R. 752. Accordingly after the execution of the transfer no decree can be passed in favour of the transferor plaintiff even if the transferee is impleaded as defendant in the suit—*ibid.* The position would however be different if the plaintiff trans-

feror had an interest jointly with the transferee in which case a decree could be passed in favour of the transferor plaintiff and the transferee—*ibid.* As to the case of a collusion between the transferee and the debtor for defeating the rights of the transferor, see this case.

From the date of assignment, all the rights of the transferor in the actionable claim vest in the transferee. If a debt is transferred by way of the sale, but the transferor in spite of the sale realises the amount of such debt, it is just and equitable that the vendee should be allowed credit for the amount so realised, out of the consideration—*Ramdas v. Dwarka*, A.I.R. 1930 All. 875 (876), 128 I.C. 763. Even prior to the enactment of sec. 38 (7) of the Insurance Act, 1938, an assignment of a life policy on condition that the policy should revert to the assured if the assignee predeceased him before maturity was valid in law. On such a conditional assignment an immediate vested interest is created in the assignee and such an assignment is not revocable. It completely divests the assignor of any right under the policy. The assignment, however, becomes imperative on the happening of the condition—*In re Khairunnissa Begum & Others*, A.I.R. 1955 Mad. 459.

Consent of debtor, not necessary :—The consent of the debtor is not necessary for the assignment of an actionable claim. The assignment, therefore, does not become invalid for want of such consent—*Seetharama v. Narayanaswami*, 47 I.C. 749.

652. Sub-section (2)—who can sue after transfer :—The transferee is the only person who can sue for the debt after transfer—*Arunachalam v. Madaswami*, 27 M.L.T. 269; *Muthukrishna v. Veeraraghava*, 38 Mad. 297, 21 I.C. 316. He can sue in his own name and it is not necessary for him to obtain the transferor's consent, or to make him a party to the suit. In a Madras case, it has been held that although sec. 130 lays down that when an actionable claim is transferred, all the rights and remedies of the transferor are transferred to the transferee, still the transferor may maintain an action on the claim for the benefit of the transferee, and hand over the amount when collected to the transferee—*Chandrasekaralingam v. Nagabhushanam*, 53 M.L.J. 342, A.I.R. 1927 Mad. 817, 104 I.C. 409. An unqualified endorsement on a railway receipt transfers to the endorsee the property in the goods covered by the receipt as well as the right and benefit of the contract of carriage and the endorsee can enforce the performance of the contract by a suit in his own name—*Shah Mulji Deoji v. Union of India*, A.I.R. 1957 Nag. 31. But see *Commissioners, Port of Calcutta v. General Trading Corporation*, 68 C.W.N. 410 where it has been held that a mere endorsement and delivery of the railway receipt, without any consideration, is not intended to confer any proprietary right in the goods on the indorsee and that such an endorsee cannot sue the railway for the loss of goods or damages to them. See also *Ibrahim v. Union of India*, A.I.R. 1966 Gujrat 6 where it has been held that a mere endorsee of a Railway receipt cannot sue the Railway for short delivery and that a Railway receipt is not an actionable claim.

As notice is not a condition precedent to the validity of a transfer of a debt, it is competent to the transferee to bring a suit against the debtor without giving a previous notice of the assignment. The suit is not liable to be dismissed on the ground that no notice of the assignment was given

to the debtor. Even if notice to the debtor is necessary, the institution of the suit is in itself a notice of the assignment—*Kalka v. Chandan*, 10 All. 20 (27); *Lala Jagdeo v. Brij Behari*, 12 Cal. 505 (510); *Subbammal v. Venkatarama*, 10 Mad. 289 (290). These cases were decided, before the Amendment of 1900 under the old section 131, which required that the debtor must have notice or must be otherwise aware of the transfer, before he could be made liable to the transferee. Under the present section, notice to the debtor is not at all necessary.

130A. [*Transfer of policies of marine Insurance*—repealed by section 92 Marine Insurance Act, 1963 with effect from 1st August, 1963.]

The repealed section 130A stood as follows :

(1) *A policy of marine insurance may be transferred by assignment unless it contains terms expressly prohibiting assignment, and may be assigned either before or after loss.*

(2) *A policy of marine insurance may be assigned by endorsement thereon or in any other customary manner.*

(3) *Where the insured person has parted with or lost his interest in the subject matter insured, and has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative :*

Provided that nothing in this sub-section affects the assignment of a policy after loss.

(4) *Nothing in clause (e) of section 6 shall affect the provisions of this section.*

653. This section was inserted by the Transfer of Property (Amendment) Act VI of 1944. This section having been incorporated into the comprehensive code on Marine Insurance, has been proved to be redundant and as such has been repealed.

131. Every notice of transfer of an actionable claim shall be in writing, signed by the transferor or his agent duly authorized in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.

654. **Essentials of notice :—**The notice to be given to the debtor must be an express notice, and not merely constructive ; see para 2 of sec. 130.

The old section 132 (before the amendment of 1900) contained the words "Every such notice must be in writing signed by the person making the transfer or by his agent duly authorised in this behalf." That is, it contained no provisions as to giving of notice by the *transferee*. And so it was held that as this section did not provide for the assignee giving notice in a particular way, all that was required of him was to make the debtor somehow aware of the transfer. And therefore the service of the summons

on the debtor in a suit by the assignee against him was held to be sufficient notice—*Ragho v. Narayan*, 21 Bom. 60 (63). In this case, Farran, C.J. expressed the opinion that the duty of giving notice should be cast upon the transferee. "Before the passing of the Transfer of Property Act, it was the assignee upon whom it was incumbent for his own protection to give notice of the assignment to the debtor. There is no particular reason why the assignor should give it. We cannot help thinking that there has been a slip made in sec. 132 (now 131) in throwing upon the person making the transfer the obligation of giving express notice to the debtor.....The attention of the Legislature may well be directed to the point"—*Ragho v. Narayan*, 21 Bom. 60 (62). Out of deference to these remarks the Legislature added the words "or in case.....transferee," thus making a provision for the giving of the notice by the transferee. But still the Legislature has cast the duty of giving notice *primarily upon the transferor*, and it is only when he refuses to give the notice that the transferee may give it. The notice which the transferor gives must be a valid and sufficient notice; if the transferee finds it insufficient, he is entitled to give a notice of his own—*Gopala Krishna v. Gopala Krishna*, 33 Mad. 123.

The notice of transfer is to be given by the transferor and if given by the transferee it should be alleged or shown that the transferor had refused to sign the notice, although it is not necessary to mention that fact in the notice—*Kanraj v. Vijai Singh*, A.I.R. 1951 Raj. 74.

The notice must contain the name and address of the transferee. The reason is thus stated by the Select Committee: "A notice in general terms not stating the name and address of the transferee would not be sufficient as a safeguard against fraud. A debtor is, we think, entitled to know the name and address of the person to whom he becomes liable on a transfer of the claim against him." Though there be a valid transfer of a debt between the transferor and the transferee, the person bound to pay the debt is not bound by the transfer unless he receives an express notice in writing conforming to the provisions of sec. 131, from the transferor, or if he refuses to sign, from the transferee, stating the name and address of the transferee—*Basant Singh v. Burma Ry. Co. Ltd.* 8 Bur. L.T. 266, 30 I.C. 278. Where the notice given by the transferor did not contain the address of the transferee, it was held to be insufficient—*Hansraj v. Nathoo*, 9 Bom. L.R. 838. So also, a notice which did not state the address of the assignee but his solicitor's address, was held to be defective—*Sadasook v. Hoare Miller & Co.*, 27 C.W.N. 733, A.I.R. 1923 Cal. 719 (720), 41 C.L.J. 176.

The notice must be given to the person concerned or to his agent authorised to receive such notice—*Basant Singh v. Burma Ry. Co. Ltd.*, (supra).

132. The transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.

Liability of transferee of actionable claim.

Illustrations.

- (i) A transfers to C a debt due to him by B, A being then indebted

to B. C. sues B for the debt due by B to A. In such suit B is entitled to set off the debt due by A to him, although C was unaware of it at the date of such transfer.

(ii) A executed a bond in favour of B under circumstances entitling the former to have it delivered up and cancelled. B assigns the bond to C for value and without notice of such circumstances. C cannot enforce the bond against A.

Scope :—This section of itself does not apply to a transferee who purchases at a Court-sale, but the principle hereof will apply. One general principle is that the transferee of a debt, decretal or non-decretal, cannot get rid of the commitments and disabilities to which the original holder is subject. Thus where a person purchases a debt during the pendency of a suit in relation to it, he takes it subject to the result of that suit against the creditor—*Ramchandra v. Shankar*, A.I.R. 1944 Nag. 98, I.L.R. 1944 Nag. 170.

655. Liabilities of the assignee :—The assignee is bound by all the terms and conditions to which the debt assigned may have been subject. He will therefore be bound by an order of the Court previously passed relating to the subject-matter of the assignment—*Subbaraya v. Srinivasa*, 10 M.L.J. 211.

The debtor has a right to set off any counter-claim against the assignee which he could have done against the assignor—*Kaim Ali v. Luckhy Kant*, 10 W.R. 32 (F.B.) ; *Ram Bhaj v. Ram Das*, 3 Lah. 414, 69 I.C. 720, A.I.R. 1923 Lah. 261 ; *Kristo Ramani v. Kedar Nath*, 16 Cal. 619 ; and this the debtor can do even when the amount claimed to be set off is due under a transaction independent of and unconnected with the claim assigned to the plaintiff—*Arunachellam v. Subramania*, 30 Mad. 235 ; *Subramanian v. Kiradadasan*, 1912 M.W.N. 1235, 16 I.C. 686. Such a set-off is enforceable even though the plaintiff was the purchaser of the actionable claim in *Court auction* : though the Act does not apply of itself to a transferee who purchases in a Court-sale, still the principle of this section will apply to such transfers—*Subramanian v. Kiradadasan*, 1912 M.W.N. 1235, 16 I.C. 686. See also *Ram Bhaj v. Ram Das*, 3 Lah. 414, where the plaintiff purchased the debt in *Court auction*. Where a debtor on receiving notice of the assignment of the debt, sees that the assignee is deceived and yet stands by and allows the assignee to be defrauded, he will not be allowed to set up an equity which he has against the assignor—*Brahmayya v. K. P. Thangavelu Nadar*, A.I.R. 1956 Mad. 570.

The debtor is entitled to set off against the transferee not only a counter claim which existed at the time of the assignment, but also a claim which accrued to him *after* the assignment, provided the assignee had notice of such claim. Thus, A obtains a decree against B for Rs. 5,000. B then sues A for Rs. 2,000. Pending B's suit A transfers his decree to C *who has notice* of B's suit. A decree is then passed in B's suit. C applies for execution against B of the decree for Rs. 5,000. B will be entitled to set off his decree for Rs. 2,000 which he has obtained against the assignor A, as C is a transferee with notice of B's suit. C will therefore be not entitled to execute for more than Rs. 3,000—*Kristo Ramani v. Kedar Nath*, 16 Cal. 619. This principle however has not been applied to an assignment of a

mortgage, as a mortgage is not an actionable claim. Therefore in a suit by the assignee of a mortgage, the debtor (mortgagor) will not be allowed to set off any claim obtained by him against the assignor (original mortgagee) subsequent to the date of assignment—*Subramania v. Subramania*, 40 Mad. 683, 34 I.C. 859. It has been held by the Nagpur High Court that the claim of set-off under this section cannot be allowed in a suit to recover arrears of profit in a village share transferred to a co-sharer, as right to such profits is not an actionable claim but a benefit arising out of land and hence immoveable property—*Kamal v. Shyamal*, A.I.R. 1936 Nag. 217 (218), 165 I.C. 414.

A pledge of a promissory note vests in the pledgee all the rights and the remedies of the pledgor subject to all equities which remained in the pledgor. The pledgee is the only person entitled to sue for the debt due under the pro-note, and if he omits to sue and allows the debt to become time-barred, he is accountable to the pledgor for the amount of the debt—*Muthu Krishna v. Veeraraghava*, 38 Mad. 297, 21 I.C. 316 following *Shyam Kumari v. Rameswar*, 32 Cal. 27 (P.C.), and *Mulraj v. Viswanath*, 37 Bom. 198 (P.C.). Where a vendor sells the equity of redemption in a property after the right of redemption had been extinguished by a deed containing the usual clause for indemnity and the vendee executes a bond for a part of the purchase money, the assignee of the bond cannot recover anything on the bond and he cannot be heard to say that the defendant was liable on the doctrine of *caveat emptor*—*P. Sankunny Menon v. Thommen Mathai*, A.I.R. 1956 Trav.—Co. 80.

Since the assignee of an actionable claim takes it subject to all existing equities, the onus of proving affirmatively that the assignment is free from an existing right is upon the assignee—*Venkata Subbiah, v. Subba Naidu*, 1915 M.W.N. 822, 31 I.C. 152. But it has been held by the Madras High Court that where a fixed deposit receipt is validly assigned and the bank is informed about the assignment, the bank has no right of set off or adjustment against the deposit—*Brahmayya v. K. P. Thangavelu Nadar*, A.I.R. 1956 Mad. 570.

133. Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration.

656. This section does not make it compulsory on the part of the assignor to give the assignee any warranty as to the solvency of the debtor, nor does it mean that in every assignment of an actionable claim there shall be implied a covenant by the assignor to warrant the solvency of the debtor. This section merely lays down a rule of construction to be applied only when the assignor actually gives such warranty to the assignee. If the assignor gives the warranty, it means that the debtor is solvent *at the date* of the transfer. The insolvency of the debtor *after* the date of the transfer does not entail any liability on the transferor. But the assignor should do nothing in derogation of his deed, which may pre-

vent effect being given to his assignment—*Aulton v. Atkins*, 25 L.J. (P.C.) 229.

Further, the liability of the transferor as regards the solvency of the debtor is only limited to the extent of the amount of the consideration received by him and not to the extent of the amount of the debt.

134. Where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by the transferor or recovered by the transferee, is applicable, first, in payment of the costs of such recovery : secondly, in or towards satisfaction of the amount for the time being secured by the transfer ; and the residue, if any, belongs to the transferor or other person entitled to receive the same.

Mortgaged debt.

657. Scope :—This section does not allow the transferor to recover the debt. Accordingly, after the transfer no decree can be passed in favour of the transferor in a suit by him even if the transferee is impleaded as a defendant—*Santuram v. Trust of India Assurance Co.*, A.I.R. 1945 Bom. 11, 46 Bom. L.R. 752. A debt can be transferred apart from the security, though the debt can be realized by enforcing the security by the mortgagee or the assignee from him. It is equally partible. So under the Hindu Women's Rights to Property Act, 1937, before its amendment by Act XXVI of 1947 a Hindu widow was entitled to a share in a mortgage debt secured on both agricultural and other movable properties—*Veerayamma v. Venkamma*, A.I.R. 1951 Mad. 809, (1951) 1 M.L.J. 364.

A transfer of an actionable claim (e.g., debt) can be made not only by way of absolute sale, but also by way of mortgage—*Muthu Krishna v. Veeraraghava*, 38 Mad. 297, 21 I.C. 316.

An assignment by way of security of a book-debt of a company (in this case bills) for securing an existing debt constitutes a mortgage of the debt—*Ranjit v. David*, A.I.R. 1935 Cal. 218, 38 C.W.N. 1190, 155 I.C. 193. It has been observed in this case that the wordings of this section read with sec. 130 are anomalous inasmuch as instead of saying "residue belongs to the transferor" it ought to have said "residue if any shall be transferred by the original transferee to the original transferor". It is submitted with respect that if the debt is received by the transferor no question of re-transfer arises. If, on the other hand, the debt is recovered by the transferee, it is money in his hands and so "re-transfer" would be hardly the appropriate word. As to the criticism that under sec. 130 all the rights including the right of ownership pass to the transferee, it may be submitted that this is subject to the latter provision in sec. 134 regarding mortgage of a debt.

Though this section speaks only of a mortgage, it is obvious that a charge-holder has the same right as a mortgagee. And consequently the holder of a charge on a debt due to his debtor, by way of security for his own loan, is to be treated as a transferee of an actionable claim, and so entitled to recover the debt from the transferor's debtor—*Muthu v. Venkatachellum*, 20 Mad. 35; *Ramasami v. Muthu*, 34 Mad. 53, 5 I.C. 834; *Ardeshir v. Syed Sirdar*, 33 Bom. 610. See also *Imperial Bank of India v.*

Bengal National Bank, 59 Cal. 377 (P.C.), 35 C.W.N. 1034 (1040), A.I.R. 1931 P.C. 245.

135. Every assignee, by Assignment endorsement or of rights other writing, of a under marine policy of marine or fire policy of insurance. insurance or of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself.

135. Every assignee, by Assignment endorsement or other of rights writing, of a policy under policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself.

For the original sec. 135 this new section has been substituted by the Transfer of Property (Amendment) Act VI of 1944.

The original section reproduced the only unrepealed section of the Policies of Insurance (Marine and Fire) Assignment Act, 1866 (V of 1866). Inasmuch as the provisions of that enactment constituted an exception to the rule laid down in section 130, they ought to have found a place in this chapter.

135A. *Assignment of rights under policy of marine Insurance*—repealed by section 92 Marine Insurance Act, 1963 with effect from 1st August, 1963.

The repealed section 135A stood as follows :

(1) *Where a policy of marine insurance has been assigned so as to pass the beneficial interest therein, the assignee of the policy is entitled to sue thereon in his own name ; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.*

(2) *Where the insurer pays for a total loss, either of the whole, or; in the case of goods, of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the insured person in whatever may remain of the subject matter so paid for, and he is thereby subrogated to all the rights and remedies of the insured person in and in respect of that subject matter as from the time of the casualty causing the loss.*

(3) *Where the insurer pays for a partial loss, he acquires no title to the subject matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies*

of the insured person as from the time of the casualty causing the loss, in so far as the insured person has been indemnified by such payment for the loss.

(4) *Nothing in cause (e) of section 6 shall affect the provisions of this section.*

This section was inserted by the Transfer of Property (Amendment) Act VI of 1944 but this section having been incorporated in the comprehensive code of Marine Insurance, the section was found superfluous and has been repealed by section 92 Marine Insurance Act, 1963, with effect from 1st August, 1963.

Transit by land can be the subject matter of marine insurance—*Indian Trade and General Insurance Co. Ltd. v. Union of India*, A.I.R. 1957 Cal. 190. Where the deed of subrogation gives the insurer nothing more than what he would have under s. 135 A (3) he is not entitled to file a suit for damage in his own name—*Ibid.* See also *Asiatic Govt. Security Fire and General Assurance Co. v. Scindhia Steam Navigation Co.*, A.I.R. 1965 Ker. 214; *Textiles and Yarn (P) Ltd. v. India National Steamship Co. Ltd.*, A.I.R. 1964 Cal. 362.

An insurer who has paid for a total loss of an apportionable part of insured goods carried by a Railway can maintain a suit in his own name under sub-sec. (2) against the carrier for reimbursement of the amount paid to consignee—*Union of India v. Bharat Fire and General Insurance Ltd.*, A.I.R. 1961 Punj. 157. An insurer paying compensation to the owner cannot sue the carrier, unless the right to sue is assigned to him, there being no statutory provision enabling him to sue—*New India Assurance Co. Ltd. v. Savani Transport (P) Ltd.*, (1968) 1 Andh. L.T. 317.

136. No Judge, legal practitioner or officer connected with any Court of Justice shall buy or traffic in, or stipulate for, or agree to receive any share of, or interest in, any actionable claim, and no Court of Justice shall enforce, at his instance, or at the instance of any person claiming by or through him, any actionable claims, so dealt with by him as aforesaid.

658. Principle :—The object of this section is to prevent the legal practitioners from purchasing claims with the express purpose of putting them in suit, and thus oppressing debtors and fomenting litigation. Further, the intention of the Legislature was that the persons mentioned in this section should not be placed in a position in which they may be tempted to use the influence or the information which they may acquire by virtue of their possible connection with the transaction of business in the Court, to the prejudice of persons who might have to resort to it for the adjudication of actionable claims—*Rathnasami v. Subramanya*, 11 Mad. 56 (at p. 61). "It is of great importance that no officer of a Court of Justice should be even exposed to the suspicion that in the discharge of the official duties his conduct may be influenced by any personal consideration; and although we see no reason to think that the proceedings in the present case have been at all affected, either in their

origin or in their conduct hitherto, by such considerations, yet when there is room for the operation of sinister motives, the belief of their operation can hardly be excluded from the minds of the parties"—*Kerakoose v. Serle*, 3 M.I.A. 329 (at p. 346).

A pleader is guilty of unprofessional conduct if he purchases an actionable claim, especially so if the purchase be speculative, as when a suit has been instituted on the claim, and the claim is ripe for judgment and the seller is his own client unable to judge the result of the suit—*Muni Reddi v. Venkata Row*, 37 Mad. 238, 17 I.C. 544.

659. Scope of section :—The law under the old section (before the amendment by the T. P. Amendment Act of 1900) stood thus: "No Judge, pleader, mukhtar, clerk, bailiff, or other officer concerned with Courts of Justice can buy any actionable claim falling under the jurisdiction of the Court in which he exercises his functions." Thus, it appears that under the original section the prohibition was not so extensive as it now is; under that section, the persons specified therein were forbidden to purchase only such claims as fell under the jurisdiction of the Court in which they exercised their function. Therefore, a pleader or an officer who did not habitually practise or exercise his functions in the Court by which the actionable claim was cognizable was not prevented from purchasing it—*Appasami v. Scott*, 9 Mad. 5; *Rathnasami v. Subramanya*, 11 Mad. 56 (61); *Singaracharlu v. Sivabai*, 11 Mad. 498; *Subbarayudu v. Kotayya*, 15 Mad. 389. But having regard to the fact that there are constant changes of Judges as well as officers, and that legal practitioners from all parts of the country may from time to time plead and appear in any court, it was thought desirable to make the prohibition absolute as regards them all. Consequently the section was amended in 1900, and it now prohibits the lawyers and officers of any Court from purchasing an actionable claim, and the above cases should be regarded as overruled.

The right to recover arrears of rent being an actionable claim, a transfer of such claim by a Magistrate to a Mukhtar is barred by this section—*Sheo Gobind v. Gouri Prasad*, A.I.R. 1925 Pat. 310 (312), 4 Pat. 43, 83 I.C. 81. A claim to unpaid dower debt is an actionable claim and a legal practitioner is debarred from taking transfer of such a claim. The prohibition under this section being absolute, the transfer is void—*Amir Husan v. Md. Nazir*, A.I.R. 1943 All. 345 (347), 54 All. 499, 136 I.C. 853. The transfer being void in such cases, in a suit instituted by a person who is prohibited from dealing in actionable claims, to recover the debt transferred, the assignor may be substituted in place of the assignee plaintiff and continue the suit—*Sitla Bux v. Mahabir*, A.I.R. 1936 Oudh 275 (277), 162 I.C. 229.

The word 'buy' refers to private sales and not to sales in execution; therefore, there is nothing to prevent a pleader from purchasing the property of his client sold in Court, although no doubt the Courts will always look askance at such a transaction—*Aghore Nath v. Ram Churn*, 23 Cal. 805; *Subbarayyudu v. Kotayya*, 15 Mad. 389; *National Insurance Co. v. Haridas*, 46 C.L.J. 225, A.I.R. 1927 Cal. 691; and the onus will lie very heavily on him to show that the transaction was free from suspicion—*Subbarayyudu v. Kotayya*, 15 Mad. 389. The only persons who are for-

bidden to purchase at Court-sale are "officers or other persons having any duty to perform in connection with any sale" (C. P. Code, O. XXI, r. 73) and a pleader does not fall under the category of those persons—*Alagirisami v. Ramanathan*, 10 Mad. 111.

A pleader is not precluded from purchasing decrees of Courts which are not actionable claims—*Ibid*; *Govindarajulu v. Ranga Rao*, 40 M.L.J. 124, 62 I.C. 255. But the right to *arrears of rent* in respect of property purchased by a pleader along with the property is an actionable claim, and he cannot under this section enforce it in any Court—*Hira Lal v. Tripura Charan*, 40 Cal. 650 (F.B.), 17 C.W.N. 679, 19 I.C. 129; *Sheogobind v. Gouri Prasad*, 4 Pat. 43, 6 P.L.T. 139, A.I.R. 1925 Pat. 310.

This section prohibits a legal practitioner from *purchasing* an actionable claim; but a *sale* of an actionable claim by a pleader is not invalid. It is doubtful whether a mere sale would amount to "trafficking in"—*Hirday Narain v. Jugat Prasad*, A.I.R. 1927 Pat. 2, 8 P.L.T. 201, 97 I.C. 373.

137. Nothing in the foregoing sections of this Chapter

Saving of negotiable instruments, etc. applies to stocks, shares or debentures, or to instruments which are for the time being, by law or custom, negotiable or to any mercantile document of title to goods.

Explanation.—The expression, "mercantile document of title to goods," includes a bill of lading, dock-warrant, warehouse-keeper's certificate, railway receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

660. Scope of section:—This section merely provides that the *methods* of assignment in this Chapter shall not apply to the case of certain specified documents which are for the time being by law or custom negotiable. It merely deals with the *manner* in which the documents to which it relates can be transferred, but it does not affect the result of the transfer when made—*Arunachalam v. Ko Po Yan*, 1 Bur. L.J. 90, A.I.R. 1923 Rang 1 (4).

661. Negotiable instruments:—These instruments have been exempted from the operation of this Chapter because their assignment is regulated mostly by the provisions of the Negotiable Instruments Act. The usual mode of transfer of negotiable instruments is endorsement or delivery. See secs. 27 and 48, Neg. Ins. Act. But such instruments are nevertheless *choses in action*, and as such may be transferred by assignment *i.e.*, by an instrument in writing under sec. 130; *Ghanshyam v. Ragho*, A.I.R. 1937 Pat. 100 (102) (F.B.), 16 Pat. 74, 167 I.C. 57; *Ram Rattan v. Gobind Ram*, A.I.R. 1939 Lah. 501, 185 I.C. 428; *Surath v. Kripanath*, 61 Cal. 425, 38 C.W.N. 465, A.I.R. 1934 Cal. 549; *Lacha Ram v. Hem Raj*, A.I.R. 1932 Lah. 30, 33 P.L.R. 120, 134 I.C. 121. The important difference between transfer by endorsement and transfer by assignment of a negotiable instrument

is that in the case of an assignment, the assignee will acquire no more than the right, title and interest of his assignor, *i.e.*, subject to all the liabilities and equities to which the assignor was subject (sec. 132), whereas in the case of an endorsement, the endorsee will have all the rights and advantages of a holder in due course, and not subject to the liabilities and equities of his transferor—*Mahammad Khumbar Ali v. Ranga Rao*, 24 Mad. 654; *Muthar Sahib v. Kadir Sahib*, 28 Mad. 544; *Raman Chetty v. Nagaratna*, 11 M.L.T. 246, 15 I.C. 380; *Akhoy Kumar v. Haridas*, 18 C.W.N. 494.

Where a promissory note is taken in the name of a joint family, and after partition of the joint estate a share of the debt is allotted to one member, he can bring a suit to recover his share of the debt. In such a case an assignment of the debt is not necessary—*Gopalu v. Kothandarama*, A.I.R. 1934 Mad. 529 (532), 57 Mad. 1082, 153 I.C. 916. But see *Virappa v. Mahadevappa*, A.I.R. 1934 Bom. 356 (359), 36 Bom. L.R. 807, 153 I.C. 352 where it has been held that where a pro-note was executed in favour of a son but on arbitrator's award and decree following it was allotted to the father, the latter could not sue upon it making his son a defendant, for the facts did not amount to an assignment by operation of law. See in this connection *Narayanamoorthi v. Vumamaheshwaram*, A.I.R. 1930 Mad. 197, 122 I.C. 345.

According to the custom of merchants in the cotton trade at Bombay, a railway receipt is a negotiable instrument—*Ramdas v. Amarchand*, 40 Bom. 630 (P.C.) But according to the custom of the merchants of Rangoon in the paddy trade, a railway receipt is not a negotiable instrument—*Arunachalam v. Ko Po Yan*, 1 Bur. L.J. 90, A.I.R. 1923 Rang. 1 (4).

Shares :—Under the English law a share is regarded as a chose in action [*Harold v. Plenty*, (1901) 2 Ch. 314]. But in India it is not so. This section excepts the applicability of this Chapter, which deals with transfer of actionable claims, to stocks and shares, and both in sec. 28 of the Companies Act and sec. 2, cl. (7) of the Sale of Goods Act “shares” have been defined as constituting moveable property and are therefore “goods” within the meaning of the latter Act—*Kanhambra v. Krishna Pattar*, A.I.R. 1943 Mad. 74, (1942) 2 M.L.J. 120, (1942) M.W.N. 450, 55 M.L.W. 428, reversing A.I.R. 1941 Mad. 394, I.L.R. 1941 Mad. 419, 199 I.C. 828.

662. Mercantile documents of title to goods :—The definition of a mercantile document of title to goods embodied in the Explanation is taken from sec. 1(4) of the English Factors Act 1889.

The documents specified in the Explanation also occur in Exception 1 of sec. 108 of the Indian Contract Act.

Delivery order :—A delivery order is a mercantile document of title. It passes from hand to hand by endorsement, and the transferee acquires a title to the goods to which it relates—*Anglo-Indian Jute Mills v. Omademull*, 38 Cal. 127, 10 I.C. 859. In some cases the delivery order may be transferred by mere delivery of the document—*Khoo Po Khwet v. Nanigram*, 9 L.B.R. 143.

The true test as to whether a document is a delivery order or title to goods is to ascertain whether it is such as is used in the ordinary course of business as proof of the possession or control of goods or authorising or

purporting to authorise, either by endorsement or delivery, the possessor of the document to transfer or receive the goods—*Abdul v. Motiram*, A.I.R. 1949 Nag. 186, J.L.R. 1948 Nag. 843. In this case it was held that a mere endorsement on a *souda chethi* (agreeement to sell goods) was not sufficient to transfer the rights in the goods, as the document could not be said to represent the goods.

Railway receipt :—A railway receipt is a document of title and passes by endorsement, so that the endorsee acquires title to the goods covered by the receipt—*Amerchand v. Ram Das*, 38 Bom. 255, 21 I.C. 343, on appeal, *Ram Das v. Amerchand*, 40 Bom. 630 (P.C.). "In their Lordships' opinion the only possible conclusion is that whenever any doubt arises as to whether a particular document is a 'document showing title' or a 'document of title' to goods for the purpose of the Indian Contract Act, the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or delivery, the possessor of the document to transfer or receive the goods thereby represented. In the present case it has been found as a fact by both the Courts below, and is not, and indeed cannot be disputed before this Board, that the railway receipts in question satisfy the test. It is therefore unnecessary to consider whether apart from evidence as to the ordinary course of business, the effect of sections 4 and 137 of the Transfer of Property Act would be conclusive on the point. It is clear even without the assistance of these sections, the receipts in question are 'documents showing title to goods' within sections 102 and 108, and documents of title within section 178, Contract Act"—*Ibid* at pp. 634—35. See also *Commissioner of Income-tax v. Bhopal Textiles Ltd.*, A.I.R. 1961 S.C. 426, where it has been held that the railway receipt is a document of title, and that when it is handed over to the consignee on payment, the property in the goods is transferred. Their Lordships, however, have expressed doubt whether the property in the goods passes to the buyer by the mere fact of the receipt being in the name of the consignee. But a railway receipt which contains a condition contemplating delivery only to the consignee or to his endorsee as his agent (if the consignee is himself unable to take delivery), is not a document of title within the meaning of this section or section 108 of the Contract Act—*Bombay Steam Navigation Co. v. Ramdas*, 14 Bom. L.R. 532, 16 I.C. 61. In the absence of evidence to show a mercantile custom that an unendorsed railway receipt is used in the ordinary course of business as proof of the possession or control of goods, unendorsed railway receipt is not a document of title in the hands of a person to whom it is sent—*Secretary of State v. Rishi Ram*, A.I.R. 1928 All. 145 (146), 50 All. 227, 108 I.C. 457. But see *Governor General v. Joynarain*, A.I.R. 1948 Pat. 36, 29 P.L.T. 99 where it has been held that the contract indicated by a railway receipt can be transferred without a writing, the form or method of transfer being regulated by custom. The transfer can be made even by endorsement in blank coupled with delivery of the document, provided the intention is to make an absolute delivery of the goods—*ibid*. Where the railway receipt is handed over on payment of the price of the goods, there is such an absolute transfer—*ibid*. The endorsement of a railway receipt coupled with a letter of lien to the effect that the goods were deposited with the bank by way of security had the effect of passing the goods in the constructive possession

of the bank irrespective of the fact that there was no notice to the carrier—*Mercantile Bank v. Official Assignee*, A.I.R. 1933 Mad. 207 (209), 56 Mad. 177, 64 M.L.J. 320. The railway receipt is in effect clothed with all the essential characteristics of negotiability though it may not be a negotiable instrument in the strictest sense—*Shah Mulji Deoji v. Union of India*, A.I.R. 1957 Nag. 31. Where there is a series of indorsements on the railway receipt the last endorsee can sue in his own name—*Ibid.* But see *Commissioners for the Port of Calcutta v. General Trading Corporation*, 68 C.W.N. 410 where it has been held that the railway receipt is not like a negotiable instrument.

Mate's receipt :—A document denominated 'mate's receipt' granted by a shipping company which merely acknowledges the receipt of the goods shipped and promises to carry them to the place of destination, is a simple ordinary receipt for goods and not a negotiable instrument or a mercantile document of title within the meaning of this section, and cannot be transferred by mere endorsement. If the consignee endorses the receipt to another person, such person gets no title to the goods covered by the receipt and cannot compel the company to deliver the goods to himself—*Natcheappa v. Irrawaddy Flotilla Co.*, 41 Cal. 670 (P.C.), 22 I.C. 311, 18 C.W.N. 457.

THE SCHEDULE

(a) Statutes

Year and chapter	Subject	Extent of repeal
27 Hen. VIII, c 10.	Uses ...	The whole.
13 Eliz. c. 5 ...	Fraudulent Conveyances. ...	The whole.
27 Eliz. c. 4 ...	Fraudulent Conveyances. ...	The whole.
4 Wm & Mary. c. 16	Clandestine Mortgages.	The whole.

(b) Acts of the Governor-General in Council

Number and year	Subject	Extent of repeal
IX of 1842 ...	Lease and release.	The whole.
XXXI of 1854 ...	Modes of conveying lands.	Section 17.
XI of 1855 ...	Mesne profits and improvements.	Section 1, in the title, the words "to mesne profits and", and in the Preamble "to limit the liability for mesne profits and."
XXVII of 1866 ...	Indian Trustee Act.	Section 31.
IV of 1872 ...	Punjab Laws Act.	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XX of 1875 ...	Central Provinces Laws Act.	So far as it relates to Bengal Regulation I of 1798 and XVII of 1806
XVIII of 1876 ...	Oudh Laws Act.	So far as it relates to Bengal Regulation XVII of 1806.
I of 1877 ...	Specific Relief Act.	In sections 35 and 36 the words "in writing."

(c) Regulations

Name and year	Subject	Extent of repeal
Bengal Regulation I of 1798.	Conditional Sales.	The whole Regulation.
Bengal Regulation of XVII of 1806.	Redemption.	The whole Regulation.
Bombay Regulation V of 1827.	Acknowledgment of debts ; Interest ; Mortgages in Possession.	Section 15.

The Code of Civil Procedure 1908

(ACT V OF 1908)

ORDER XXXIV

Suits Relating to Mortgages of Immovable Property

1. Parties to suits for foreclosure, sale and redemption—Subject to the provisions of this Code, all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

Explanation.—A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage.

2. Preliminary decree in foreclosure-suit—(1) In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a preliminary decree—

(a) ordering that an account be taken of what was due to the plaintiff at the date of such decree for—

(i) principal and interest on the mortgage,

(ii) the costs of suit, if any, awarded to him and,

(iii) the costs, charges and expenses properly incurred by him up to that date in respect of his mortgage-security, together with interest thereon; or

(b) declaring the amount so due at that date and

(c) directing—

(i) that, if the defendant pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from that date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the plaintiff shall deliver up to the defendant, or to such person as the defendant appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the defendant at his cost free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also if necessary, put the defendant in possession of the property; and

(ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the defendant fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the plaintiff shall be entitled to apply for a final decree debarring the defendant from all rights to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

(3) Where, in a suit for foreclosure, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9 or Form No. 10, as the case may be, of Appendix D with such variations as the circumstances of the case may require.

High Court Amendments :

Orissa Same as in Patna.

Patna —In sub-rule (2) after the words "the Court may" insert the words "of its own motion or" (7.1.1936).

3. Final decree in foreclosure-suit—(1) Where before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed,

the defendant makes payment into Court of all amounts due from him under sub-rule (1) of rule 2, the Court shall, on application made by the defendant in this behalf, pass a final decree—

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree, and, if necessary,—

(b) ordering him to retransfer at the cost of the defendant the mortgaged property as directed in the said decree, and, also, if necessary,—

(c) ordering him to put the defendant in possession of the property.

(2) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree declaring that the defendant and all persons claiming through or under him are debarred from all rights to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property.

(3) On the passing of a final decree under sub-rule (2), all liabilities to which the defendant is subject in respect of the mortgage or on account of the suit shall be deemed to have been discharged.

4. *Preliminary decree in suit for sale*—(1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a preliminary decree to the effect mentioned in clauses (a), (b) and (c) (i) of sub-rule (1) of rule 2, and further directing that, in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold and the proceeds of the sale after deduction therefrom of the expenses of the sale be paid into Court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs, charges, expenses and interest and the balance, if any, be paid to the defendant or other persons entitled to receive the same.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree for sale is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

(3) *Power to decree sale in foreclosure suit*.—In a suit for foreclosure in the case of an anomalous mortgage, if the plaintiff succeeds, the Court may at the instance of any party to the suit or of any other person interested in the mortgage security or the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of the sale and to secure the performance of the terms.

(4) Where, in a suit for a sale or a suit for foreclosure in which sale is ordered, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree referred to in sub-rule (1) shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9, Form No. 10 or Form No. 11, as the case may be, of Appendix D with such variations as the circumstances of the case may require.

High Court Amendments :

Allahabad.—In sub-rule (2) after the words "the Court May" insert the words "of its own motion, or," (24.7.1926).

Assam.—Same as in Calcutta.

Calcutta.—Re-number sub-rules (3) and (4), as sub-rules (4) and (5) respectively, and insert the following as sub-rule (3) :

"(3) The Court may in its discretion direct in the decree for sale that if the proceeds of the sale are not sufficient to pay the mortgage debt the mortgagor shall pay the balance personally." (3.2.1933).

East-Pakistan.—Same as in Calcutta.

5. *Final decree in suit for sale*—(1) Where, on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree passed under sub-rule (3) of this rule, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of rule 4, the Court shall, on application made by the defendant in this behalf, pass a final decree or, if such decree has been passed, an order,—

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree,

and, if necessary,—

(b) ordering him to transfer the mortgaged property as directed in the said decree,

and also, if necessary,—

(c) ordering him to put the defendant in possession of the property.

(2) Where the mortgaged property or part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule unless the defendant, in addition to the amount mentioned in sub-rule (1), deposit in Court for payment to the purchaser a sum equal to five per cent of the amount of the purchase-money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent, thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-rule (1) of rule 4.

High Court Amendments :

Andhra Pradesh.—Same as in Madras.

Kerala.—Same as in Madras. (9.6.59).

Madras.—In sub-rule (3) between the words "in this behalf" and "pass a final decree" insert the words "after notice to all parties." (20.8.31).

6. Recovery of balance due on mortgage in suit for sale.—Where the net proceeds of any sale held under the last preceding rule are found insufficient to pay the amount due to the plaintiff, the Court, on application by him may, if the balance is legally recoverable from the defendant otherwise than out of the property sold, pass a decree for such balance.

7. Preliminary decree in redemption suit.—(1) In a suit for redemption, if the plaintiff succeeds, the Court shall pass a preliminary decree—

(a) ordering that an account be taken of what was due to the defendant at the date of such decree for—

(i) principal and interest on the mortgage,

(ii) the costs of suit, if any, awarded to him, and

(iii) other costs, charges and expenses properly incurred by him up to that date, in respect of his mortgage-security, together with interest thereon; or

(b) declaring the amount so due at that date; and

(c) directing—

(i) that, if the plaintiff pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in Rule 10, together with subsequent interest on such sums respectively as provided in Rule 11, the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff at his cost free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall also, if necessary, put the plaintiff in possession of the property; and

(ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the plaintiff fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interests, the defendant shall be entitled to apply for a final decree—

(a) in the case of a mortgage other than a usufructuary mortgage, a mort-

gage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgaged property be sold, or

- (b) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all right to redeem the property,

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before the passing of a final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

8. *Final decree in redemption suit.*—(1) Where, before a final decree debarring the plaintiff from all right to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree passed under sub-rule (3) of this rule, the plaintiff makes payment into Court of all amounts due from him under sub-rule (1) of rule 7, the Court shall, on application made by the plaintiff in this behalf, pass a final decree or, if such decree has been passed, an order—

(a) ordering the defendant to deliver up the documents referred to in the preliminary decree, and, if necessary,—

(b) ordering him to re-transfer at the cost of the plaintiff the mortgaged property as directed in the said decree, and, also, if necessary,—

(c) ordering him to put the plaintiff in possession of the property.

(2) Where the mortgaged property or a part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the plaintiff, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent of the amount of the purchase-money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase money paid into Court by him, together with a sum equal to five per cent thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the defendant in this behalf,—

(a) in the case of a mortgage by conditional sale or of such an anomalous mortgage as is hereinbefore referred to in rule 7, pass a final decree declaring that the plaintiff and all persons claiming under him are debarred from all right to redeem the mortgaged property and, also, if necessary, ordering the plaintiff to put the defendant in possession of the mortgaged property; or

(b) in the case of any other mortgage, not being a usufructuary mortgage, pass a final decree that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and the balance, if any, be paid to the plaintiff or other persons entitled to receive the same.

8A. *Recovery of balance due on mortgage in suit for redemption.*—Where the net proceeds of any sale held under the last preceding rule are found insufficient to pay the amount due to the defendant, the Court, on application by him, may, if the balance is legally recoverable from the plaintiff otherwise than out of the property sold, pass a decree for such balance.

9. *Decree where nothing is found due or where mortgage has been overpaid.*—Notwithstanding anything hereinbefore contained, if it appears, upon taking the account referred to in rule 7, that nothing is due to the defendant or that he has been overpaid, the court shall pass a decree directing the defendant, if so required, to re-transfer the property and to pay to the plaintiff the amount which may be found due to him; and the plaintiff shall, if necessary, be put in possession of the mortgaged property.

10. *Cost of mortgagee subsequent to decree.*—In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure, sale or redemption, the Court shall, unless in the case of costs of the suit the conduct of the mortgagee has been such as to disentitle him thereto, add to the mortgage-money such costs of the suit and other costs, charges and expenses as have been properly incurred by him since the date of the preliminary decree for foreclosure, sale or redemption up to the time of actual payment.

11. Payment of interest.—In any decree passed in a suit for foreclosure, sale or redemption, where interest is legally recoverable, the Court may order payment of interest to the mortgagee as follows, namely:—

(a) interest up to the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage—

(i) on the principal amount found or declared due on the mortgage,—at the rate payable on the principal, or, where no such rate is fixed, at such rate as the Court deems reasonable.

(ii) * * *

(iii) on the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage-security up to the date of the preliminary decree and added to the mortgage-money,—at the rate agreed between the parties, or, failing such rate, at the same rate as was payable on the principal, or failing such rate at such rate not exceeding six per cent per annum as the Court deems reasonable; and

(b) subsequent interest up to the date of realisation or actual payment on the aggregate of the principal sums specified in clause (a) as calculated in accordance with that clause at such rate as the Court deems reasonable.

12. Sale of property subject to prior mortgage.—Where any property the sale of which is directed under this Order is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

13. Application of proceeds.—(1) Such proceeds shall be brought into Court and applied as follows:—

first, in payment of all expenses incident to the sale, or properly incurred in any attempted sale;

secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs, properly incurred in connection therewith;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made;

fourthly, in payment of the principal money due on account of that mortgage; and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

(2) Nothing in this rule or in rule 12 shall be deemed to affect the powers conferred by section 57 of the Transfer of Property Act, 1882 (IV of 1882).

14. Suit for sale necessary for bringing mortgaged property to sale.—(1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, rule 2.

(2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882 (IV of 1882), has not been extended.

15. Mortgages by the deposit of title-deeds and charges.—All the provisions contained in this Order which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds within the meaning of section 58, and to a charge within the meaning of section 100 of the Transfer of Property Act, 1882 (IV of 1882).

High Court Amendment:

Allahabad.—Read the present Rule 15 as Rule 15(1) and add as sub-rule (2), the following:

“(2) Where a decree orders payment of money and charges it on immovable property, on default of payment, the amount can be realized by sale of that property in execution of that very decree.” (17 January 1953).

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